

**IMPROVING EXCELLENCE: EVALUATION OF THE JUDICIAL
DISPUTE RESOLUTION PROGRAM IN
THE COURT OF QUEEN'S BENCH OF ALBERTA**

EVALUATION REPORT

**JUSTICE JOHN D. ROOKE
COURT OF QUEEN'S BENCH OF ALBERTA**

JUNE 1, 2009

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ABSTRACT

This Evaluation Report assesses the Judicial Dispute Resolution (JDR) Program in the Court of Queen's Bench of Alberta, based on empirical Survey Questionnaire (Survey) data supplied by lawyers and clients who participated in 606 JDRs for the year ending June, 2008. The Survey data reveals much about the process leading up to and during a JDR, including the role of JDR justices, the level of settlement success, and the overall satisfaction of users.

The Survey data, aided by my judicial adjudicative and dispute resolution education and experience, and supplemented by relevant dispute resolution literature, have allowed me to: comment on the role of rights and interests in the resolution of disputes; resolve terminology usage; report usefulness of the Program to users; explore differences in JDR culture within Alberta; measure JDR judicial strengths; present current, and potential future, JDR service models; explore the future impact of mandatory pre-trial dispute resolution; examine the utility of pre-JDR steps; investigate JDR judicial conduct issues; and make program recommendations.

I conclude that the JDR Program has provided utility and success for lawyers and their clients and, in doing so, has achieved a degree of excellence. However, it can be improved - hence, the title, "Improving Excellence:".

EXECUTIVE SUMMARY

It is not intended that anyone will read this Evaluation Report cover to cover. Rather it is intended that readers will view this as a resource and, if at all, will read sections or pieces that relate to their interest or enquiry. With this in mind, I invite you to pursue this document to see what the Evaluation Report contains and to determine if and how you might wish to utilize it.

The evaluation of the Court's JDR Program commenced in early 2007 with research on evaluation methods, and the development the Survey Questionnaires (Survey). As a project for my Canadian Judicial Counsel (CJC) approved Study Leave and my Master of Laws in Dispute Resolution from the University of Alberta, the evaluation received approval from the Chief Justices of the Court and the University of Alberta Arts, Sciences and Law Research Ethics Board. The history, motivation and goals for the project are set out in the letter of Chief Justice Wachowich that introduced the evaluation in July 2007 with distributed the Survey to each lawyer and client participating in 606 JDRs held in Alberta in the twelve months ending June 30, 2008. For the Letter and the Survey, see Appendices 1 and 2.

Now, more than two years later, this Evaluation Report is based on pure and analyzed empirical research data from 374 lawyers and 193 clients who participated in these 606 JDRs, aided by my judicial dispute resolution education and experience, and analysis of dispute resolution literature. The Survey data results and analysis reveals much about the JDR Program and its worth to disputants and their lawyers in Alberta.

Aspects of this Evaluation Report will ultimately form a part of my Thesis in my LL. M. program. However, this Evaluation Report has a much larger focus

and purpose. It is not directed to academia but to the Court and users of the JDR Program. Nevertheless, it contains a thesis - that JDR has become a normative and valuable part of civil litigation in the Court, not in substitution for, but in conjunction with, traditional adjudication. However this Evaluation Report is much broader than that thesis in that it examines the underlying principles, purposes and goals of dispute resolution processes other than adjudication, in general and the JDR Program in particular. It evaluates various aspects of the JDR Program in relation to some of the theories and principles behind the methodology for the Program, encourages more education and training by the Court's JDR justices, points out judicial conduct pitfalls to avoid, and makes recommendations on many aspects of the Program and how it operates on a day to day basis.

The expert in dispute resolution theory will find little or nothing new in this Evaluation Report, except the Survey data and the JDR Program methodology, past, present, and as recommended for the future, which may be valuable to them. However, the primary purpose is the hope that JDR justices and users (lawyers and their clients) will find parts of the Evaluation Report of assistance in future participation in JDRs.

I make the latter statement because it is not expected that anyone will sit down and read this Evaluation Report from cover to cover. Rather, it is to be looked at as a resource that, with ample headings, can lead any reader to specific sections which explain and provide background for the rather stark recommendations for the Program that follow at the end of the Evaluation Report, and are repeated in Appendix 8. With this in mind, let me describe the parts of the Evaluation Report.

In the Preface, more detail will be provided about the history of the JDR Program and the steps and goals leading to this Evaluation Report.

Acknowledgments will chronicle those who took early leadership in commencing the JDR Program and taking it into the normative mainstream of litigation in the Court and, of course, those who made this Evaluation Report possible.

The Table of Contents is rather vast, with a view to making it as easy as possible for readers to search for and find any particular area of interest.

Part I acknowledges the traditional adjudicative role of the Court, set out the motivations and promises of alternative dispute resolution (ADR) in general; articulate the reasons for the establishment of the JDR Program using some of those dispute resolution methods; and address the reasons for the evaluation of the Program. It will look at the difference between litigated legal rights and relevant and related private interests and the proper role of both in settling disputes in the Program. Terminology in dispute resolution is a problem and definitional weaknesses have been exacerbated by judicial avoidance of certain terms that some do not feel appropriate for judicial use. I suggest that we put those fears aside, understand the substance of identified dispute resolution processes and use descriptive terminology that has become common - indeed, normative. In this process, and throughout the Evaluation Report, I provide my views relative to the limits that some, including some of my judicial colleagues, would put on the judicial role, within jurisdiction, in dispute resolution in general and the JDR Program in particular.

Part II starts by discussing the evaluation process design, timing and procedures. It then provides my comments and preliminary analysis on the "pure" Survey data that is summarized in detail in Appendices 3 to 5. I will make additional introductory observations of matters that will arise from the later database integrated analysis and analysis of the qualitative responses. I will

make micro recommendations along the way, some of which will be a part of, or are converted into macro recommendations for the Program that are provided at the end of the Evaluation Report, and in Appendix 8.

Part III provides a detailed and integrated analysis of the interactive quantitative results of the lawyers' Survey. In this way, using the database resources, I drill down into a deeper appreciation of the data and the relationship between various aspects of the data to obtain greater understanding of the phenomena that characterize the JDR Program in practice. This leads to more detailed conclusions and recommendations and set out some of the reasons leading to the latter. One interesting statistic is that the trial time saved was the equivalent of a whole year of the Court's civil trial capacity, accomplished in 1/4 of that time at JDRs, leaving available judicial time to devote to new cases in the queue and other expanding judicial responsibilities. However, even more telling, the trial time saved also reduced Alberta clients' estimated legal costs by \$10,000,000. Not bad for a year's work accomplished by the Court's JDR Program!

In Part IV I point out the more significant aspects, resulting in conclusions and recommendations, of the qualitative data that are contained in the Lawyers' and Clients' Surveys, the edited verbatim of which is reported in great detail in Appendices 4 and 5.

Part V is a summary of the conclusions and recommendations that flow from the Survey results. On a macro level, the observations and recommendations include, but are not limited to:

- significant demand for JDR
- most participants are clients (high proportion of professional adjusters) represented by lawyers

- case types are 70% personal injury (mostly motor vehicle collisions), 25% family matters, and 5% split among a number of civil claims
- 80% of JDR cases were in the litigation system for more than 2 years; 60% more than 4 years, leads to a recommendation that
 - the Court conduct a time to disposition analysis and take appropriate action, in any event of the JDR Program
- users are experienced with JDR - a very high percentage of lawyers and professional adjusters have participated in several JDRs
- JDR types are primarily evaluative mediation, with facilitative mediation more predominant in Calgary and mini-trials more predominant in Edmonton
- the frailties of the adjudicative system - cost, delay, risk, stress and formality, process options, and relationship maintenance are the motivations for JDR
- settlement is the goal, or, alternatively an evaluation of other alternatives
- Pre-JDR conferences are conducted in an overwhelmingly high percentage of cases in Edmonton, but not so in Calgary, there are mixed opinions as to their usefulness, and parties and their counsel are not always clear as to the process that may (or will) be employed in the JDR, resulting in recommendations for
 - a JDR Judicial Profile to identify the JDR services and processes that a JDR justice will, or will not, use if requested
 - a JDR Booking Confirmation form (with relevant details from the participants) to tell the JDR justice whether a Pre-JDR conference is requested or would be otherwise prudent and to assist in preparation
 - a Pre-JDR conference (with consideration to teleconferencing) when requested, otherwise prudent, or when a self-represented party or a Binding JDR

- a comprehensive JDR Instruction Letter from the JDR justice (in any event of a Pre-JDR conference)
- a high rate of settlement success, for which JDR justices are an indispensable influence
 - up to 80% on all issues, and higher on some issues
 - not dependent on case type, or JDR type
- mixed views on caucusing - caucusing being more prevalent in Calgary, with growing demand in all centres
- choice of JDR justice is essential and participants have a very high regard for a wide variety of judicial qualities, with only minuscule exceptions
- overwhelmingly, the participants would use JDR again if the need arose and would recommend it to others
- JDR timing
 - invariably after discovery
 - most frequently after expert reports
 - generally at the stage of litigation thought appropriate for a JDR, but most wish the stages had taken place earlier
- qualitative comments suggest there is the need for more judicial training and education in dispute resolution theory and craft
- other observations based on conclusions or arising from the Survey data

Part VI describes the current role of the Court in the JDR Program. It starts with a discussion on why the Court's justices are involved in dispute resolution, rather than just maintaining their adjudicative role, and leaving other dispute resolution procedures to the private sector. I identify literature which characterizes some of the views of the Court's justices on JDR and express views in opposition to those who argue for an artificially restricted or limited judicial role. The judicial dispute resolution services that the JDR Program offers are discussed, explaining what I believe the judiciary should bring to the process.

External and internal concerns expressed about the judicial role in JDR are addressed, with me expressing my opinion on those which I believe are invalid and need no more consideration and those valid concerns which must be recognized and dealt with in a prudent judicial fashion.

Part VII focuses on specific issues of judicial conduct. With a tracing of general judicial conduct background, it identifies positive aspects of judicial conduct to follow, and others to avoid, and cautions for JDR justices to take throughout. In this way it addresses issues such as apparent imprudent settlements, coercion to obtain settlement, and the considerations relating to the non-public process that is a feature of the JDR Program (including issues of confidentiality and caucusing, and transparency in each). Judicial involvement in Binding JDRs will be considered in detail, in light of the Alberta Court of Appeal decisions in *J.W. Abernethy Management & Consulting Ltd. v. 705589 Alberta Ltd.* and *L.N. v. S.M.*

Part VIII looks to the future, the JDR services to be maintained, and potential new offerings in light of a new focus by “new lawyers” on how to provide dispute resolution legal service in the twenty-first century that promote better access to justice. Early Neutral Evaluation (ENE) is considered but not recommended. The processes and manner of continuing to provide JDR services are examined and recommendations made. Impending mandatory mediation under the New Rules of Court is considered, and judicial fears about the ability of the JDR Program to meet the challenges are allayed. The role of Alberta Justice sponsored court-annexed mediation programs and their relationship to the JDR Program are examined. How the Court can maintain the high standards it has achieved in the JDR Program is discussed, with a focus on judicial training and education - the theory and the craft. Pitfalls to avoid and how to handle self-represented litigants and deal with vulnerable people and related

power imbalances and abusive conduct are addressed. Other topics and sources for future research are identified. The need for future evaluation of the JDR Program is discussed.

The last part, Part IX, comes to a brief conclusion - the JDR Program has achieved a degree of excellence in providing what has become a normative part of dispute resolution in Alberta. Detailed recommendations for continuing and maintaining the high standards of the JDR Program are articulated for consideration by the JDR Committee of the Court and recommendation to the Court. As there is still room for improvement, it is "Improving Excellence:".

The Bibliography and the Appendices follow. The latter: provide the Lawyer and Client Survey Questionnaires (Appendices 1 and 2); summarize the activity in the JDR Program and its evaluation throughout Alberta from July 2007 to June 2008 (Appendix 3); report a summary of the quantitative, and an (edited) verbatim articulation of the qualitative, data from the Lawyers' and Clients' Surveys (Appendices 4 and 5); display tables of the results of an integrated (and interactive) analysis of the quantitative data (Appendix 6); reproduce the Guidelines that currently, and New Rules that will in the future, set the parameters for the JDR Program (Appendix 7); repeat the Recommendations (to promote easy access), and propose sample forms that support the Recommendations that arise from this Evaluation Report, which will provide further guidance and tools to maintain and improve the JDR Program in the future (Appendix 8); and provide a Further Reading list (Appendix 9).

Having spent the majority of my now concluded Study Leave focusing on Court related projects, including this Evaluation Report, I shall now, on my own time, address some of my personal goals, focusing on a segment of the

Evaluation Report to be re-articulated into a Thesis which satisfies the more academic interests relative to and requirements for my LL. M.

Finally, as I now turn to focus on my LL. M. Thesis, I must end with some apologies and limitations. First, the massive nature of the project was much more time challenging than I ever imagined. The relevant literature is monumental in depth and scope, difficult to limit (as much as I tried) and, yet, I did not finish reviewing and incorporating as much of it as I had wished. The result has led to an Evaluation Report that is, at the same time, more extensive in some areas and more limited in other areas than I wanted, and much less polished throughout than I would have intended if time had not been an issue. In the latter regard, it is acknowledged that: while valuable, there are too many detailed quotes; there may be too much detail in some areas, yet some gaps in detail in others and, unfortunately, much repetition throughout; due to my familiarity with the processes and the literature there may be some lack of clarity for those less attuned; and there is a need of much improvement to the language. In short, it needs a couple more months of fine tuning the literature resources, and incorporating relevant parts of same, all with a better editor than this Evaluation Report demonstrates. However, my Study Leave is spent and today I return fully to my “day job” and so the project must end - in the end, thus, “it is what it is”. I apologize for its short comings but, I hope that setting those limitations aside, it is useful, with all its warts, to my hardworking and dedicated JDR judicial colleagues who will continue to provide, and to the lawyers and clients that will continue to use, what I consider to be an excellent, and hopefully soon improved, JDR Program. I hope as well that others interested in the continued promise of new dispute resolution methods as part of a normative dispute resolution process - in my Court and outside it - will pick up this (what I wish will be considered) “diamond in the rough” and expand and edit it - indeed, polish it -

into other works, but use the resource created, that will aid dispute resolution in general and the JDR Program in particular.

June 1, 2009

Justice John D. Rooke

PREFACE

The recent Alberta history of the journey that leads to this Evaluation Report was set out in the original communication by Chief Justice Wachowich to JDR users commencing in the summer of 2007, when Survey¹ Questionnaires were distributed to lawyers and clients who participated in JDRs over the next year. At that time, he said:

The Court of Queen's Bench of Alberta (Court), informally since the late 1980s, and on a more formalized basis since June 1996², has been conducting a program of Judicial Dispute Resolution (JDR) to assist in the settlement of civil and family litigation³. The Court has

¹ I shall use the terms "Survey" in a broad way to identify the Questionnaires that went out, the replies that were returned, the database created and the results as summarized herein as it applies to both lawyers and clients. Where there is a distinction between them, I shall use the terms "Lawyers' Survey" and "Clients' Survey". Where more specific use is required, I will express it or it should be read in context.

² In fact, a detailed search (during the drafting of this Evaluation Report) of the Court's assignment schedules for Edmonton and Calgary shows that: while mini-trials have been offered to litigants informally since in or before 1990 (Alberta Law Reform Institute, *Civil Litigation: The Judicial Mini-Trial* (Edmonton: Alberta Law Reform Institute, 1993)[ALRI, "Mini-Trial"], at 8, relying on Chief Justice W. Kenneth Moore, "Mini-Trials Reduce Clients' Stress and Expense" (1992) 27 *The Law Society of Alberta Benchers' Advisory* 11, and Associate Chief Justice Tevie Miller, "Mini-Trials" (1992) May *Edmonton Bar Association Notes*, at 2), mini-trials have been formally scheduled from the fall of 1992 to the fall of 1995 inclusive, ADR (the term "JDR" had not yet been selected but the service was the same thereafter) was scheduled in the spring and fall of 1996, and JDRs were scheduled from the spring of 1997 onward. Prior to that and in other judicial centres, mini-trials and later JDRs were and are scheduled as the need arose and arises.

(Please note that I will use this first occasion in referring to a Justice or a Professor, *qua* writer, to advise the reader that I shall try to state the profession and/or title of the writer on the first occasion, but thereafter for simply and consistency, with no disrespect, I shall use the last name only - thus, Moore, Miller, etc.)

³ This puts a caveat on - indeed, it is an exception to - the comment by the Honourable George W. Adams and Naomi L. Bussin, in "Alternative Dispute Resolution and Canadian Courts: A Time for Change" (1995) 17 *Advoc. Q.* 133 [Adams & Bussin], at 134, that, except for pre-trial conferences that have "become an important spur to the settlement process", "[w]hat has not yet happened in Canada, however, is the institutionalization of the many different

some anecdotal information about what participants think of the JDR program⁴, but no hard quantitative and qualitative information.⁵

ADR processes which now exist as an adjunct to the court system in the United States”.

Indeed, by five years later, as at the end of 1999, others had concluded that JDR had “been largely institutionalized in the superior courts of the prairie provinces”, with the Court becoming “the first court in Canada to incorporate ‘JDR weeks’ into regular sitting schedules”: Joan I. McEwen, “JDR - Judicial Dispute Resolution” (1999) 8:7 National 36, at 36-7.

⁴ Valerie Jo Danielson, in the abstract for her Master’s thesis, Valerie Jo Danielson, “Judicial Dispute Resolution in Alberta: An Examination of the Court of Queen’s Bench Judicial Dispute Resolution Program”(Master’s Research Project, Osgoode Hall Law School, York University, 2007)[unpublished] [Danielson], at i, stated:

The success of the JDR Program in resolving disputes is widely recognized within the Alberta civil litigation Bar. The underlying reasons for the JDR program’s success are not commonly known and, indeed, have never been studied previously in any detail. Available Court statistics on the program’s settlement rates do not reveal the reasons for the program’s high success rate.

Later, at 5, she added “... the JDR Program has been driven by its success. The Alberta Bench ‘has embraced the program’ creating a program of credibility and integrity”. As to the “high success rate”, at 6, she provided some statistics to support a success rate of between 70 - 80%. However, the results of the Lawyers’ Survey shows that it is higher than that - 81% on all issues and 89% on at least some issues. The results of the Clients’ Survey shows that it was 64% on all issues and 91% on at least some issues. See section F1 for the both Surveys for detailed analysis.

⁵ Danielson, *supra* note 4 at 1, said that the research in the form of survey data from JDR justices was for the purpose of gaining

... important insight from the Justices prior to any research being done on members of the Alberta Bar or litigants themselves. This project is not intended to be an evaluation of the JDR Program, or of the Justices who perform their duty within the JDR Program.

She later, at 47 laments that “there is no formal evaluation of the Alberta JDR Program”. Well, my research picks up from that point because it is all of these latter things, as she later recognized at 68 (footnote 238), when she referenced my then forthcoming empirical research:

Also of note, lawyers and clients are being surveyed... commencing September 1, 2007. Client and lawyer satisfaction with the JDR Program have not been seriously studied in Alberta previously, and the results of this forthcoming study will be revealing and instrumental, no doubt, in future planning for the Court.

It should be recognized, so as not to be missed in passing, that the views of my judicial colleagues as collected by Danielson, are very important to my evaluation of the Program. Naomi Bussin, “Evaluating ADR Programs: The Ends Determine the Means” (1999-2000) 22 Advoc. Q. 460 [Bussin], at 472, makes the point that,

It is time to evaluate the program and make any necessary or advisable improvements to insure the program remains relevant and of assistance to litigants.

Coincidentally with this need for evaluation, Justice John Rooke, a senior member of the Court, with a significant amount of education and experience as a JDR Justice, is scheduled to enroll in a Master of Laws course in Dispute Resolution at the Faculty of Law, University of Alberta in September 2008, and intends to do research and write a Evaluation Report on the Court's JDR Program, its successes and challenges, and to make any appropriate recommendations for improvement.

Thus, this Survey of Participants in the Court's JDR program, approved by myself and Associate Chief Justice Wittmann, is to assist in this research and review. The Survey has also received approval from the University of Alberta Arts, Sciences and Law Research Ethics Board for the conduct of research. Through this stringent process, the identity of the client, the lawyer and the JDR Justice, the fact of completion of the Survey and the information from it are all confidential

As a recent participant in the Court's JDR process and procedure, you will have important insights to offer that can help to improve the delivery of the Court's JDR program and services in the future. Reference is made to "process and procedure" because the Survey is only designed to evaluate the JDR process and procedure, not the merits of your litigation or the impact of JDR on it.

Therefore, I request your assistance in this Survey - to answer as many questions (both "Basic" and "Additional") as you wish and send in the results.

in the evaluation of a JDR system, in addition to the external, "internal stakeholders should be consulted and their input requested during the entire evaluation process" ... "stakeholders should be asked to provide ideas for change within the system". The Danielson survey accomplishes much of that. While I have not done a formal survey questionnaire of my colleagues (except on some rather minor points), I have provided numerous requests and opportunities for comments and recommendations from them, and have received some - not overwhelming - input. As part of the next step, consideration, and, if thought advisable, implementations of the recommendations herein will be provided to my colleagues based on Evaluation Report.

I thank you in advance for taking the time to help ensure that the Court's JDR Program remains relevant and helpful to litigants in the future.

July 2007

Chief Justice A.H. Wachowich

Thus, the evaluation starts with empirical research in the form of replies to survey questionnaires (Survey) completed by 374 lawyers and 193 clients who participated in 606 JDRs⁶ for the year ending June 30, 2008.

Accordingly, this Evaluation Report is about reporting the data (pure and analyzed) from the Survey and then rounding it out with my analysis, based upon

⁶ For a good understanding of how JDRs are conducted, see Danielson, *supra* note 4 at 4-8. However, there are some minor corrections - such as the suggestion (at 4 and 69) that following the work of Associate Chief Justice Miller in the early 1990's, the "Program was later taken over by ... [Justice] Belzil on his appointment to the Bench." and that it was "nourished under the subsequent pioneering efforts of Justice Belzil". Justice Belzil is one of the Courts excellent JDR justices who clearly "nourishes" JDRs. He chairs an Edmonton *ad hoc* JDR Committee of the Court's Edmonton judiciary who meet informally once a year to consider developments in JDR practice over that year. However, with some embarrassment at the accolade, he advances no "take over" and no "pioneering", rather maintaining merely that he is "but a JDR soldier in the ranks" like every other JDR justice. See also Deborah Lynn Zutter, "Incorporating ADR in Canadian Civil Litigation" (2001) 13 Bond L. Rev. 445 [Zutter], at 455, who gives a very simple explanation of the Court's JDR Program, relying on a presentation made by Justice Rawlins of the Court early in the life of the Program.

dispute resolution literature⁷, and my education and experience⁸ relative to ADR and JDR.

To be clear, the views herein are mine, and not those of, or binding on, any other member of the Court of Queen's Bench. Obvious too, any errors are mine.

⁷ The quantity of literature is overwhelming, and extensively, but not uniformly, cross-referenced. Indeed, Justice Louise Otis and Professor Eric H. Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice", (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351[Otis & Reiter], at 35, footnote 2, state that "[t]he literature on ADR is vast", and they reference:
 - Carrie Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defence of Settlement (in Some Cases)" (1995) 83 *Geo. L.J.* 2663; and
 -Jean R. Sternlight, "ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice" (2003) 3 *Nev. L.J.* 289;
 which they say provide "particularly useful overviews with bibliographical orientation".
 I have tried to limit my review of dispute resolution literature with the following criteria in mind (in no particular order): focus almost exclusively on North America, concentrate more on articles that have arisen since the Court's JDR Program started in 1996, do not get into subjects beyond the boundaries of this Evaluation Report (except to point out sources for further study) and try to keep those boundaries tight, try to avoid studies of other ADR systems which add little to the study of the Court's JDR Program, time available to do the research (which became a severely limiting constraint), and "other considerations". I know I have missed or not had the time to consider (at all or in sufficient depth) many excellent sources, but I was time constrained to complete this Evaluation Report. Thus, further valuable material has been left for me and others to review in the future. Nevertheless, I will reference at the end of this Evaluation Report (Appendix 9) a Further Reading list of some other bibliographies and sources for future consideration, that I had intended to review, but for which I ran out of time.

⁸ It should be noted that, while the Evaluation Report will reference and rely upon a significant number of literature sources relative to dispute resolution in general, and JDR in particular, they will not provide all the answers for the evaluation of the JDR Program. Rather, the primary focus of this Evaluation Report is the Survey results obtained. The analysis of the Survey results, will be based, in part, on some aspects of the literature, but perhaps even more substantially, on my own previous education and experience in judicial dispute resolution.
 While my experience is significantly more limited in volume (over 100 JDRs over the last 12 plus years), the value of experience, understanding and commitment to the process is advanced as being, in itself, a valuable resource in analysis such as this: Judge Michael R. Hogan, "Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation" (1991) 27 *Willamette Law Review* 429 [Hogan], at 430 and footnote 3.

In the end, I conclude that the users find the JDR Program excellent, but some improvements are possible.⁹

9

Danielson, *supra* note 4 at 76, in the last paragraph of her thesis said:
... there is potential for the Alberta Court of Queen's Bench JDR Program to continue to improve and expand. ... Our Courts have responsibility not only to change but to provide a leadership role as the ultimate regulator and keeper of the peace in society's disputes. Alberta's Court of Queen's Bench Judicial Dispute Resolution Program is a clear response to this challenge.

Indeed, as Gandhi said "We must be the change we want to see in the world": Daniel Bowling and David Hoffman, ed., *Bringing Peace to the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (San Francisco: John Wiley & Sons, 2003)[Bowling & Hoffman, "Text"], at 1.

A Georgia judge brought it home to the dispute resolution judiciary of the future:
The role of the judge in resolving disputes is to look to the future, assess the way things are done now, and be ready to change, not just for the sake of change but so we can continue to be a viable, equal, third branch of government.

Judge Robert G. Walther, "The Judge's Role in Resolving Disputes" (1993) 244 Georgia State Bar Journal 29, at 29.

ACKNOWLEDGMENTS

First, I would like to acknowledge the Alberta pioneers in this field. While there were some interesting judicial personalities who, in years past would take active, sometimes not too subtle, measures to secure settlement of civil disputes - not always for purely altruistic reasons - the true pioneers in Alberta of the craft that has become JDR were (the late) Associate Chief Justice Tevie Miller, and Chief Justice W. Kenneth Moore (now retired - the Honourable W. Kenneth Moore, Q.C., C.M., L.D., O.C. - who continues doing mediations and arbitrations to this day)¹⁰.

¹⁰ Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA: Harvard University Press, 1993)[Kronman, "Lost"], is about the virtues of what the author called the "lawyer-statesman". At 3, he said that "[i]t is an ideal that has had distinguished representatives in every age of American law." He said that Abraham Lincoln was both a lawyer and a statesman. In talking about Lincoln's role in democracy vis-à-vis the Civil War, he said:
 ... as he struggled to find a way to save the Union and democracy too, Lincoln had no formula to guide him. He possessed no technical knowledge that could tell him where the solution to America's dilemma lay. He had only his wisdom to rely on - his prudent sense of where the balance between principle and expediency must be struck.

While they both would have been/would be embarrassed to be compared to Lincoln, I believe that both of these jurists fit the same description, if the subject matter were JDR. They struggled to find a way to save the benefits of an excellent Alberta adjudication system, but, facing long lead times to trial and a growing dissatisfied class of litigants, wished to achieve better access to justice before the Court as well. They had little precedent to follow, neither was an expert in ADR (although Associate Chief Justice Miller was a natural for it, and Chief Justice Moore became very proficient), and they could not be sure that JDR would be the solution. However, they used their wise and prudent judgment (which Kronman said was the quality "that the ideal of the lawyer-statesman values most") to add JDR as a judicial service to strike the appropriate balance between the principled standard of adjudication and newer forms of dispute resolution. I believe that the Survey results demonstrate that they significantly achieved that balance.

There is, however, another link to Lincoln, because as Danielson reminds us, *supra* note 4 at 25-6, relying on Peter Bowal, "The New Ontario Judicial Alternative Dispute Resolution Model" (1995) 34 *Alberta Law Review* 206, at 210, Abraham Lincoln was an early advocate of settlement: "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, expenses, and waste of time."

It was the leadership and foresight of these two men, assisted by others on the Court, that led the Court into a formal JDR program in 1996¹¹, ably assisted by

Then Manitoba Law Dean Trevor Anderson, Q.C. repeated this recommendation in 1986 that lawyers have a duty to help their clients settle their disputes: *1986 Isaac Pitblado Lectures: Alternative Dispute Resolution: Emerging Mechanisms and Professional Responsibilities in Dispute Resolution*. (Winnipeg: Law Society of Manitoba, 1986)[Pitblado Lectures], at 1.

Others justices who worked with then Chief Justice Moore and Associate Chief Justice Miller in the early days of settlement conferences in the 1980s included Justices Egbert, Dixon, Forsyth and Virtue in Calgary, and Justices Agrios and Dea in Edmonton.

11

This is exactly opposite the lack of judicial leadership at the same time in much of the United States, according to Brazil:

The judiciary has been, for the most part, an essentially reactive and in some ways reactionary institution. Its primary modus has been passive. It has tended to act only when called upon by forces outside itself.... These facts of traditional judicial life militate against active approaches to building ADR programs.

Yet some (including Chief Judge Robert F. Peckham of the Northern Federal District of California) showed the same type of dedication that Associate Chief Justice Miller and Chief Justice Moore showed:

... He wanted the court to find ways to make resolving disputes less painful and more satisfying for clients. It was that deep, unadulterated desire to serve better our courts' users that drove the development of every phase of our ADR program.

Wayne D. Brazil, "ADR and the Courts, Now and in the Future" (2000) 189 F.R.D. 500, at 504-5, and (1999) 17 Alternatives to High Cost Litig. 85 [Brazil, "Now"], at 89-90.

Danielson, *supra* note 4 at 75, in her concluding remarks, said "... there was great foresight on part of Queen's Bench Justices to experiment with and develop the Judicial Dispute Resolution Program in Alberta".

This was at the same time that in "the *Systems of Civil Justice Task Force Report*, the authors [were stating] that the multi-option civil justice system of the twenty-first century will require an expanded judicial role in the management and resolution of cases": Graeme A. Barry, "In the Shadow of the Rule of Law: Alternative Dispute Resolution and Provincial Superior Courts" *News and Views on Civil Justice Reform 2* (Fall 1999), online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/publications/newsviews-02/n2-shad.php>> [Barry], at 7, referencing The Canadian Bar Association, *Systems of Civil Justice Task Force Report* (Ottawa: The Canadian Bar Association, August, 1996), at 55.

See also: Wayne D. Brazil, "Hosting Settlement Conferences: Effectiveness in the Judicial Role" (1987-8) 3 Ohio St. J. On Disp. Resol. 1 [Brazil, "Hosting"], at 1, referencing his earlier work: Wayne D. Brazil, *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges* (Chicago: American Bar Association, 1985) at 39 and 44, who, even back then, noted that:

... the vast majority of litigators believe that judges are in a position to make valuable contributions to the settlement process. In fact, lawyers want judges to become more assertively involved in settlement than has been the norm in most courts in the past. It seems clear that judges are going to be under

one of the leading and most knowledgeable proponents of the craft, Justice John Agrios (now retired)¹². Since then many of my colleagues past and present have made the JDR Program what it is today.

I want to acknowledge the work of my colleague, Justice Lawrie Smith, whose paper on the subject¹³ I discuss in some detail. It will be immediately apparent that, although I have great respect and admiration for her personally and professionally, there is much in - indeed, most aspects of - her conclusions with which I respectfully disagree. However, her work has assisted me a tremendous amount, and reminds me of the words of former Yale Law Dean, Professor Anthony Kronman, who, when talking of his colleagues, Bruce Acherman and Owen Fiss, said: "I doubt that I shall ever persuade these two good friends that I am right. But the debt I owe them for helping me to know my own mind is immeasurable and can never be discharged." This applies to me and Justice Smith and, on occasion, the Honourable John Agrios.¹⁴

continuing and increased pressure to make settlement work a major part of their job description.

It is interesting to note that states of the European Union are presently becoming new pioneers in determining the best dispute resolution mechanism for disputes between people within the Union: Rainer Kulmus, "Privatizing Civil Justice Through Mediation: Is There a US Lesson for German Courts?" (2008) 7 The Icfai University Journal of Alternative Dispute Resolution 9.

- ¹² Justice Agrios later wrote an "electronic book", in which, in the first chapter, he said, with his usual modesty, "I believe that most neutral observers would agree that [the Court is] further ahead in our formalized dispute resolution practices ... than any other superior trial court in the country": Justice John A. Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Judges*, version 3.1, October 2007. (Edmonton, AB : s.n., 2007)[unpublished], online: National Judicial Institute, Judicial Library <<http://www.nji.ca/>>[Agrios], at 3.
- ¹³ Justice Lawrie Smith, "Seeing Justice Done: From Judicial Mediation to The Judicial Settlement Conference"(Paper presented to the National Judicial Institute, Judicial Settlement Conference, Vancouver, British Columbia, October 15, 2008)[unpublished], online: National Judicial institute <<http://www.nji.ca>> [Smith].
- ¹⁴ Kronman - "Lost", *supra* note 10, at viii.
My biggest regret as to Justice Smith's work is that she had not changed all her allegations of actual harm being done or predicted, to rather a caution of things to

I acknowledge the outstanding assistance and dedication of my spouse, Gayle Rooke, M.A. (Distance Learning), in: formatting the questionnaires for the Survey; the preparation of the database for the inputting of the responses; leading me (a relative techno peasant) through the software tools for the simple and more integrated analysis of the data, and advice and computer skills on my literature research - in short all her computer related assistance; assisting with last minute editing and delivery of this Evaluation Report, but most important of all, her inspiration and patience throughout this project.

I thank the 374 lawyers and 193 clients who took the time and showed the interest to complete a long questionnaire (most completed not only the four page “Basic Questions”, but also the six page “Additional Questions”). I appreciate the

constantly and forever maintain, ensure and keep in mind so as to make certain that no harm resulted from JDRs, as did Brazil and Dickson (Wayne D. Brazil, “Continuing the Conversation about the Current Status and the Future of ADR: A View From the Courts” [2000]Journal of Dispute Resolution [Brazil, “Continuing”], at 1, and the Right Honorable Brian Dickson, “ADR, The Courts and The Judicial System: The Canadian Context” (1984) The Law Society Gazette 234 [Dickson], as she quoted at 28-9), and as did she, herself, in the closing paragraph of her paper, at 30-1. Had she done that earlier and more consistently, my need to respond to such allegations of actual harm would have been lessened and this Evaluation Report would have been much shorter. That having been said, I find myself in the same position as stated by William H. Simon in *The Practice of Justice: A Theory of Lawyers’ Ethics* (Cambridge, Mass.: Harvard University Press, 1998)[Simon], at 109-10, namely that “[i]t is much easier to show the inconsistencies and nonsequiturs in someone else’s argument than to construct an affirmative vision of the good”. The one thing we clearly agree upon is the need for judges to maintain the highest judicial standards while performing JDRs, although we do not agree on how restricted those standards should be. Agrios, *supra* note 12 at 53, speaks of “fair-minded Judges who disagree” with his views . I believe that, notwithstanding some of the vehemence with which Smith, Agrios and I, along with others, engage in arguments on matters relating to JDRs, our discussions fall into that category. Wayne D. Brazil, “Court ADR 25 Years After Pound: Have We Found a Better Way?” (2002) 18 Ohio St. J. Disp. Resol. 93 [Brazil, “25 Years After”], at 124, talks about disagreements between judges over ADR principles and says of divergent views “we must acknowledge them squarely, take them seriously, and consider open-mindedly their validity and their reach. We must also make changes in our programs where necessary and reassure our critics where we can.” While it will be for others to determine my open-mindedness (or the contrary), that is what I have tried to do where my view diverge from my colleagues - these two, and a few others, in particular.

further willingness of the 178 lawyers and 85 clients who volunteered for more questions or interviews (but were not called upon). I acknowledge the assistance of the 60+ Queen's Bench judicial puisne, and an evolving group of up to 20 supernumerary, colleagues who have worked and continue to toil so hard day in and day out in making JDRs successful, and who assisted in the handing out the Survey questionnaires. I also appreciate the dedication and support of a number of my judicial colleagues who gave me advice throughout the project commencing in the spring of 2007 until the completion of this Evaluation Report.

I thank Chief Justice A.H. Wachowich and Associate Chief Justice Neil Wittmann for their full cooperation in allowing me to undertake the Evaluation, and acknowledge them and Alberta Justice for securing the necessary office resources for the paper flow and staffing in getting the questionnaires out to the users and back and inputting into the database. I specifically want to thank the Court's Trial Coordinators, especially JDR Coordinators Brent Rosin of Edmonton and Pat Gordon of Calgary, and Trial Coordinator Lisa Brown of Lethbridge, for their diligence in helping convert Survey questionnaires into Survey results. I thank summer student, Jenna Will, for a month's plus+ work in the summer of 2008 in inputting the Survey data into the data base, and my administrative assistants, first, Valerie Horne, and later, Darlene Walker, for all their work in helping me to initiate, follow up on, and coordinate the completion of, the evaluation and this Evaluation Report.

I acknowledge that the time to dedicate to this project was made possible by the Canadian Judicial Council Study Leave Program, pursuant to approval of the Governor in Council, under s. 54(1)(b) the *Judges Act*, R.S.C. 2000, c. J-1, which allowed me to leave behind most of my daily judicial duties (other than writing overdue reserved judicial decisions and my duties as Acting Chair of the

Rules of Court Committee until December 12, 2008, especially in relation to the New Rules of Court Project), in the period September 1, 2008 to April 30, 2009.

I thank Alberta Justice, Alberta Law Libraries, Rhonda O'Neill, B.A., M.L.I.S., Assistant Director, and Lyn Beattie, B.A., M.L.S., Cindy Roorda, B.A. (Hon.), M.L.S., and Lola Salami, Ph. D., M.L.I.S., all Reference Librarians, for their spectacular assistance in coordinating literature searches, and editing of cites and the bibliography. I also appreciate the assistance of Lauren Warrack, Legal Counsel to the Court, for her diligence in reviewing cites and editing in the last week of the project (all other requests for desperately needed legal counsel or student-at-law editing assistance was denied by the Court).

While I take the responsibility for any criticisms as to the quality of this Evaluation Report, it would not have been anywhere near what is without the assistance and advice of my friend, Judge Hugh F. Landerkin, Provincial Court of Alberta, who gave me advice in the writing process, provided excellent work (some, along with Professor Pirie) from which I have quoted liberally, and reviewed an earlier draft - I am in his debt.

Last, but not least, I thank my new friends at the University of Alberta, Faculty of Law, who provided the endorsement, atmosphere, setting and support in which to conduct this work: Dean David Percy, for giving me the opportunity to be a Justice in Residence (along with my friend, Justice Don Lee) and an LL. M. student during my Study Leave year; Assistant Dean Wayne Renke, for helping me through the University of Alberta Arts, Sciences and Law Research Ethics Board process to issue the Survey questionnaire¹⁵, and for his

¹⁵ Notwithstanding the comment of Herbert M. Kritzer, "Research is a Messy Business: An Archeology of the Craft of Social-Legal Research" in Simon Halliday and Patrick Schmidt eds., *Conducting Law and Society Research: Reflections on Methods and Practices* (New York: Cambridge University Press, 2009) [forthcoming], online: Social Science Research Network

advice since; Professor Ted DeCoste, who taught me not only to apply the law, as I have been for 39 years, but also to love and appreciate the law for itself - and who is still trying to warp this judge into a quasi scholar - a work still very much in progress¹⁶; Assistant Dean, Graduate Studies, Dr. Moin Yahya for his support, assistance and encouragement - and personal friendship, in helping me back to school after 38 years and to succeeding in my project, this Evaluation Report and, upon completing my thesis, my LL. M. degree; and to Professor Dr. Russell Brown, my Masters supervisor, for his advice, but more importantly, his encouragement, enthusiasm and friendship throughout this process.

Without all of these people, the research, empirical and theoretical, and the writing leading this Evaluation Report would not have been possible. I thank them all.

June 1, 2009

Justice John D. Rooke

<<http://ssrn.com/abstract=1288063>>[Kritzer], at 1, about the “‘problems’ of increasing demands from Institutional Review Boards charged with protecting human subjects”, thanks to the assistance of Associate Dean (Academic), Professor Wayne N. Renke, this was a relatively painless process.

16

The measure of the value of much of this Evaluation Report is the work leading up to, and the results and information obtained from the Survey. As I complete this Evaluation Report, and consider the attempts to make me even a quasi-scholar, I know that I have not yet even achieved that low standard. However, I do want to make it clear that I consider this Evaluation Report to be about the search for, and, subject to measurement limits, the finding of the truth about the JDR Program. In the Preface of his book, Kronman - “Lost”, *supra* note 10 at vii, Yale Professor Anthony Kronman said “Scholarship ... aims at the truth. Advocacy, by contrast is concerned merely with persuasion” - in this Evaluation Report, it is truth that I seek. Moreover, on the subject of scholarship, I wish to adopt Kronman’s words (Kronman - “Lost”, *supra* note 10 at 6) to state that I do not write this in a scholarly language - I am a judge, and it is hard to change one’s spots - therefore, I, rather, have attempted (to use his words) to write “in simple terms and without the use of specialized jargon”.

TABLE OF CONTENTS

I.	INTRODUCTION.	2
	A. THE BACKGROUND.	2
	B. THE PRESENT.	15
	1. WHY AN EVALUATION NOW?.	15
	2. COURT’S NORMATIVE ROLE IN DISPUTE RESOLUTION.	19
	C. RIGHTS AND INTERESTS, AND THE RELEVANCE OF THE DEBATE.	42
	1. THE THEORY.	42
	2. THE THEORY PUT TO PRACTICE.	60
	D. TERMINOLOGY.	69
	1. ADR AND JDR.	75
	2. NEGOTIATION.	86
	3. MEDIATION	87
	a. FACILITATIVE MEDIATION.	93
	b. EVALUATIVE MEDIATION.	95
	c. FACILITATIVE/EVALUATIVE MEDIATION HYBRID.	97
	d. JUDICIAL MEDIATION.	104
	e. MEDIATION CONCLUSION.	111
	4. MINI-TRIALS.	112
	5. MEDIATION/ADJUDICATION.	115
	6. EARLY NEUTRAL EVALUATION.	124
	7. OTHER TERMS AND CONCLUSION.	128

II.	SURVEY - SUMMARY OF QUANTITATIVE/QUALITATIVE REPORTING.....	129
A.	INTRODUCTION.....	129
B.	SURVEY QUESTIONS - EVALUATION PROCESS DESIGN, TIMING AND PROCEDURES.....	131
C.	RESULTS AND PRELIMINARY ANALYSIS.	149
1.	APPENDIX 3 - GENERAL AS TO ALL JDRS.....	149
2.	APPENDICES 4 AND 5 - LAWYERS' AND CLIENTS' SURVEY RESULTS.	153
D.	QUESTIONS NOT ASKED.	209
1.	LAWYERS AND CLIENTS.	210
2.	JUSTICES.	213
E.	CONCLUSION.	216
III.	DETAILED AND INTEGRATED ANALYSIS OF SURVEY RESULTS..	218
A.	MINI-TRIAL ANALYSIS.....	220
B.	MEDIATION & EVALUATION ANALYSIS.....	222
C.	BINDING JDR ANALYSIS.....	227
D.	SUCCESS BY JUDICIAL DISTRICT AND CASE TYPE.....	228
E.	CAUCUSING BY JUDICIAL DISTRICT AND CASE TYPE.....	229
F.	PRE-JDR - JDR JUSTICE PROFILE, JDR BOOKING CONFIRMATION FORM, PRE-JDR CONFERENCE, JDR INSTRUCTION LETTER AND OPENING STATEMENTS	230
G.	OTHER ANALYSIS.	243
1.	SUCCESS AS A FUNCTION OF THE DURATION OF THE LITIGATION.	243
2.	SUCCESS AS A FUNCTION OF THE STAGE OF THE LITIGATION.	243

3.	REPRESENTED BY OTHER THAN LAWYERS.....	244
H.	CONCLUSION.....	245
IV.	ANALYSIS OF QUALITATIVE SURVEY RESULTS.....	246
A.	LAWYERS.....	248
B.	CLIENTS.....	254
C.	OTHER CONSIDERATIONS.....	268
V.	SUMMARY OF CONCLUSIONS FROM SURVEY ANALYSIS.....	270
VI.	CURRENT ROLE OF THE COURT IN JDR.....	274
A.	DESCRIPTION OF CURRENT ROLES.....	291
B.	EXTERNAL AND INTERNAL CONCERNS EXPRESSED.....	296
1.	INVALID CONCERNS.....	301
2.	VALID VIGILANCE.....	303
C.	CONCLUSION.....	303
VII.	JUDICIAL CONDUCT.....	304
A.	INTRODUCTION.....	304
1.	THE SETTING.....	304
2.	CHANGES TO THE NORM.....	311
3.	THE CHALLENGES OF THE NEW NORM.....	315
4.	TERMINOLOGY - AGAIN.....	321
5.	PURPOSE = GUIDANCE.....	321
B.	JUDICIAL CONDUCT - THE BASICS.....	324
1.	CANADIAN JUDICIAL CONDUCT PRINCIPLES.....	328
2.	U.S. MEDIATION CODES.....	339
3.	RESPONSE TO SMITH.....	343

C.	JUDICIAL CONDUCT - RECENT PRONOUNCEMENTS.....	354
1.	U.S. JUDICIAL CONDUCT CODES.....	355
2.	PRELUDE TO JDR JUDICIAL CONDUCT ISSUES.....	363
D.	JUDICIAL CONDUCT - JDR ISSUES AND ANALYSIS.....	366
1.	WHICH HAS PRECEDENCE - JUSTICE OR EXPEDIENCY?.....	379
a.	IMPRUDENT SETTLEMENT.....	381
b.	USE OF COERCIVE POWER.....	385
2.	NON-PUBLIC PROCESS, CONFIDENTIALITY AND CAUCUSING.....	396
a.	TRANSPARENCY.....	396
i.	PUBLIC SCRUTINY.....	396
ii.	CAUCUSING.....	401
b.	COMMUNICATE THE “RULES” OF CAUCUSING IN ADVANCE.....	405
3.	CAMOUFLAGE, DECEPTION OR FRAUD.....	406
4.	CONFIDENTIALITY AND KNOWLEDGE OF BARGAINING POSITION.....	407
5.	OTHER.....	409
a.	SELF-DETERMINATION.....	409
b.	JUDICIAL STATUS.....	410
6.	JUDICIAL INVOLVEMENT POST JDR.....	412
a.	IS IT INAPPROPRIATE JUDICIAL CONDUCT TO PARTICIPATE IN A BINDING JDR?.....	412
b.	JUDICIAL CONDUCT ISSUES WHEN DOING A BINDING JDR.....	432
7.	CONCLUSIONS AND RECOMMENDATIONS.....	433

VIII.	FUTURE ROLE OF THE COURT IN JDR.	435
A.	SERVICES TO BE MAINTAINED.	435
B.	POTENTIAL NEW OFFERINGS	438
C.	ATTITUDE AND TIMING IN OFFERING JDR.	443
1.	WHEN & HOW OPTIMUM - “QUICKEST/CLOSEST TO THE GOAL LINE”	443
a.	ACCESS TO JUSTICE GOAL.	443
b.	THE COURT’S MANDATE AND TIMING IN THE JDR PROGRAM.	449
2.	FUTURE PROCESS FACTORS AND WARNINGS.	451
D.	IMPENDING MANDATORY MEDIATION.	461
E.	RELATIONSHIP TO COURT-ANNEXED MEDIATION AND PRIVATE MEDIATION PROGRAMS.	466
F.	MAINTAINING THE STANDARDS.	469
1.	TRAINING AND EDUCATION.	478
a.	THEORY.	493
b.	BASICS OF THE CRAFT.	505
c.	PITFALLS TO AVOID.	509
i.	SELF-REPRESENTED LITIGANTS.	509
ii.	VULNERABLE PEOPLE, POWER IMBALANCES, ABUSIVE CONDUCT, SECURITY AND PSYCHOLOGY.	514
iii.	CONCLUSION.	517
2.	OTHER TOPICS FOR FUTURE RESEARCH.	517
3.	FUTURE EVALUATION.	520

IX.	CONCLUSION AND RECOMMENDATIONS.	522
A.	CONCLUSION.	522
B.	RECOMMENDATIONS.	524
	APPENDIX 1 - LAWYER'S SURVEY FORM.....	566
	APPENDIX 2 - CLIENTS SURVEY FORM.....	583
	APPENDIX 3 - SUMMARY OF JDRs HELD IN COURT TERM 2007-8.	600
	APPENDIX 4 - SUMMARY OF RESULTS - LAWYERS.....	602
	APPENDIX 5 - SUMMARY OF RESULTS - CLIENTS.	700
	APPENDIX 6 - TABLES AND SUMMARY OF RESULTS - INTERACTIVE ANALYSIS.....	766
	TABLE 6.1 - WAITE TIMES.	766
	TABLE 6.2 - MOTIVATION.	768
	TABLE 6.3 - SETTLEMENT - IMPACT ASSESSMENT..	769
	TABLE 6.4 - PEAK PERFORMANCE.	770
	TABLE 6.5 - JUDICIAL QUALITIES.	771
	TABLE 6.6 - MINI-TRIAL ANALYSIS.	774
	TABLE 6.7 - MEDIATION/EVALUATION ANALYSIS.....	776
	TABLE 6.8 - BINDING JDR ANALYSIS.	778
	TABLE 6.9 - SUCCESS BY JUDICIAL DISTRICT AND CASE TYPE.	779
	TABLE 6.10 - CAUCUSING BY JUDICIAL DISTRICT AND CASE TYPE.	781

TABLE 6.11 - DEMAND FOR FUTURE CAUCUSING....	783
TABLE 6.12 - PRE-JDR CONFERENCE AND INSTRUCTION LETTERS ANALYSIS.....	784
TABLE 6.13 - SUCCESS/DURATION ANALYSIS.	785
TABLE 6.14 - SUCCESS/LITIGATION STAGE ANALYSIS.	786
TABLE 6.15 - LAWYERS' SURVEY QUALITATIVE HIGHLIGHTS.....	787
TABLE 6.16 - CLIENTS' SURVEY QUALITATIVE HIGHLIGHTS.....	806
APPENDIX 7 - GUIDELINES FOR JUDICIAL DISPUTE RESOLUTION.	810
APPENDIX 7 - PROPOSED NEW RULES OF COURT - DISPUTE RESOLUTION.....	811
APPENDIX 8 - EVALUATION REPORT RECOMMENDATIONS.	816
TABLE 8.1 - SAMPLE JDR JUSTICE PROFILE.	829
TABLE 8.2 - JDR BOOKING CONFIRMATION	831
TABLE 8.3 - SAMPLE JDR INSTRUCTIONAL LETTER .	832
APPENDIX 9 - FURTHER READING.....	833
APPENDIX 10 - END-NOTES.	840

LIST OF SYMBOLS, NOMENCLATURE¹⁷ OR ABBREVIATIONS

ALRI	- Alberta Law Reform Institute
ADR	- Alternative Dispute Resolution (in this Evaluation Report, alternative to a dispute resolution by, or involving the Court ¹⁸), where a neutral third party assists the parties to attempt to settle a dispute
BATNA	- best alternative to a negotiated agreement
Binding JDR	- a JDR where, at the parties' request, if a settlement is not reached on one or more issues, the JDR justice will provide

¹⁷ Terminology is a substantive issue addressed in this Evaluation Report, so the nomenclature here is a mere summary of what follows. Relevant thereto are numerous glossaries of dispute resolution terms, some of which are discussed *infra*. See, for example:

- Catherine Morris, "Definitions in the Field of Conflict Transformation", online: Peacemakers Trust
<<http://www.peacemakers.ca/publications/ADRdefinitions.html> [Morris];
- Center for Public Resources (CPR) Institute for Dispute Resolution, "The ABCs of ADR: A Dispute Resolution Glossary (1995) 13 Alternatives to High Cost Litig. 147 [CPR, "Glossary"];
- Law Society of Upper Canada, *Short Glossary of Dispute Resolution Terms*, The Law Society of Upper Canada, Research and Planning Committee, July 1992;
- Robert J. Niemic, Donna Stienstra, and Randall E. Ravitz, *Guide to Judicial Management of Cases in ADR* (Federal Judicial Centre, 2001)[Niemic *at al*], at 8-10; and
- Douglas H. Yarn, et al, *Dictionary of Conflict Resolution* (San Francisco: Jossey-Bass, 1999), available on line at <http://www.credoreference.com> [Yarn].

¹⁸ This use is notwithstanding what Justice Linden said:

... we're going to move on to the study of what we call better dispute resolution rather than alternative dispute resolution, because there is a sense about alternative dispute resolution that it rejects the court system and that it looks for ways to solve these things that are outside the court system. Nothing can be further from the truth because alternatives can be used within the court system as well. The only reason people look for alternatives is when the court system doesn't respond to their needs sufficiently....:

Allen M. Linden, "Comments on How Alternative Dispute Resolution Would Apply to Canada's Legal System", in the Pitblado Lectures, *supra* note 10 at 12.

an non-binding opinion which the parties expressly agree in advance, at any time, or thereafter, to accept as binding on them as to the result (thus, a “Binding JDR opinion”), or, where available (not currently available in Alberta as a result of *L.N. v. S.N.*¹⁹), the JDR justice will provide a formal decision (“Binding JDR decision”) under a similar express agreement. While there are, at least theoretically, two ways to get there, both are referenced as “Binding JDR”.

C	- Client (in reference to Survey data)
CAMP	- Court-Annexed Mediation Program of Alberta Justice
Clients Survey	- Survey relating to clients
coercion	- the propensity of a neutral, including a JDR justice, to potentially use the power of his/her office to an attempt to convince a party and/or their counsel to settle litigation in a certain way
Court	- Court of Queen’s Bench of Alberta
ENE	- Early Neutral Evaluation - as the phrase suggests, an evaluation by a neutral third party early in the life of the dispute (generally after the commencement of formal litigation - usually after document exchange but before any oral examination for discovery)
evaluation	- an assessment of the potential success and/or risks associated with adjudicating a dispute
IL	- JDR Instruction Letter (from the judiciary, advising counsel and/or parties of the information required for a JDR)
judge	- a judicial decision maker, in general, whether a judge or justice

¹⁹

L.N. v. S.M., 2007 ABCA 258, 412 A.R. 232, 79 Alta. L.R. (4th) 33, 284 D.L.R. (4th) 1, [2007] 12 W.W.R. 191, 43 R.F.L. (6th) 4, 159 A.C.W.S. (3d) 672, 2007 CarswellAlta 1080, [2007] A.J. No. 888 [*L.N.*].

justice	- a judge of the Court
JDR	- Judicial Dispute Resolution ²⁰ - a voluntary and consensual process whereby parties to a dispute, following the filing of an action in Court (and, most typically, close to trial), seek the assistance of a JDR justice to help, in a facilitative, medicative and/or evaluative way, to settle the dispute before trial ²¹
JDRC	- Judicial Dispute Resolution Committee of the Court's internal committee structure - newly created, April 2009.
JSC	- Judicial Settlement Conference, a term rejected by the Court as the name for the JDR Program, but used by some to informally describe a JDR.
L	- Lawyer (in reference to Survey data)
Lawyers Survey	- Survey relating to lawyers
LESA	- Legal Education Society of Alberta
LInC	- Alberta Law Information Centre
Mandatory ADR	- a process where some form of ADR or JDR is required before a trial of a dispute ²²
Mediation	- a neutral third party, who has no decision making power,

²⁰ In this Evaluation Report, I have taken the liberty of creating a whole new vocabulary. "JDR" is broadly used as a new term - as a noun, plural or singular ("a JDR", or "JDRs"), an adjective ("a JDR session", or "JDRing") and a verb ("JDRed").

²¹ This definition is not far off of that used by Danielson, *supra* note 4 at 2, referencing Alberta Law Reform Institute, Alberta Rules of Court Project, "Civil Appeals", Consultation Memorandum No. 12.21, April 2007, at 137, para. 307, and Alberta Law Reform Institute, Alberta Rules of Court Project, "Promoting Early Resolution of Disputes by Settlement", Consultation Memorandum No. 12.6, 2003, at 68, para. 156.
Note that where the parties do not agree to a JDR, an adjudication is the only recourse: *Nanrhe v. Nanrhe*, 2005 ABQB 722, [2005] A.J. No. 1332 (Veit J.).

²² Note that, in Alberta, mandatory dispute resolution is mandated under the New Rules, some form of private ADR, JDR, or court-annexed dispute resolution, will be required, or must be judicially waived, before a trial date can be obtained - see NR 4.16 and 8.4.

who assists parties to a dispute to resolve that dispute and issues associated with it²³

- Mini-trial - a JDR where, after review of briefs, and submissions of the parties and/or their counsel, the JDR justice provides a non-binding opinion of the result that might be achieved in a judicial adjudication²⁴
- New Rules (NR) - new Alberta Rules of Court, as recommended by the ALRI in October 2008, with the general concurrence of the RCC in December 2008, subject to the determination of the Minister of Justice of Alberta, scheduled to come into force on January 1, 2010. NR is used to precede a specific proposed New Rule.
- PATNA - probable alternative to a negotiated agreement
- PTC - pre-trial conference
- ranking - ranking and derivatives of it reference, in multiple choice questions, the ranking (or rating scale) from 1 to 5, where 1 is usually (with some exceptions) negative, and 5 usually positive

²³ In a family law context, Landerkin adds “through an informed settlement”, ostensibly meaning “in the shadow of the law” as discussed *infra*: Hugh F. Landerkin, “Custody Dispute in the Provincial Court of Alberta: A New Judicial Dispute Resolution Model” (1997) 35 Alta. L. Rev. 627 [Landerkin, “Custody”], at 661.
There are numerous adjectives related to mediation, as will be discussed *infra*.

²⁴ Danielson, *supra* note 4 at 3, referencing Alberta Law Reform Institute, Alberta Rules of Court Project, “Promoting Early Resolution of Disputes by Settlement”, Consultation Memorandum No. 12.6, 2003, at 73, para. 168, claims that the Court in “Alberta is considered the pioneer in the mini-trial”.

As an aside, it appears that, even if Alberta is a “pioneer” in this field, it was not the first. Indeed, even the term itself is a misnomer - U.S. District Court Judge Enslin, noted that it arose in 1978 and that “It is not named that way by its founders, but named that way by the New York Times.” and that “It isn’t a substitute for a trial. It isn’t a trial. Mini trial is the wrong word. It’s a settlement technique.”: Richard A. Enslin, in “Alternative Dispute Resolution”, in the Pitblado Lectures, *supra* note 10 at 6.

- Pre-JDR - a pre-JDR meeting or conference to discuss the JDR process to be followed in an individual case in the Court Queen's Bench (QB) - Court of Queen's Bench of Alberta
- RCC - Rules of Court Committee, under s. 25 of the Court of Queen's Bench Act, R.S.A. 2000, c. C.31
- SRL - Self Represented Litigant(s) - in the U.S., the term "*pro-se*" is used
- Survey - broadly, the questionnaires that went out, the replies that were returned, the database created and the results as summarized herein as it applies to both lawyers and clients. Where there is a distinction between them, I shall use the terms Lawyers' Survey and Clients' Survey.
- WATMA - worst alternative to a negotiated agreement

IMPROVING EXCELLENCE: EVALUATION OF THE JUDICIAL DISPUTE RESOLUTION PROGRAM IN THE COURT OF QUEEN'S BENCH OF ALBERTA

*The role of judges in the adjudicative system is undergoing significant change.... As a result of the widespread introduction of judicial case management and judicial mediation, which are often pushed for by judges themselves and are never effective without their support, many judges are reconsidering the part they play in dispute resolution. The significance of the attitude of the bench toward change cannot be underestimated – their professional leadership will be key to the future.*²⁵

25

Professor Julie Macfarlane, *The New Lawyer: How Settlement is Transforming The Practice of Law* (Vancouver: UBC Press, 2008) [Macfarlane], at 224. A reading of this Evaluation Report will show that I quote from and reference Macfarlane's latest book a great deal. I do so unabashedly and without apology, but with great thanks, for several reasons. While the focus of her book is on lawyers, not judges, her comments are most often dealing with a subject or analysis for which judges are merely the "flip side", or, at least, the corollary of those comments. But, more importantly, it is the most up-to-date, authoritative, comprehensive, Canadian, and empirical and literature researched based study of dispute resolution available. It has helped me tremendously to think about and articulate my views, and to analyze other views, for this Evaluation Report, in relation to my experience and the empirical data I have collected, relative to the JDR Program in Alberta.

See also Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2000), which has a similar philosophy, and comes with a recommendation from Frank E.A. Sander, "The Future of ADR", [2000] J. Disp. Resol. 3 [Sander, "Future"], at 9, then referencing the intended yet unpublished book as *Beyond Winning: How Lawyers Can Create Value for Clients Through Negotiation*.

As to Sander, this being one of the first mentions of his name, I should state how much I learned from that veteran - indeed, the icon - of ADR - the "Dean in this arena - the commentator and leader with the deepest experience, the broadest vision, the richest knowledge, and the most balanced counsel" (Brazil, "Continuing", *supra* note 14 at 1]) - Professor Frank E.A. Sander, Bussey Professor of Law at Harvard University, and, additionally, his extremely knowledgeable colleagues, Michael K. Lewis and Linda R. Singer, both of ADR Associates of Washington, DC, who brought a piece of Harvard University to Simon Fraser University to conduct a "Mediation Workshop" in Vancouver in 1997, early in my days of practicing JDR. I am not alone - there are many tributes: see Brazil, "25 Years After", *supra* note 14 at 94, who called him the "spiritual father of court ADR".

It is also noted and recognized that Alberta Provincial Judge Hugh F. Landerkin, in conjunction with Professor Andrew J. Pirie, did a broader, and very valuable, "evaluat[ion of] the place of Judicial Dispute Resolution or JDR in Canada's justice system", on which I have relied also heavily in this Evaluation Report: Hugh F. Landerkin, and Andrew J. Pirie, "Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?" (2003) 82 Canadian Bar Review 249 [Landerkin & Pirie].

I. INTRODUCTION

A. THE BACKGROUND

Objectives of traditional, adversarial, adjudicative litigation include: truth finding - “[t]ruth finding holds pride among the objectives of formal adjudication...”²⁶; fact finding in an atmosphere of scarcity and uncertainty, but at the same time having a system of weight, probability and finding control mechanisms, so as to avoid “discretionary” or arbitrary findings²⁷; and liability finding, but in a way that is just, timely, and has a finality and bindingness²⁸. However, in this Evaluation Report, we are not focused on the substance - the truth - historical or precisely mathematical, or the facts, but more the result, and the objective of the process to get there - one that is timely, fair and just, yet final and binding, and allows the parties to move more quickly back to their regular

Macfarlane references “judges”, but, to be clear, throughout this Evaluation Report, I am addressing the role of the judiciary in active judicial service, specifically justices of the Court of Queen’s Bench of Alberta, appointed under s. 96 of the constitution (*Constitution Act, 1982*), and the *Federal Judges Act*, R.S.C. 2000, c. J-1, and operating under the *Court of Queen’s Bench Act*, R.S.A. 2000, c. - C-31. Although, in a generic sense, my comments may apply to other trial judges - provincial and territorial court judges (e.g., *Provincial Court Act*, R.S.A., 2000, c. P-31), court of appeal justices (e.g., *Court of Appeal Act*, R.S.A. 2000, c. C-30), and other actively serving judges and justices in similar situations, that is not my focus. Nor is my focus on the very valuable services provided by the retired judiciary acting as mediators and/or arbitrators - so called “rent-a-judges”, whom I shall consider as private mediators/arbitrators: see, Landerkin & Pirie, at 251.

²⁶ Lisa Dufraimont, “Evidence Law and the Jury” (2008) 53 McGill L.J. 199, at 203, referencing *R. V. Nikolovski*, [1996] 3 S.C.R. 1197, at 1206, 31 O.R. (3d) 480. See also Adams & Bussin, *supra* note 3 at 143.

²⁷ Alex Stein, “An Essay of Uncertainty and Fact-Finding in Civil Litigation, with Special Reference to Contract Cases” (1998) 48 U.T.L.J. 299, at 301-2; and Alex Stein, “The Refoundation of Evidence Law” (1996) 9 Can. L.J. & Juris 279, at 319-21.

²⁸ Susan Haack, “Of Truth, in Science and in Law” (2008), 73 Brooklyn L. Rev. 985, at 985-6.

lives without the costs, delay and agony of traditional, adversarial adjudication²⁹. In other words, the objective is a process that is a ritualistic return to a more simple, but peaceful, settlement of social conflicts³⁰, where the interests of the parties are as important as the legality of their rights, and where, in the process, there is a wise balance of a fair and just, but speedy, inexpensive and efficient procedure for achieving finality for such disputes³¹.

Alternative Dispute Resolution (ADR) methods arose to meet this challenge³². Adams & Bussin discuss the benefits of ADR which, they say, include: "lower court caseloads", "more accessible forums", "reduced expenditures of time and money", "speedy and informal settlement", "enhanced public satisfaction with the justice system", "tailored resolutions", "increased satisfaction and compliance with resolutions", and "restoration of... values", responding to "complaints about the current judicial system", including "the cost (time and money spent to resolve the dispute); the incomprehensibility of the process (issues relating to the lack of participation of the affected parties); and

²⁹ In a broader context, there are also economic benefits to a jurisdiction that has, or develops, and maintains a judicial system that can resolve commercial disputes ethically, within the Rule of Law, but also quickly, efficiently and at a reasonable cost: see Joanne Goss, "An Introduction to Alternative Dispute Resolution" (1995) 34 Alta. L. Rev. 1 [Goss, "An Introduction"], at 2, referencing "The Verdict from the Corner Office" (1992) (13 April) *Business Week* 66.

³⁰ Laurence H. Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process" (1971) 84 Harvard Law Review 1329, at 1376. Again, see Adams & Bussin, *supra* note 3 at 143-4.

³¹ Jack B. Weinstein, "Some Difficulties in Devising Rules for Determining Truth in Judicial Trials" (1966) 66 Colum. L. Rev. 223, at 241, who 30 years later was still troubled about the issue of balance - see Jack B. Weinstein, "Some Benefits and Risks of Privatization of Justice Through ADR" (1996) 11 Ohio St. J. on Disp. Resol. 241.

³² The establishment of the JDR Program was also consistent with the goals of the 1988 Canadian Bar Association Task Force on ADR, chaired by Bonita Thompson, Q.C.: Goss, "An Introduction", *supra* note 29 at 3, referencing Canadian Bar Association, *Alternative Dispute Resolution: A Canadian Perspective* (Task Force Report)(Ottawa: Canadian Bar Foundation, 1989), at 2.

the results (issues related to the imposition of a "remedy" by a "stranger" from a pre-determined and limited range of win/loss or "zero-sum" options)". They later added that the costs originate with the "highly competitive and adversarial processes [that] encourage the parties to exaggerate their claims", which leads to a upward spiral of costs. As adversarial adjudication spirals costs, it also spirals consequences - delay, "emphasizes positional bargaining", "extravagant positions from which it is difficult to resile without losing face", "exacerbates negative feelings between the parties", and even settlement does not sufficiently reduce costs because of its late arrival, if at all - "leaving the parties exhausted, embittered and often impoverished"³³.

Adams and Bussin also reference some of the options that mediators bring to the dispute resolution process, including: cost and time savings to all participants (including the courts, creating a greater chance of access to justice to others); confidentiality of information sharing and timely and strategic methods of flow and disclosure (direct or indirect - the later often "without identifying authorship" resulting in the creation of a feeling of ownership of the idea by all parties, as in that was "my idea"); engendering of civility between the parties, and resulting enhancements of communication; creating an atmosphere of "brainstorming" for creative solutions; raising objective perceptions of common ground; promoting face saving admissions, retractions and changes in positions; and, in the end, providing a tailored solution that is fair in both process and feels

³³ Adams & Bussin, *supra* note 3, at 141-6. Reliance was put, by the authors, on, *inter alia*:
 - Stephen B. Goldberg, Frank E.A. Sander, Nancy H. Rogers et al., *Dispute Resolution: Negotiation, Mediation, and Other Processes*, 2nd. ed. (Toronto: Little, Brown and Company, 1992) ["Goldberg, Sander and Rogers", as to all editions, unless otherwise noted], at 8;
 - D. Paul Emond, "Alternative Dispute Resolution: A Conceptual Overview", in Emond ed., *Commercial Dispute Resolution* (Aurora, ON: Canada Law Book, 1989) at 5-6; and
 - Thomas C. Schilling, *The Strategy of Conflict*, (Cambridge: Harvard University Press, 1960), chapter 4.

fair to the parties in the result³⁴. I might add, the process creates an opportunity for “venting” of emotion, if relevant and helpful to the process (e.g. this is how your actions “hurt me”, and “I am sorry my actions hurt you”, etc.).

While there are reports of governments and politicians who “decry the growing financial burden placed by the court system on society” and are ‘[s]earching for ways to off-load the costs of litigation”, that was not a motivation of the Court in creating the JDR Program. Rather, it was “to help reduce the strains on the court system”, and, in particular, the long backlog in trials (and thus the delay in getting a trial date) and the costs to the litigants. Moreover, instead of “off-loading” cases, the Court, in effect, took on more, but in a way that provided a more valuable service for some litigation, and at the same time

reduced the backlog: “Unlike initiatives whose effect is to move dispute resolution *away* from the courts, this initiative involve[d] a material *expansion* of the judge’s traditional role”³⁵.

Sanchez addressed the role of adjudication - the only option before ADR - this way:

The task of serving justice through adjudication will never be perfectly achieved, no matter how many rules of procedure or substantive law are created to further this goal. It is perhaps for this reason that the process of administering justice in court increasingly involves a bargaining process where the interests of

³⁴ Adams & Bussin, *supra* note 3 at 144-6.

³⁵ Joan I. McEwen, “ADR: Moving From Adversarial Litigation to Collaborative Dispute Resolution Models” (1999) 57 *The Advocate* 699, at 699 and 702-3.[Emphasis in original.]

the parties, and of society at large, are in some measure, negotiated on an ongoing, case by case basis³⁶.

Apropos of the lead-in to this introduction, and the move to ADR as an alternative to traditional adjudication, Macfarlane, a leading expert on ADR, started the Preface of her most recent book with the following statement:

A 98% civil settlement rate and the increasing use of negotiation, mediation, and collaboration in resolving lawsuits have dramatically altered the role of the lawyer. The traditional conception of the lawyer as “rights warrior” no longer satisfies client expectations, which centre on value for money and practical problem solving rather than on expensive legal argument and arcane procedures.³⁷

Sander picked up on some of these points. He noted that there is “[i]ncreased emphasis on problem solving as a skill for lawyers” and the “increasing use of settlement counsel (negotiation experts who focus exclusively on ways of settling the case while other lawyers are handling the litigation aspects of the case)”³⁸. In an earlier article, he noted that “some ... law firms have set up ADR practice groups, where people who specialize in ADR come together. These lawyers also help to raise the ADR awareness of their colleagues”³⁹.

Macfarlane continued the discussion started *supra*:

³⁶ Valerie A. Sanchez, “Back to the Future of ADR: Negotiating Justice and Human Needs” (2002-3) 18 Ohio State Journal on Dispute Resolution 669 [Sanchez], at 763.

³⁷ Macfarlane, *supra* note 25 at ix - x.

³⁸ Frank E.A. Sander, in “Some Concluding Thoughts” [to “The Impact of Mediation: 25 Years after the Pound Conference” symposium held at the Ohio State University Moritz College of Law in November 2001] (2002) 17 Ohio St. J. On Disp. Resol. 705 [Sander, “Ohio Symposium”] at 709, referencing:
- Carrie Menkel-Meadow, “Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?” (2001) 6 Harv. Negot. L. Rev. 97; and
- William F. Coyne, Jr., “The Case for Settlement Counsel” (1999) 14 Ohio. St. J. On Disp. Resol., 367.

³⁹ Sander, “Future”, *supra* note 25 at 3.

A growing reluctance to spend very large amounts of time and money on litigation has provided an impetus for another highly significant change: judicial reform. The most important of these reforms have introduced ... settlement processes into the civil courts, in the form of mediation and judicial settlement conferences.... Finally, as the courts push mediation on recalcitrant parties and lawyers, many corporations and institutions have determined for themselves that they wish to adopt new voluntary policies and codes of practice that emphasize a problem-solving approach to conflict resolution, and aim to reduce the litigation budgets.⁴⁰

Later in her text she discussed the motivations for the reform:

There is pressure all round for civil justice reform - from government, from policy makers, from the largely dissatisfied and often disenfranchised public, and from influential members of the bench and bar. The wide-spread introduction of court-connected and private mediation programs, case management, and *judicial mediation* is testament to concerns about the costs and delays in justice. ... All courts function differently than they did twenty years ago, with at least some shift toward the judicial management of cases and their settlement.

40

Macfarlane, *supra* note 25 at ix - x.

Yet this reform was in contrast with what heretofore had prevented change - "...the very qualities of discernment, reason, and wisdom that give traditional adjudication its authority also prevent it from changing so as to meet the demands of an increasing volume of litigation": Otis & Reiter, *supra* note 7 at 361.

Also, see Sanchez, *supra* note 36 at 674, footnote 8, says that "[t]here is a rich literature on the subject of judicial settlement conferences as operated by court-employed settlement officers and judges", referencing:

- Richard Posner, "Challenge and Reform", [1996] Federal Courts L. Rev. 237, at 237-41 (which Sanchez says focuses on "the parties' economic incentives to utilize out-of-court settlement, including court-annexed arbitration and the processes the courts use to encourage such private settlement");

- Richard Posner, "Crises and Reform", [1985] Federal Courts L. Rev. 9, at 9-11 (which she says, discusses "the weight of the potential costs and outcomes of private arbitration versus litigation");

- Carrie Menkel-Meadow, "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 UCLA L. Rev. 485, at 512-13 (which, she says, notes "the trend of courts to use mandated settlement conferences and the pros and cons associated with this trend"); and

- Judith Resnick, "Managerial Judges" (1982) 96 Harv. L. Rev. 374, at 377-80 (which she says re-examines "the role of judges as case managers as the need to clear the docket through settlement has risen").

... the requirement of early settlement meetings is imposed by courts and legislators in response to the frustration of personal and commercial clients who, not unreasonably, want justice delivered in a timely and accessible form.⁴¹

Indeed, a decade before the Court's JDR Program started, a Canadian jurist described the then challenges needing reforms:

We in Canada are lucky with our legal system. It's been a very fine system. It's served us extremely well, but it, too, is beginning to show wear and tear. Not so much of time, but of numbers. As the cities are growing, as the numbers of lawyers grow, as the types of disputes that come up in our society increase in number and in complexity, greater and greater pressure is being placed upon the legal system to respond to it and a lot of the old methods are really not working as well nowadays. It's just taking us too long and costing us too much.

Later, he argued that it was time for the judiciary to do something about cost and delay:

Conflict is becoming more and more a part of our life. So often it seems there are battles that don't seem to go anywhere.... There are, of course, benefits to .. [the adversary system] but there are also costs, and in particular these days, the costs of lawyers who, if they wish, can battle away for months and even years before trial and during trial. There are so many issues now that can be raised that people can drown one another with costs and we as judges, I think, and as people who are in charge of the legal system, have got to start getting hold of it.

...

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Macfarlane, *supra* note 25 at 7 [emphasis added].

This is one of the first references in this Evaluation Report to "judicial mediation". Note the ease with which Macfarlane uses the term - I believe a recognition very relevant to the section on terminology, *infra*.

Note, however, that the Court's JDR program is completely voluntary, not imposed.

I believe that it's important for judges to be involved if we can devise within the system techniques to bring the parties together ... to settle.⁴²

A decade later, Associate Chief Justice Miller and Chief Justice Moore, and this Court, rose to this challenge, as leaders in Canada, in offering a real, albeit judicial, alternative to traditional adjudication - a dispute resolution reform that "forme[ed] an integral part of the judicial process"⁴³.

⁴² Allen M. Linden, "Comments on How Alternative Dispute Resolution Would Apply to Canada's Legal System", in the Pitblado Lectures, *supra* note 10 at 11-12. For a good general history of the background need for the reforms leading to ADR in Canada (in Manitoba and equally in Alberta), but not yet JDR, see other articles in the Pitblado Lectures, *supra* note 10, including at 1, but also specifically at 24-5, in Philip Harter "Implementing Alternative Dispute Resolution". See also, at 47-9, then Manitoba Court of Queen's Bench Associate Chief Justice Scott on "Pre-Trial Conferences" and their changing role in that province to becoming "unabashedly settlement-orientated", a trend similar - but not identical - to what led to JDR initiatives as we now see them in our Court. See also, as to the importance, style and activities of the judicial role, E.W. Olson, Q.C., in "Negotiated Settlements - The Use of the Pre-Trial Conference as a Tool", in the Pitblado Lectures, *supra* note 10 at 61-64. On the subject of the historical progression from earliest times of only adjudication, to case management, to pre-trial conferences (and in the United States the use of "Settlement Weeks"), to judicial mediation, see Landerkin & Pirie, *supra* note 25, at 262-71. Parenthetically, they suggest judicial mediation was anything but new, but rather historically cyclical, or like a "pendulum constantly in motion", adding the following additional sources: - J. Resnick, "Managerial Judges" (1982) 96 Harv. L. Rev. 376; and - M. Galanter, "The Emergence of the Judge as a Mediator in Civil Cases" (1986) 69 Judicature 257. For the history on U.S. "Settlement Weeks", see Linda R. Singer, *Settling Disputes: Conflict Resolution in Business, Families and the Legal System* (Boulder, CO: Westview Press, Inc., 1990) [Singer], at 10 and 165. See also Adams & Bussin, *supra* note 3 at 133, who say that "ADR is not some 'newfangled idea', but the logical expansion of established practice".

⁴³ ALRI, "Mini-Trial", *supra* note 2 at 1.

Six years after the JDR Program started, Magistrate Judge Wayne D. Brazil⁴⁴ brought all the concepts of adjudication and alternative dispute resolution together by stating:

... we contravene the spirit of ADR if we insist on "winning" -- if we insist on establishing that ADR is necessarily better than traditional litigation. ADR is *not* about being better than; it is about being in addition to. ADR is *not* about subtracting; it is about adding.⁴⁵

He added later that the "most significant" promises of court ADR are "opportunity and ... process integrity"⁴⁶. Opportunity was a promise to users to "serve you better". The promise of process integrity, which is really the *raison d'être* of the Evaluation that is the subject of this Evaluation Report was described thus:

...the promise of process integrity. Because the public's trust and confidence in the courts is their most precious and essential asset, courts that sponsor ADR programs must promise the public that those programs would do nothing to diminish or undermine that trust and confidence, but, instead, will enhance it.⁴⁷

⁴⁴ A United States Magistrate Judge in the United States District Court, Northern District of California, since 1984. To demonstrate the value of his views, he is the 2009 American Bar Association prestigious dispute resolution D'Alemberte-Raven Award winner, who, in the ABA announcement of the award is referred to in the following language "Few people in our [ADR] field have the range of vision, the attention to detail, the energy for new tasks, the depth of experience, or the passion for the enterprise of dispute resolution that ... Brazil shares with the world". From my review of his work, I heartily support this characterization. His address at Royal Roads in 2003 (*Whose Court is it Anyway? Judicial Dispute Resolution in Canadian Courts - A Symposium for Judges*, Royal Roads University, Victoria, April 2003) and subsequent supply to me of relevant evaluation material planted the original seeds that caused me to recommend the pursuit of the evaluation of the JDR Program to my Chief Justices in 2003-4. A subsequent review of his extensive, relevant and very helpful literature on the subject has greatly assisted me in preparing this Evaluation Report.

⁴⁵ Brazil, "25 Years After", *supra* note 14 at 94.

⁴⁶ *Ibid*, at 95 -6. It is important to note that much of dispute resolution in the United States, of which he writes, is not judicial dispute resolution, but that conducted by court staff mediators or private mediators "annexed" to the court, so the use of the term "ADR" is generic and appropriate.

⁴⁷ *Ibid.*, at 97.

At the end of my analysis, I have concluded that has been achieved in the JDR Program.

At the risk of boring the reader with the all too familiar recitation (or re-recitation) of all the causes of dissatisfaction with the classical adjudicative system that provoked this need, they must be recognized. Otis and Reiter provide a list:

Of particular importance for a discussion of judicial mediation, we might mention long delays (administrative and procedural); judicial and extrajudicial costs related to adversarial debate; agency costs resulting, at times, from overlapping interests; the physical and psychological trauma associated with long judicial conflicts; and the inherent limits of contradictory debate for finding the best solution that would, in real terms, put an end to the dispute.⁴⁸

MacCoun Lind and Tyler provide another list

ADR programs are generally adopted for a variety of reasons: to save money and time, to decrease court backlogs, to enhance litigant satisfaction and perception of fairness, to generate outcomes that are better fitted to the particular situation in the dispute, to facilitate continuing interaction among litigants, and to increase the legitimacy and acceptance of the decision and the legal process.

...

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Otis & Reiter, *supra* note 7 at 360, referencing, *inter alia*:

- Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353, at 370-71 and 397-99;

- Judith Resnik, "For Owen M Fiss: Some Reflections on the Triumph and the Death of Adjudication" (2003) 58 U. Miami L. Rev 173;

- Carrie Menkel-Meadow, "From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context" (2004) 54 J. Legal Educ. 7;

- Michael C. Jensen & William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 J. Financial Econ. 305, at 308; and

- Louise Otis, "The Conciliation Service Program of the Court of Appeal of Quebec" (2000) 11 World Arb. & Mediation Rep. 80, at 81.

According to a recent American Bar Association statement, 'delay devalues judgments, creates anxiety in litigants and uncertainty for lawyers, results in loss or deterioration of evidence, wastes court resources, needlessly increases the cost of litigation, and creates confusion and conflict in the allocation of court resources'⁴⁹.

The concept of client satisfaction in dispute resolution - indeed, gratitude - is very relevant to the confidence in the legal system itself, and is not to be minimized, as Brazil notes:

... the court is a service-orientated institution and... the people it is to serve are the litigants (not the judges, not the lawyers, not the administrators). ... [It is about the lack of access to justice which has] effectively frozen some claimants out of the public court system and a commitment by the court to try hard to correct this unacceptable state of affairs....

...good ADR programs inspire both respect for and gratitude toward the courts -- and toward our system of government by democratically developed law. The gratitude can be palpable. It is reflected in feedback that we get from litigants.... Inspiring respect and gratitude toward public institutions is [important]....⁵⁰

It is these phenomena, and other reasons, that caused the Court's response, under the forward thinking leadership of then Chief Justice Ken Moore and others, to formally initiate a JDR program in 1996. It is the measure of

⁴⁹ Robert J. MacCoun, E. Allan Lind, and Tom R. Tyler, "Alternative Dispute Resolution in Trial and Appellate Courts", in D.K. Kagehiro and W.S. Laufer, eds., *Handbook of Psychology and Law* (New York: Springer-Verlag, 1992)[MacCoun, Lind and Tyler], at 96-7, also indicating the "a major impetus" was the "litigation explosion, a rapid upsurge in the propensity of [North?] Americans to sue", causing "congestion, backlogs and delays". Note that these authors are referencing ADR, not JDR (except at 107-108, and even there it relates to pre-trial settlement conferences where the parties are not usually present). Six years earlier, in 1986, one U.S. jurist was already talking about court backlogs, arguing that alternatives to exiting methods of judicial dispute resolution were needed because "our courts are dangerously overloaded": Richard A. Posner, "The Summary Jury Trial and Other Methods of Alternate Dispute Resolution: Some Cautionary Observations" (1986) 53 U. Chi. L. Rev. 366.

⁵⁰ Brazil, "Continuing", *supra* note 14 at 38. He made an even more emphatic statement, to the same effect, in Brazil, "25 Years After", *supra* note 14 at 108.

achieving this state of satisfaction that is the purpose of the Survey and this Evaluation Report.

Macfarlane described the role of the judiciary in this process as follows:

The role of the judge in the civil courts is changing as the institutionalization of case management and settlement processes place judges in an increasingly supervisory and managerial role. A wide range of processes are being developed and tested, including early case management ..., judicial mediation (when the judge is charged with bringing the parties to settlement), as well as more traditional pre-trial processes (where judges play in an evaluative role)... In some courts, judges understand their role is purely facilitative, while in others they assume a more evaluative stance, whatever the formal process.⁵¹

Judge Cratsley spoke of the managerial judge in this fashion:

The other reality that fuels the movement to the managerial judge of today is the ready acceptance of this development by the bar. Virtually every study of the attitudes of practicing attorneys toward judicial involvement in settlement finds approval, if not an affirmative invitation, from the bar. Thus, it is no surprise that the limited concern about this expansion of the judicial role has come from academics and not from practicing attorneys⁵².

⁵¹ Macfarlane, *supra* note 25 at 233.
Danielson, *supra* note 4 at 12, described an “evaluator” as someone ...who normally gives opinions and advice, assesses arguments on each side, assists parties to reach agreements by making predictions about likely court [adjudicative] outcomes and proposes equitable resolutions about the issues in dispute. and a “facilitator” as someone “... whose primary purpose is to clarify and to enhance communication between the parties in order to help them decide what to do”. Later, at 22, she noted that “[e]valuating is the daily experience of the Justice: assessing facts, weighing credibility and applying the law.”

⁵² John C. Cratsley, “Judicial Ethics and Judicial Practices: Time for Two Strangers to Meet” (2006) 21 Ohio State Journal On Disp. Resolution 569 [Cratsley], at 572-3, referencing, *inter alia*:
- Carrie Menkel-Meadow, “For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference” (1985) 33 UCLA L. Rev. 485, at 497, who, he noted said “[I]t is instructive to note that despite all the academic criticism of the judicial settlement role, lawyers overwhelmingly seem to favor judicial intervention.”;
- Marc Galanter & Mia Cahill, “Most Cases Settle’: Judicial Promotion and Regulation of Settlements” (1994) 46 Stan. L. Rev. 1339, at 1345;
- James A. Wall, Dale E. Rude & Lawrence F. Schiller, “Judicial Participation in

Directly relevant to the evaluation of this JDR Program in this Evaluation Report, Macfarlane made two statements that seem to make this type of empirical research valuable. In summarizing judicial innovations she added:

With rapid yet uncoordinated development across courts and jurisdictions, the need for research on process and style variations is increasingly urgent. Such research would illuminate the scope and diversity of innovations in courts across North America.

Earlier, she had also noted, “[i]t is the hallmark of a vibrant and responsible profession that it can reevaluate itself and its roles without fear and in anticipation of offering enhanced service”⁵³. It is the evaluation of the Court’s JDR Program 12+ years after formal introduction that is the focus of this Evaluation Report.

Indeed, the role of the judiciary and the courts in reform of dispute resolution processes is significant, as these words make clear:

There is ... [in public opinion] a very substantial degree of trust and confidence in the courts in this country. Indeed, ... even though the movement to ADR is in a sense a response to a crisis in the dockets and demands of the courts, in a strange sense that development is a tribute to the achievement of the courts, through the extension of the services that they are rendering to the... public in an ever widening range of dispute resolution.⁵⁴

Settlement”, [1984] Mo. J. Disp. Resol 25;
 - Jonathan M. Hyman & Milton Heumann, “Minitrials and Matchmakers: Styles of Conducting Settlement Conferences” (1986), 80 *Judicature* 123; and
 - Harold Baer, Jr., “History, Process, and a Role for Judges in Mediating Their Own Cases” (2001) 58 *N.Y.U. Ann. Surv. Am. L.* 131 [Baer], at 146.

⁵³ Macfarlane, *supra* note 25 at 233 and 16.
 Stewart and Henshell noted that for any new developments in dispute resolution, “statistics of assessment and evaluation need to be collected and analyzed. Consumer response is important”: Kenneth P. Stewart and Patricia Henshall, “Take the ‘Alternative’ out of Alternative Dispute Resolution: Results of an ADR Survey of Administrative Judges” (1993) 14 *Journal of the Kansas Bar Association* 62.

⁵⁴ Dean Anderson, in “Summation”, at the Pitblado Lectures, *supra* note 10 at 94.

B. THE PRESENT

The JDR Program, from all points of view, is fully and usefully functioning on a daily basis - 631 being held in Alberta in the year ending June 30, 2008 (Appendix 3). It is assumed for the purpose of this Evaluation Report that there is an understanding as to how JDRs are conducted. However, if a general view of this is required, see: *J.W. Abernethy Management & Consulting Ltd. v. 705589 Alberta Ltd.* 2004 ABQB 312, 25 Alta. L.R. (4th) 326 (Agrios J.), at paras. 3 and 11; and *Varga v. Sihvon* (2001), 288 A.R. 1, 2001 ABQB 276 (Burrows J.), at paras. 42-9.

1. WHY AN EVALUATION NOW?

The discussion *supra* explains why the Court has a JDR Program, but why an evaluation, and why now? And what is expected to be achieved? In one respect, the answer is as simple as that stated by Otis and Reiter; dispute resolution has become normative in the courts, but it must be constantly monitored to make certain that courts maintain their important place in society:

As the judicial mediation model takes hold and creates a new way of approaching dispute resolution within the formal institutions of justice, new challenges will arise. As with any process that goes up against an entrenched paradigm, solutions to these challenges will require new ways of thinking that go beyond the assumption that adjudication is normative, while other forms of conflict resolution are alternative or exceptional. The goal remains the same: resolution of legal conflicts in a just, complete, and efficient way.

...

Clarification of the ethical principles engaged by mediation is an ongoing challenge....

A ... significant issue to be monitored as judicial mediation matures and spreads is the tendency towards the professionalization of the process.⁵⁵

Galanter and Cahill describe this new normative and the courts' responsibilities in this way:

... Once courts were envisioned as dedicated exclusively to adjudication, so that settlement was seen as the product of a consensual private departure from the public forum But now it is common knowledge that most remedy seeking in the vicinity of courts is going to eventuate in settlement *Once we see settlements not as a stray byproduct of the judicial process, but as part of the essential core, the responsibilities of courts can no longer be defined as coextensive with adjudication. Once we apprehend the multiplex connection between court and settlement, ensuring the quality of these processes and the settlements they produce is a central task of the administration of justice*⁵⁶.

Martha Minow spoke of the courts' role in engendering justice:

... Courts provide a place for the contest over realities that govern us This is the special burden and opportunity for the Court: to enact and preside over the dialogue through which we remake the normative endowment that shapes current understandings. When the Court performs these roles, it engenders justice.⁵⁷

Much more recently Sanchez noted that the "spirit of reform that first inspired the [ADR] movement has now taken on a life of its own within the legal

⁵⁵ Otis & Reiter, *supra* note 7 at 401. However, contrary to the subsequent comments of the authors, there is no goal in Alberta that says "as the model matures, it may be profitable to expand its scope to embrace a broader range of disputes" - indeed, almost any civil dispute for which an action was commenced in the Court was eligible for the Program .

⁵⁶ Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements" (1994) 46 *Stan. L. Rev.* 1339, at 1390-1, as quoted by Sanchez, *supra* note 36 at 677, footnote 14 (emphasis added by Sanchez).

⁵⁷ Martha Minow, "Justice Engendered" (1987) 101 *Harv. L. Rev.* 10, at 74 and 95, as quoted by Sanchez, *supra* note 36 at 761, to which she added "when ADR processes perform these functions, they can also engender justice".

profession as the practice of ADR is increasingly becoming viewed as central to the practice of law”⁵⁸. This is a significant point in the JDR Program because it is right within, and controlled by, the Court, so, as we will see *infra*, it adds credibility to the process, without all the problems of programs that are merely ADR annexed to the court.⁵⁹

Lamenting that “no one has produced a comprehensive picture or assessment of the state of ADR in the courts”, (a matter which the Survey and this Evaluation Report intends to correct for this Court), Brazil makes clear that it is important that evaluation of a JDR system not concentrate only on the success rate of settlements, because, as we shall see, that puts pressure on mediators to abuse conduct issues to achieve that success. Moreover, as we shall also see, there are benefits other than pure settlement success that inspire the whole ADR process⁶⁰. In the result,

⁵⁸ Sanchez, *supra* note 36 at 775, referencing a number of authors and articles arising from “The Impact of Mediation: 25 Years after the Pound Conference” symposium held at the Ohio State University Moritz College of Law in November 2001, at (2002) 17 Ohio St. J. On Disp. Resol. 527 - 710. Note too, as Adams & Bussin, *supra* note 3 expressed at 155, “by making ADR a public issue and part of the public court system, the weight of the court’s authority is added to the ADR movement, thereby increasing its legitimacy and credibility in the eyes of the public and the legal profession.”

⁵⁹ See, *inter alia*, Brazil, “ADR 25 Years After”, *supra* note 14.

⁶⁰ Adams & Bussin, *supra* note 3 noted at 147, that after an “unsuccessful” JDR process:

Even when a case proceeds to trial, ADR may have served to narrow issues and tailor the remaining litigation procedures. ADR, while not immediately effective, may also contribute to a settlement at some point closer to the eve of trial. Brazil, “25 Years After”, *supra* note 14 at 108-8 quoting from and relying on Robert W. Rack, Jr., “Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation” (2002) 17 Ohio St. J. On Disp. Resol. 609, at 613 and 621, reported and opined that:

... there can be real 'value to the parties in just knowing a case cannot be settled.' A good lawyer and a wise client will always want to know what their options are so they can feel centered in pursuing the course they elect. When an ADR program helps them explore the prospects for settlement and teaches them what terms are available by agreement, they can make much

...we should use a sophisticated set of criteria for measuring the value of those programs that reflect the full range of benefits (economic, emotional, philosophic, sociological) that a good ADR program can deliver to the people the courts serve and to the long-range health of our society⁶¹.

Evaluation must also be performed with some understanding of what users think about such programs in general - to measure the subject program against general perceptions.

Although there was no direct connection to this evaluation, it is to be noted that Benson interviewed 25 lawyers in Saskatchewan and Calgary in 2005, and reported some of her findings. Of relevance here, she concluded that: “judicial mediation is popular and successful” - avoiding the negatives of adversarial litigation and getting the “opportunity to speak with a judge” without the risks of trial; “judicial mediators are highly influential” - some elements of coercion evident here with the comments that “[c]lients perceive judges as the final authority. Lawyers perceive pressure to settle.”; “timing, procedures and expectations matter” - there is a definite need for “[c]oordinated practices and shared understandings on these matters [to] enhance outcomes”, JDR justices are “almost universally very well prepared” and the process is superior to just negotiation; yet, “judicial mediation may create role uncertainty” - the difference between, and emphasis on, a settlement - the amount of which may not be what

better informed decisions. And if they elect to proceed with the litigation, they can do so with a clearer sense that that course is the wisest for them. We should not ignore the value of giving litigants the opportunity to develop that sense.

To the same effect, see Wayne D. Brazil, *Early Neutral Evaluation in the Northern District of California: Handbook for Evaluators* (San Francisco: United States District Court, Northern District of California, Revised November 2008 [Brazil, “Handbook, 2008”]), at 69, item 3.

⁶¹

Brazil, “Continuing”, *supra* note 14 at 12, with the quotation from the closing sentence at 39. See the lead-up reasons to this conclusion at 36-9, to be touched on later in this Evaluation Report.

is suggested by “legal analysis”, and judges may give an evaluation or opinion too soon - premature evaluation⁶²; and there is a need for “lawyers’ ethical obligations” in participating in judicial mediation.⁶³ All these matters are areas to measure in the within evaluation.

2. COURT’S NORMATIVE ROLE IN DISPUTE RESOLUTION

While authorities maintain that there are three ways in which people or groups resolve disputes in the Western Legal Tradition⁶⁴: consensual, adjudicative or legislative⁶⁵, in this Evaluation Report, I shall only address the first two, but more specifically the first, although there are some hybrids between those two. Consensual dispute resolution is where the parties to the dispute, most often with the advice of their lawyers, decide the process and the outcome (pursuing the resolution of a dispute through settlement) by negotiation, facilitative mediation⁶⁶, and evaluative mediation. The Court’s JDR⁶⁷ Program⁶⁸ is

⁶² See Agrios, *supra* note 12 at 26.

⁶³ Marjory L. Benson, “Lawyers’ Perspectives on Judicial Mediation”, National Judicial Institute Seminar on Judicial Ethics, Montreal, September 2008 [Benson], referencing her research: Marjory L. Benson, *The Skills and Ethics of Negotiation* (College of Law: University of Saskatchewan, 2007).

⁶⁴ F.C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies*, 2d ed. (Markham, ON: LexisNexis, 2007) [DeCoste], at xxi and various locations.

⁶⁵ Morris, *supra* note 17 at 1.

⁶⁶ Hugh F. Landerkin, “Conflict Management: Are Skills and Theories Enough? The Qualities of a Third Party Intervener”, in Laohasiriwong, Suwit and Ang, Ming-Chee eds. *Natural Resources Related Conflict Management in Southeast Asia* (Khon Kaen, Thailand: Siriphan Press, 2006), at 8-33 [Landerkin, “Conflict”] at 15 adds that “[m]ediation is, at the very least, a facilitated negotiation”.

⁶⁷ I will leave it to other authors to determine if Landerkin and Pirie are right that “[t]he expression Judicial Dispute Resolution` appears originally coined by Alberta judges” (Landerkin & Pirie, *supra* note 25 at 251, footnote 3), and, if so, by which Court, although it is clear that this Court started using that appellation in 1996.

⁶⁸ The Court’s JDR Program must be distinguished from the similar named program commenced in Edmonton (only) 4 - 5 years later (2000) by the Family and Youth division of the Provincial Court of Alberta, the process of establishment and

a service offered to parties who already have disputes filed before the Court, that would otherwise go to an adjudication⁶⁹ by way of a binding decision before a justice of the Court, but may instead, by the choice of the parties, go to a consensual dispute resolution process to seek a voluntarily settlement - a JDR, assisted (but with no binding decision making power) by a justice of the Court.

However, before invoking a JDR, I believe it is the duty of counsel to try to negotiate their client's disputes at an appropriate time in the litigation. Often they do, with a resulting settlement - frequently as high as approximately 95% of the cases. However, that means that the remaining 5% will surely go to trial, without some external intervention. As the 95% resolve without the Court's intervention, I believe that it is only the 5% where the Court should get involved in the settlement realm.

The latter two methods, facilitative and evaluative mediation, are often encouraged by the Court (whether using judicial or private neutrals), because all too often counsel on behalf of the parties do not, on their own, attempt to negotiate a settlement or do not do so in a timely fashion, or in a fashion that

evaluation of which is detailed in a methodologically sound and well written "how to do it" document by Provincial Court Judge Joanne Goss: Joanne Goss, "Judicial Dispute Resolution: Program Setup and Evaluation in Edmonton" (2004) 42 Family Court Review 511 [Goss, "Judicial"].

⁶⁹

While "adjudication" is so well known that it likely needs no definition, for completeness, it includes:

... decision making by a judge in a court, by an administrative tribunal or quasi-judicial tribunal, a specially appointed commission, or an arbitrator ... [that] determines the outcome of a dispute by making a decision for the parties that is final, binding and enforceable.

Per Morris, *supra* note 17 at 4 - 5.

Arbitration is different from other forms of adjudication in that it is usually voluntary and the parties have usually (not always) agreed to it in advance of a dispute in an agreement setting the rules of a relationship, or *ad hoc* after a dispute arises. Occasionally, however arbitration is imposed by statute. See Morris, *supra* note 17 at 5.

recognizes the intervening cost/benefit analysis. I say “counsel”, because different from their role in a JDR, traditionally the parties themselves were not involved in the negotiation, but only provide the instructions on the result, which, in itself, increases the time and cost. This is a matter changing with mediation, where the parties play a much more active role - indeed provide a “value added” role⁷⁰.

Macfarlane addresses this by making at least three significant comments: “the tendency to delay serious negotiation until the closing stages of litigation, when legal arguments have been deepened and formalized, further enables and makes logical a rights-based approach to negotiation”;

Lawyers spend far more time preparing for litigation than they do preparing for or holding negotiation sessions.... The amount of dollars that clients invest in settlement preparation and negotiation, compared to what they expend in taking procedural steps in litigation, seems disproportionately small for such a significant, almost inevitable, event. The settlements appear as if by magic once the parties have exhausted (and perhaps bankrupted) themselves with the legal process.;

and, referencing an Alberta example: “... the difference between the original offer of settlement and the final agreement is often negligible, especially when legal costs are factored in.” (I develop this somewhat more, *infra*, in my “quickest and closest to the goal line” analogy.)⁷¹

Moreover, when lawyers do negotiate (among themselves on behalf of their clients), it is almost exclusively a rights-based, not an interest based, negotiation that, even if “successful”, may not achieve a settlement that is as meaningful as it could be. Thus, there is value in mediation, in any event of

⁷⁰ See Macfarlane, *supra* note 25 at 73, on those two points.

⁷¹ Macfarlane, *supra* note 25 at 66-8.

earlier counsel negotiation, in getting the parties involved in settlement, bringing out their interests, and doing it in a more timely fashion. Macfarlane discussed this process a lot in her book, including the resulting tensions between lawyers and their clients as to their respective settlement roles (a matter beyond the scope of this Evaluation Report).⁷² Later, focusing on rights-based negotiation style where “everything is a rehearsal for trial”, she legitimizes the last point, noting that these type of “legal negotiations often produces mediocre and unimaginative settlements at a point at which the parties are exhausted, embittered, and settle in order to avoid further expense, not because they are satisfied with the outcome”⁷³.

Conversely, and perhaps paradoxically, the trend to mediation has come to mean, as I have seen in the JDR Program, that many counsel do not even try, as they should, to negotiate at all (or sufficiently diligently) prior to mediation. This proceeding directly from adversarialism to mediation is sometimes referenced as “divert[ing] cases from private bilateral settlement”⁷⁴.

Of an alternative to traditional adjudication, but within the litigation commenced, such as the JDR Program, Otis and Reiter had this to say:

In our view, for disputes that are already within the adjudicative system or that have proved resistant to extrajudicial resolution, judicial mediation presents a powerful alternative to the often blunt

⁷² However, passages on the phenomena with some relevance to this Evaluation Report, in addition to the above, include Macfarlane, *supra* note 25 at 59 - 63.

⁷³ Macfarlane, *supra* note 25 at 74-5.

⁷⁴ MacCoun, Lind and Tyler, *supra* note 49 at 95-6.
In support of the reality of this phenomena, see also Benson, *supra* note 63 at 2, where she reported one lawyer advising “there’s a tendency now not to bother negotiating until you get there” - to the settlement conference or JDR. Of the same problem, Agrios, *supra* note 12 at 8, expressed the fear of some (on some days, I am in that camp) that “[b]y creating a judicial dispute resolution forum we absolve lawyers from reaching their own settlements and simply prolong the time needed to go to trial”.

instrument of an adversarial trial. It offers a *via media*, combining some of the legal and moral gravitas of adjudication with the flexibility and adaptability of ADR. It thus represents not just an efficiency reform but also a reconceptualization of the role of the courts and judges in dispensing justice.⁷⁵

However, it should be recognized that traditional trials will still be a big part of the Court's dispute resolution process, and that the skills for mediation are not completely unique from trial skills:

... The core value that lawyers should protect and advance their clients' interests is not changed by new dispute resolution processes that focus the parties on the potential for settlement. Many of the traditional tools that lawyers use to protect client interests remain important, for example, the evaluation of possible outcomes, the development of strategy, and the firm assertion of bottom lines (often supported by legal advice). The introduction of consensus-building processes into legal disputing structures does not mean elimination of the "old" system of litigation. Rather, litigation continues to run alongside efforts to settle legal disputes using settlement processes. Although trial work makes up a much smaller part of legal practice than it has done in the past, many trial advocacy skills are similar to, or congruent with, the skills and techniques that the new lawyer needs to practice conflict resolution advocacy.⁷⁶

And later:

Lawyers will continue to use and build on their foundational skills of

⁷⁵ Otis & Reiter, *supra* note 7 at 362. However, in the following footnote they curiously add a statement, making the process they envision separate from the settlement of a pending adjudication, or an assessment of what a pending adjudication may bring:

"It is worth recalling at this point that we refer here to mediation that a judge conducts within a courthouse setting as neutral third party and not to the various forms of evaluative or binding judicial intervention, such as settlement conferences or mini-trials."

⁷⁶ Macfarlane, *supra* note 25 at 17 and 109-11. Indeed, "[m]any of the ADR processes that are being evaluated are not separate from the court system but a part of it": R. Baruch Bush, "Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments" (1989) 66 *Denver U. L. Rev.* 335, at 342, relied upon by Bussin, *supra* note 5 at 474. That is the case in the JDR Program.

negotiation, information assimilation and analysis, advocacy, and advice giving. Rather than eliminating the old paradigm and substituting a new one, the better analogy for the evolution of the new lawyer is a *convergence* between litigation and consensus building, representing both the old and new approaches to dispute resolution. What is meant by convergence is mutual influence and cross-fertilization, whereby the old informs the new and the new builds on the old. ...

The changes that we are seeing in legal practice represent the convergence of two quite different cultures of conflict resolution: adjudication and consensus building.

...

... Convergence also offers the best choices to the consumers of legal services. Consciously or not, lawyers are developing some skill in determining when each approach - adjudication or consensus building - would be appropriate.⁷⁷

In this consensus building process, different from adversarial adjudication where no quarter is given, it is interesting to note that the theory of negotiation requires a party (or his/her lawyer on their behalf) not only to advance their interests, but also to find a way to do so in a manner that advances the other party's interests. Kronman addressed it this way:

In private negotiations the person to whom an advocate addresses his arguments is indeed often concerned only with his own advantage. To persuade such a person, one must convince him that his own welfare favors the decision he is being urged to make. ... it is therefore necessary for an advocate to search out arrangements that advance the interest of the client and some third party simultaneously. For only these permit him to secure his client's goal while providing the basis for an effective appeal to the self-interest of the other party too. Put differently, an advocate representing either the parties in a private negotiation must make an effort to identify opportunities for improving the welfare of both and then persuade them to go along.⁷⁸

⁷⁷ Macfarlane, *supra* note 25 at 20 and 22.

⁷⁸ Kronman - "Lost", *supra* note 10 at 152.

This is an important point in recognizing the value of interests, because without them:

If there are no opportunities for joint improvement through cooperation, there is nothing for the parties to negotiate. In that sense, we might say, the cooperative possibilities ... define the boundaries within which either party can pursue his own advantage at the other's expense.⁷⁹

Accordingly, without interests, the result is a zero-sum game⁸⁰, where you merely try to estimate the point in the spectrum of possibilities where a rights adjudicator will come down in the exercise of distributive justice. Thus, it can be argued that pursuing interests ancillary to such rights, will create more "opportunities" for settlement.

So, we have established that counsel and their clients want judicial involvement in settlement of their cases. What about judicial involvement?

In discussing the extent of judicial participation in ADR in the United States, Brazil noted that a:

... major barrier to implementation of... [ADR] is attitudinal. ...there are deep divisions of opinion within the... judiciary about whether ADR belongs in the courts at all. Some judges are openly hostile to ADR in concept and practice. Many more are ambivalent. And many feel that their courts already are overwhelmed with traditional duties that their current resources enable them just barely to perform.⁸¹

⁷⁹ *Ibid.*

⁸⁰ Note discussion on this - also called "distributive bargaining", and the opposite, "positive sum" or "integrative bargaining" by Landerkin: Landerkin, "Custody", *supra* note 23 at 663.

⁸¹ Brazil, "Continuing", *supra* note 14 at 20, referencing his earlier article, Brazil, "Now", *supra* note 11, in (1999) 17 *Alternatives to High Cost Litig.* 85, at 101.

Landerkin and Pirie, in 2003 stated:

We ... [are] aware that judges are already promoting and practicing JDR. ... The exact number of judges mediating is not clear. It is likely a minority percentage of the judiciary. We expect there will be similarities in how judges regard JDR and particularly mediation and how the legal profession initially viewed ADR and mediation. The number of judges learning about and applying JDR should increase significantly in the next 5 years.⁸²

Indeed, that was the case in our Court, with some justices more keen than others, and only a few “grandparented” (in the past only) not to do JDRs⁸³. However, it is now “part of the job”, and while, 5 years after Landerkin and Pirie discussed it, some are still not as keen (or as skillful) as some others, all have gained experience and/or taken training, such that all justices in the Court now do JDRs.

That being said, for this Evaluation Report, while “not all judges agree on the role JDR should take in the courts”⁸⁴, and while I will later in this Evaluation Report address some of the issues that have been raised, I am beyond the question as to whether or not settlement procedures, broadly or narrowly defined, should be part of the dispute resolution program in our Court, or whether justices should be involved in JDR. Simply put, the JDR Program in the Court is here to stay, with all trained and/or experienced JDR justices participating - it is part of the job.

⁸² Landerkin & Pirie, *supra* note 25 at 281.

⁸³ Danielson, *supra* note 4 at 71, footnote 245, reported that as of the date of her research there were 5 justices “who refused” JDR assignments. Of that number one or more have retired, and the others have changed their minds, occasionally not with great enthusiasm, after discussions with their Chief Justice.

⁸⁴ Landerkin & Pirie, *supra* note 25 at 281, who respond by saying: “Much like the history of ADR, there is wisdom in avoiding unabashed enthusiasm for the seemingly common sense notion that judge-promoted settlement within the courts is a good thing”.

On the legitimacy of judicial involvement in settlements, Macfarlane, after discussing 20 years of change, said “The sheer volume and extent of civil justice reforms suggest that a settlement orientation is here to stay”⁸⁵.

Stempel stated “ADR in some form will be part of the judicial system for at least the foreseeable future ... there will be no return to the ‘pure’ or ‘classic’ adjudicatory model that existed prior to the 1970s”⁸⁶.

Landerkin and Pirie, noting that there were a “host of policy considerations” to the issue of whether judges should be doing JDRs, were

85

Macfarlane, *supra* note 25 at 10.

Even, apparently reluctantly after all her criticisms, Smith specifically agrees (Smith, *supra* note 13 at 30).

Danielson, *supra* note 4 at 8 came specifically to the same conclusion: “... it is clear that the Alberta JDR Program is here to stay”. Then, at footnote 31, she noted the comment of one judicial interviewee “There would be *riots* if we stopped doing them. The public now demands this service from us”.

Note too that ALRI, in Alberta Law Reform Institute, Alberta Rules of Court Project, “Alberta Rules of Court Project, “Promoting Early Resolution of Disputes by Settlement”, Consultation Memorandum No. 12.6, 2003, at 82-83, para. 191 said that:

... judicial involvement in settlement has become an integral component of the civil justice system. In our opinion, facilitating settlement is an appropriate role for judges to play. The availability of a judicially-facilitated settlement process enhances public respect for civil justice as an adaptable system that is capable of changing to meet societal needs”. [Emphasis added.]

Agrios, *supra* note 12 (limiting the good natured exaggeration only slightly), said, at 4, “... 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”. [Emphasis added.]

This not a new revelation - as early as 1991 in the US, the same conclusion was being made by other authors - for example: “Judicial use of ADR is now firmly rooted in the legal landscape, and the issue is no longer whether it should be there at all, but how to shape it, prune it, cultivate it, to best effect. ... ADR is entering the mainstream.”: James F. Henry, “No Longer a Rarity, Judicial ADR is Preparing for Great Growth - But Much Care is Needed” (1991) 9 *Alternatives to High Cost Litig.* 95, at 96.

86

Jeffrey W. Stempel, “Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: *Fait Accompli*, Failed Overture, or Fledgling Adulthood” (1996) 11 *Ohio St. J. On Disp. Resol.* 297 [Stempel], at 301.

equally emphatic about the judicial involvement whether planning new programs or re-evaluating existing ones:

For judges who are considering whether or how mediation fits into their judicial role, there clearly are opportunities to match the diverse processes, goals and characterizations of mediation with long-standing judicial needs, responsibilities and structures.

... Judicial mediation also could be used as a way to regain or strengthen support for, and confidence in, the justice system.⁸⁷

Confidence in the justice system is extremely important in designing and operating any JDR system because, as Brazil noted, in referencing the use of court-annexed neutrals, but even more applicable to JDR justices in my view:

Neutrals in court-sponsored programs are perceived by litigants, lawyers, and the public generally as agents of the court - representatives of the court. How they perform will affect directly the public's feelings about the court. If they perform badly, if they make process mistakes or ethical mistakes or substantive mistakes, or if their conduct is insufficiently constrained and dignified, or they fail to follow the process protocols that the court's rules and literature lead parties to expect, they will erode public trust in the court. We must do everything we reasonably can to avoid such erosion.⁸⁸

Later, Landerkin and Pirie added that the "judicial mediation":

... nomenclature, might be fundamentally understood as an essential element of accessing justice in a free and democratic society, as bringing law to every person's door, as a wiser and fuller utilization of our judicial elders, as an opening up of a traditionally closed and often misunderstood justice system, as a move to

⁸⁷ Landerkin & Pirie, *supra* note 25 at 281. The policy considerations they raised included "headings such as the administration of justice, access to justice, the role of the courts, the judicial function, the economics of justice, the rule of law, and indeed justice itself in a free and democratic society" and "at the very least involves a fundamental analysis of whether judicial dispute resolution creates incompatibilities with the myriad of justice system values and beliefs that are at the heart of the proper functioning of courts and the judicial role in Western societies". These will be examined later in the Evaluation Report.

⁸⁸ Brazil, "Continuing", *supra* note 14 at 24-5.

empower parties in the sometimes disempowering litigation process, or as a legal process geared towards saving time and money.⁸⁹

Indeed, I believe our Survey has demonstrated that the JDR Program has done just that - given the civil justice system in our Court enhanced credibility, when cost, delay, formality and complexity were putting it on the slippery slope to collapse under its own weight. It was the Court's response and leadership, under Associate Chief Justice Miller and Chief Justice Moore, that also recognized this need, as did the Canadian Bar Association:

As concerns with access to justice, administrative efficiency or the appropriateness of court adjudication for particular kinds of cases increase, there may be a greater motivation for the Canadian judiciary to assume more leadership in identifying and evaluating new or improved procedures both inside and outside the formal court structure.⁹⁰

What else has the Court's JDR Program done? Relying on Brazil, I believe that it has fundamentally shown the public the "stuff" of which the Court is made:

... our ADR programs reflect an appreciation of our mission as a court that is more complex than it was twenty years ago. This institutional openness serves very important ends. It communicates to people that the court defines itself fundamentally as a service institution and that its duty to serve runs primarily to the people. This message means, among other things, that the values and interests that ought to play a primary role in defining court policy and programs are the values and interests of the people. Those

⁸⁹ Landerkin & Pirie, *supra* note 25 at 261-2, where "judicial mediation" means mediation with a judicial style, authority or authorization - what Landerkin & Pirie there call a measure of "judicial *imprimatur*".

⁹⁰ Landerkin & Pirie, *supra* note 25 at 267, quoting Canadian Bar Association Task Force on Alternative Dispute Resolution, *Alternative Dispute Resolution : A Canadian Perspective* (Ottawa : Canadian Bar Association, 1989)[CBA, "ADR Task Force"], at 38. Note too that, since 1994, the Canadian Bar Association has had a National Alternative Dispute Resolution Section to promote dispute resolution mechanism: Zutter, *supra* note 6 at 445.

values and interests span a very wide range, only some of which are best served by traditional litigation.⁹¹

On the more philosophical level, Landerkin and Pirie had this to say:

Judge-led JDR developments to date such as settlement conferences, mini-trials, case management, and the like seem to suggest the idea of judges appropriately helping parties settle their cases does not undermine the foundations of our formal justice system. In fact, the policy reasons behind the rapid developments in ADR and mediation generally appear to mirror the arguments for supporting JDR's integration into formal justice systems. Court congestion and long delays, staggering legal costs, and problems enforcing judicial orders can mean access to justice is compromised. As an essential element in the ordering of a democratic society pursuant to the rule of law, the court's adjudicative mechanisms have to be working and be seen to be working, particularly by those segments of society most in need of the court's protection. The courts cannot be viewed, as a 1996 report on the Canadian justice system found, as a system in which 'many Canadians feel that they cannot exercise their rights effectively because using the civil justice system takes too long, is too expensive, or is too difficult to understand'.

... JDR can thus be viewed as complimenting, not conflicting with, the appropriate administration of justice.⁹²

The Survey results herein, from both lawyers and clients, confirm these views.

Additionally, while there are exceptions, as Macfarlane noted, there is also, especially in the context of any form of mandatory mediation (a matter

⁹¹ Brazil, "25 Years After", *supra* note 14 at 111.

⁹² Landerkin & Pirie, *supra* note 25 at 282, quoting the CBA, "ADR Task Force" at 11.
As to legal costs, I note in passing that some research demonstrates that special cost rules that reward or punish for accepting or not accepting a reasonable offer - sometimes referred as cost incentives or "fee-shifting rules" "may well work as they are intended": MacCoun, Lind and Tyler, *supra* note 49 at 104. This is very relevant, because if a matter does not settle at JDR, it is my experience that the parties often follow with formal settlement offers which trigger such potential consequences, making the process potentially even more costly/rewarding than normal.

coming to Alberta under the New Rules, to which I shall return), an “if you build it, they will come” phenomenon, as she observed, relying upon several authorities:

One conclusion drawn from studies of more established programs is that continued exposure to mediation and other settlement processes, even where they are strongly resisted at first (especially where they are mandatory), generally builds recognition of the usefulness of the process and commitment to its continued use. Several studies now demonstrate that the attitudes of counsel become more positive with time and as a result of repeated experiences with mediation, and they even described themselves as “converts” or “believers”⁹³.

The motivation for this is sometimes the clients and sometimes the lawyers:

... lawyers can recognize and explore its potential benefits. Many find that their commercial clients welcome the opportunity to be more hands-on and active in the management of the file. Others point out that mediation can provide a welcome reality check for less experienced clients:...⁹⁴

Reality testing, often referred to as “bargaining in the shadow of the law” is a significant part of the rights based evaluation in the JDR process. Sanchez described the process in these words:

A central dispute-resolving function of ADR, viewed through the traditional lens of the court system, is to “reality test” the parties' perceptions of the strengths and weaknesses of their respective legal cases. This process now routinely occurs with the aid of judges who “change hats” during the course of a lawsuit and become “settlement managers,” facilitating settlement outcomes by the parties who are advised in settlement conferences to “bargain in the shadow of the law” or in the “clear light of legal certainty...”⁹⁵

She added that judicial experience indicates that this a prudent process:

⁹³ Macfarlane, *supra* note 25 at 9-10. See also, 39-40. See also Sander, “Future”, *supra* note 25 at 7-8.

⁹⁴ Macfarlane, *supra* note 25 at 10.

⁹⁵ Sanchez, *supra* note 36 at 769, referencing a number of publications mentioned at other places in this Evaluation Report.

The reality-testing function of such court-related ADR processes is, in Judge Edwards's experience, a productive function, from the standpoint of enlightening parties and saving court resources, because it serves to persuade parties to "compromise" and reach settlement outcomes, rather than risking the consequences of winner-take-all court decisions. Compromise, in Edwards' view, is the tool proffered by ADR to break deadlock and wrench concessions from each side until they both reach some mutually acceptable point between the two extremes.⁹⁶

Additionally, even if acceptance of the process is not the attitude at the first, it is one that develops with time, as I have noted on the judicial front, of my colleagues who have gone from the ranks opposed to JDRs, to reluctantly doing them, to genuinely endorsing them. The conversion, in my view, is similar to that seen in the context of lawyers:

As people become more familiar and comfortable with new structures and procedures, normative change will follow. While changing the process does not in itself change attitudes, there may be a longer-term relationship between process and attitude change. Although mandatory mediation may secure lawyers' obedient conduct without necessarily changing their minds and hearts, the changed conduct may, with future practice and exposure, affect a lawyer's normative values and attitudes towards mediation.⁹⁷

⁹⁶ Sanchez, *supra* note 36 at 770, referencing Judge Harry T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 Harv. L. Rev. 668, at 673, noting Edwards's view that a neutral judicial mediator can "greatly enhance the prospects of a settlement negotiation" not only by suggesting reality of what might happen at trial, but also to allow the parties face-saving from otherwise arguable "admission of weakness".

⁹⁷ Macfarlane, *supra* note 25 at 92, referencing:
 - J. Macfarlane, "Will Changing the Process Change the Outcome? The Relationship between Procedural and Systemic Change" (2005) 65 Louisiana Law Review 1487;
 - Roselle L. Wissler, "When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations" (2002) 2 Pepperdine Dispute Resolution Law Journal 1999;
 - John Lande, "Getting the Faith: Why Business Lawyers and Executives Believe in Mediation" (2000) 5 Harvard Negotiation Law Review 137, at 199; and
 - Morris L. Medley and James A. Schellenberg, "Attitudes of Attorneys Toward Mediation" (1994) 12 Mediation Quarterly 185, at 195-6.

These changes in the norm from adjudication only to adjudication and other dispute resolution mechanisms have been both predicted⁹⁸ and increasingly realized. Of the latter Stewart and Henshall argue that as dispute resolution methods become normative, one can “take the ‘alternative’ out of ADR so that ‘dispute resolution’ includes mediation and arbitration as well as litigation and settlement conferences”⁹⁹.

However, these statements, having been made, need some broader rounding in the context of the practice of law - both lawyering and judging. A learned academic lawyer, for whom I have great respect, relying on a legal legend, states, in my view, the most important role of lawyers and judges:

To profess the law ... requires lawyers to commit themselves to serving others. Karl Llewellyn once described law as “a service institution: in service lies its soul.... Service to others resides at the very heart of the Rule of Law.... the Rule of Law commands lawyers to serve others, fairly and without distinction and for the other’s sake.”¹⁰⁰

⁹⁸ On the projection of the normative change from adjudication only to adjudication and other dispute mechanisms, see the prediction of Dean Anderson in 1986: Pitblado Lectures, *supra* note 10 at 1.

⁹⁹ Kenneth P. Stewart and Patricia Henshall, “Take the ‘Alternative’ out of Alternative Dispute Resolution: Results of an ADR Survey of Administrative Judges” (1993) 14 *Journal of the Kansas Bar Association* 62.

¹⁰⁰ DeCoste, *supra* note 64 at 279.
As to “lawyers”, throughout this Evaluation Report, unless stated otherwise, comments directed to lawyers, often apply, *mutatis mutandis*, to judges, who, of course, were once lawyers. Indeed, judges have one of the “law jobs”, along with the two others who counsel and advocate the law: Karl Llewellyn, “The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method ” (1940) 49 *Yale Journal* 1355, as referenced by Kronman - “Lost”, *supra* note 10 at 121, endnote 5 (at 391) and Anthony T. Kronman “Living in the Law” (1987) 54 *U. Chi. L. Rev.* 835, at 863, footnote 46, wherein Kronman, especially at 864-5, develops the principle of judgment as a character trait, and asserts that to provide “wise judgments”, judges must have sympathetic detachment, where sympathy means seeing “claims ... in their best possible light ... short of actual ... endorse[ment]...” - a characteristic extremely important to judicial mediation, as we shall see *infra*.

Later, DeCoste took this process to another level:

In making justice for the parties, judges also serve political community more widely.... Though judges are confined to the parties, to their arguments and their issues ... judges make secure the community's sense that justice is possible under government by law.¹⁰¹

These words, in my view, apply to us as judges not only in our adjudicative role, but also our settlement role. While our historical and primary role to this date, is that of adjudication, I believe that the real role of judges is, in accordance with the law, broader - it is not to just adjudicate the law, but rather to resolve, or help resolve, disputes between litigants. That this may, in the right case, require adjudication is appropriate historically and in law. That it may involve other judicial roles, commensurate with proper judicial conduct, is, in my view, open for change as the administration of law reasonably demands it. This is especially so when "access to justice"¹⁰² is so in jeopardy: "Access to justice has been not just impeded, but fundamentally corroded, by what one justice of the Supreme Court of Canada has declared to be the 'astronomical' fees of the private bar"¹⁰³.

From my research of the literature on the subject and the Court's JDR experience, including the Survey data, I believe that the historic normative ordering of the resolution of disputes before the Court by adjudication alone, is now joined, again in a normative sense, by JDR, to create a relatively seamless web of dispute resolution.

¹⁰¹ DeCoste, *supra* note 64 at 286.

¹⁰² "Access to justice", a relatively recent "buzz word", is very broad. However, simply put, by using it, I mean the ability of all citizens, both financially and procedurally, to take their reasonable disputes to a public institution or official to assist in, or prescribe, a resolution.

¹⁰³ Janice Tibbetts, "Lawyer fees 'astronomical', Supreme Court judge says: Binnie suggests courts could exert power to curb costs" National Post (22 October 1999) A4; clarified in Ian C. Binnie, "Legal Fleecing", Letter to the Editor, National Post (23 October 1999) B9.

Indeed, I believe that a recently retired jurist with a huge history of active participation in judicial mediation, the Honourable Louise Otis, and her co-author, Professor Eric Reiter, summarized the conclusion of all the issues raised about whether judges should be doing JDR when they said:

For decades different forms of alternative dispute resolution (ADR) have been proposed, developed, critiqued, modified, renamed, redefined, and slowly brought *within* the usually suspicious, and sometimes hostile, edifice of state-based normative ordering. Some see this as the vindication of the "multi-doored courthouse", a democratic storming of the ... citadel of the law, which gives a more human face to the law and its institutions. Others see it as a dangerous dilution or even undermining of justice, a faddish striving for speed, flexibility, and efficiency at the expense of principle and accountability. What is clear is that the institutionalization of ADR is an indication of fundamental changes at work *in* our legal system and in our concepts of justice and law.¹⁰⁴

I have added emphasis to "within" and "in" because this represents an important opinion, which I share, that these dispute resolution processes are now *within* our system of dispute resolution mechanisms in a normative ordered way, along with the previous norm of only adjudication. Let me digress a moment to deal with two aspects of what Otis and Reiter mention.

The "multi-doored courthouse", a concept originating with Sander, is a very apt way to look at what has, in fact, happened in the Court with the JDR Program. Sander explained his 1976 creation this way:

¹⁰⁴ Otis & Reiter, *supra* note 7 at 351-2. [Emphasis added.] In footnotes, Otis & Reiter reference:
 - Judith Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St. J. Disp. Res. 211, at 216-8, for the references to Frank Sander's innovative description;
 - Carrie Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defence of Settlement (in Some Cases)" (1995) 83 Geo. L.J. 2663; and
 - Jean R. Sternlight, "ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice" (2003) 3 Nev. L.J. 289.

It is important to recognize that the ADR movement is not an anti-court movement, as is often asserted. It is an effort to have the courts more effectively doing those things that they are particularly fit to do, and have other institutions like arbitration and mediation dispose of those cases that don't require the specialized expertise of courts. That is the idea behind the multi-door courthouse -- a comprehensive justice center where cases are screened and analyzed so that they can be referred to that process or sequence of processes that's best suited to provide an effective and responsive resolution.¹⁰⁵

As to those who are the “suspicious” and the “hostile”, and believe JDR is a “dangerous dilution” of justice, there are many¹⁰⁶. However, like most defying meaningful and necessary change to reform negative aspects of our judicial system, I believe, and there is evidence to support¹⁰⁷, that they are slowly falling

¹⁰⁵ Sander, “Future”, *supra* note 25 at 5.
Baer, *supra* note 52 at 133, states that “[f]or the most part, [Sander’s] vision has become a reality”.

¹⁰⁶ Otis & Reiter, *supra* note 7 at 351-2 (footnote 3) say those who have “voiced reservations and criticisms of ADR with differing degrees of concern regarding its challenges to classical adjudication” include:

- Judith Resnik, “Managerial Judges” (1982) 96 Harv. L. Rev. 374;
- Owen M. Fiss, “Against Settlement” (1984) 93 Yale L.J. 1073;
- Owen M. Fiss, “Out of Eden” (1985) 94 Yale L.J. 1669; and
- Stempel, *supra* note 86.

However, they also added David Luban, “Settlements and the Erosion of the Public Realm” (1995) 83 Geo. L.J. 2619, “responding to some of these arguments”.

While on the subject of dissenters, I would add to this list:

- Edward Brunet, “Questioning the Quality of Alternative Dispute Resolution” (1987) 62 Tul. L. Rev. 1;
- Jill E. Fisch, “Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur” (1991) 76 Cornell L. Rev. 589;
- Rodney S. Webb, “Court-Annexed ‘ADR’ - A Dissent” (1994) 70 N.D. L. Rev. 229 - although, somewhat limited for our purposes, as it argued against court connected ADR in face of the U.S. right to a jury trial under the U.S. Constitution;
- Judith Resnik, “Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century” (1994) 41 UCLA L. Rev. 1471); and
- based on a number of her criticisms, Smith, *supra* note 13.

¹⁰⁷ Cratsley, *supra* note 52 at 570, states: “... however, a consensus has emerged among the bench and bar that judicial participation in the settlement of civil cases is a wise and useful activity”, and, in support, references, at footnote 5, the

away, as protections are built in and maintained to ensure no harm to the positive aspects of the system of justice we require and enjoy. As to the JDR Program, our Court has taken measures to avoid bad practices or complacency and, following the recommendations in this Evaluation Report, must redouble its efforts to do so.

Shunning the doomsayers and returning to the opinion of the normative nature of adjudication and other dispute resolution processes working together, I note that Otis and Reiters' thesis, which I support, is that:

... judicial mediation heralds a new, participant-centered normative order, one that conceptualizes litigation more broadly and holistically and, thus, offers justice that is fuller and better adapted to the needs of parties with a variety of conflicts.

It is increasingly apparent that "alternative" dispute resolution is becoming part of the mainstream, a part of the legal landscape accepted - sometimes grudgingly, sometimes enthusiastically - by litigants, lawyers, and courts alike. In Canada, for example, at least eight of the provinces, all three territories, and the Federal Court have some form of ADR attached to the court system. This is an ongoing project, but in our opinion, the operative question is now no longer whether ADR has a place in the justice system, but rather how, where, and who should do it. It is now time to begin assessing the integration of ADR in our legal system, not so much its practical impact (which has been the object of research already) but its normative impact (which remains largely still to be examined).

following:

- James J. Alfini, "Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial", [1999] Fall Disp. Resol. Mag. 11 [Alfini, "Risk"]- who, Cratsley says, has "labeled this 'the settlement culture'";
- Daisy Hurst Floyd, "Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement" (1994) 26 Ariz. St. L.J. 45, at 82-90;
- Brian J. Shoot & Christopher T. McGrath, "Don't Come Back Without a Reasonable Offer: Surprisingly Little Direct Authority Guides How Judges Can Move Parties (Part Two-The Judge's Role)" (2004) May N.Y. St. B.J. 28, at 32-34;
- Leroy J. Tornquist, "The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry" (1989) 25 Willamette L. Rev. 743, at 773; and
- Susan M. Gabriel, "Judicial Participation in Settlement: Pattern, Practice, and Ethics" (1988) 4 Ohio St. J. on Disp. Resol. 81 [Gabriel], at 95.

Towards this end, we discuss ... how judicial mediation in particular, which brings ADR into the very heart of state-run legal institutions, affects both classical adjudication and also mediation itself. At the same time, we address what we perceive to be the key advantages of mediation by judges, as well as some of the potential concerns about it.

Judicial mediation brings into sharp relief the issue of the relationship between state-sanctioned and private forms of normative ordering. It raises a host of interesting questions....¹⁰⁸

A fuller examination of these questions that they set out to answer makes it clear that their focus is similar to my focus in this Evaluation Report - what are “the implications of this trend for a legal system still primarily based on the paradigm of adjudication of adversarial disputes”, “limits (practical, normative, or ethical)” that the “dominant model places on judicial mediation”, “challenges” that “judicial mediation presents for the dominant model”, reconciliation of “sometimes conflicting needs of disputing parties and justice” and, “judge-mediator” management of “sometimes conflicting ethical obligations of the participants”.¹⁰⁹

Otis and Reiter go on to make it clear that, based on the voluntary program started in the Court of Appeal of Quebec inaugurated in 1998¹¹⁰, they,

¹⁰⁸ Otis & Reiter, *supra* note 7 at 353-5, listing other provincial programs, but, interestingly, missing the JDR Program that is the subject of this Evaluation Report, while mentioning Alberta’s more recent and less successful court-annexed mediation pilot.

¹⁰⁹ *Ibid.*

¹¹⁰ It is interesting to note that their program is prescribed by the *Que. Code Civ. Proc.*, R.S.Q., c. C-25, art. 508.1, which specifically: authorizes a judge to preside at a “settlement conference”; provides for judicial immunity; declares the conference is “held in private”, “without formality”, is confidential, and is “governed by the rules defined by the judge and the parties”; excludes the judicial mediator from any subsequent “hearing”; and any settlement resulting is formalized by, in effect, a consent judgment formally filed. This is similar to the Court’s Guidelines for JDR in Alberta and the proposed New Rules - specifically NR 4.17 - 4.21 (Appendix 7, *infra*). Moreover, confidentiality (except in the case of abuse of process) is strictly enforced in Alberta in any

as I, will be discussing “... one such form of institutionalized ADR - judicial mediation, where sitting judges themselves act as mediators in programs closely integrated with the traditional adjudicative system”. In a footnote they add:

Not surprisingly, given its novelty, there has been little discussion of *judicial mediation as a totally integrated part of a hybrid system of justice* (including all courts and tribunals), as opposed to mediation that is court-based but non-judicial mediators perform, on the one hand, or to judicial settlement conferences on the other.¹¹¹

In my view this is significant because, while there is reference even in the Quebec Civil Code to “settlement conferences”, in addition to stating that “judicial mediation” is “totally integrated” into the justice system, unlike other JDR programs including this Court’s JDR Program, they do not anchor the program to

event; see:

- *Stewart v. Stewart*, 2008 ABQB 348, [2008] A.J. No. 1554 (Moen J.) - dealing with enforcement of confidentiality in a private mediation;
- *J.W. Abernethy Management & Consulting Ltd. v. 705589 Alberta Ltd.* 2004 ABQB 312, 25 Alta. L.R. (4th) 326, at para. 8 (Agrios J.);
- *Petryga v. Petryga* 2005 ABQB 467, [2005] A.J. No. 769 (Veit J.), at 25; and
- *Lapp v. Lapp* 2008 ABCA 15, [2008] A.J. No. 208, 425 A.R. 232, 51 R.F.L. (6th) 11, 93 Alta. L.R. (4th) 1, 2008 CarswellAlta 267, 165 A.C.W.S. (3d) 722, at para. 27.

111

Otis & Reiter, *supra* note 7 at 352-5 and footnote 4 (emphasis added). They reference (footnote 4):

- Marc Galanter, “The Emergence of the Judge as a Mediator in Civil Cases” (1985-6) 69 *Judicature* 257;
 - Marc Galanter & Mia Cahill, “Most Cases Settle’: Judicial Promotion and Regulation of Settlements” (1994) 46 *San. L. Rev.* 1339 (Otis & Reiter later (at 356, footnote 18) reference this source in support of the proposition that “settlement has always been [a normative] part of even classical adjudication”);
 - Landerkin & Pirie, *supra* note 25;
 - Edward Brunet, “Judicial Mediation and Signaling” (2003) 3 *Nev. L.J.* 232 ; and
 - Laurence Boulle, “Judicial Policies on Mediation and ADR: Australian Trends”, (2004) 15 *World Arb. & Mediation Rep.* 194.
- At footnote 5, they also reference, *inter alia* (all references to French language literature has been excluded):
- Louise Otis, “The Conciliation Service Program of the Court of Appeal of Quebec” (2000) 11 *World Arb. & Mediation Rep.* 80; and
 - Louise Otis & Eric H. Reiter, “Judicial Mediation in Quebec”, in Nadja Alexander ed., *Global Trends in Mediation* (2nd ed.) (Alpen van den Rijn: Kluwer Law International, 2006).

pre-trial settlement conferences, but talk of it as a program having merit and standing on its own.

Later they add:

... state institutions for resolving disputes are merely the most recognizable or visible of dispute resolution mechanisms and ... we should see a dispute-resolution continuum rather than a stark division between state institutions on the one hand and "informal" methods on the other. If we stop viewing state-based law and its institutions as effectively having a monopoly on dispute resolution, from which any "alternative" forms need to be chipped away and justified, we make room for other forms of normative ordering on an equal footing with traditional adjudication.

What ADR, in general, and judicial mediation, in particular, represent are the institutionalization of some of these informal ways of normative ordering, bringing the power of informal justice within the purview of state legal systems. ... we do not argue for replacing traditional adjudication, nor for juridicizing the vast numbers of everyday conflicts that are already satisfactorily dealt with outside the courts, whether by the parties themselves or by professional mediators. Rather, we argue that complementing traditional adjudication with judicial mediation allows state dispute-resolution institutions to reflect new exigencies better, which helps them provide better justice for those who bring their disputes to the justice system for resolution.¹¹²

Still later, Otis and Reiter made it even more clear:

... what we see happening is not - cannot be - a dilution or dumbing down of the adjudicative function to meet efficiency targets but rather the development of another form of justice, complementary to the classical system and based on an entirely different model of rendering justice. For, if the mission of adjudication, or the act of judging, remains steadfast, we must nevertheless recognize that, in most civil disputes, complex and procedurally-oriented contradictory debate is ill-suited both to the

¹¹² Otis & Reiter, *supra* note 7 at 357, referencing Roderick A. MacDonald, *Lessons of Everyday Law*, (Montreal: McGill-Queen's University Press, 2002), at 38-42 (published for the Law Commission of Canada and the School of Policy Studies, Queen's University).

efficient resolution of these disputes in modern juridical reality and to the interests of litigants.¹¹³

That is precisely how I view the role of JDR Program in our Court - a state-of-the-art trial adjudication system and a state-of-the-art JDR system, working together to provide alternatives *within* the Court for the resolution of disputes commenced in the Court, while, at the same time, allowing others *outside* the Court to provide ADR services to disputes, whether litigated in the Court or not.

Finally, Otis and Reiter note, on the issue of consent (discussed *infra* in connection with the STAR Approach of the Straus Institute):

Consent-based normativity can co-exist with state-based (or authoritative) normativity. Judicial mediation, of course, somewhat blurs the boundary between authoritative and consent-based normative ordering, because it combines a basis in the will of the parties with many of the semiotic trappings of state-based law (for example, it is conducted by a judge within the courthouse - though not in a courtroom - and it plays out in the shadow of adjudication, since participants can at any time abandon mediation and return to the adjudicatory track). Some types of conflicts naturally lend themselves better to one or the other, but, in general, deciding whether a dispute should be litigated or mediated is a question of tool selection or "fitting the forum to the fuss."¹¹⁴

This is exactly the normative result that I now see in the dispute resolution regime in the Alberta with private ADR, and the JDR Program, along with the

¹¹³ Otis & Reiter, *supra* note 7 at 361.

¹¹⁴ Otis & Reiter, *supra* note 7 at 378, referencing:
 - Lon L. Fuller, "Two Principles of Human Association" (1969) 11 *Nomos* 3;
 - Lela P. Love, "Images of Justice" (2000) 1 *Pepp. Disp. Resol. L.J.* 29; 114;
 - Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harv. L. Rev.* 353, at 366-71;
 - Lester M. Salamon, "The New Governance and the Tools of Public Action: An Introduction", in Lester M. Salamon ed., *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002); and
 - for that famous expression, Frank E.A. Sander & Stephen B. Goldberg, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure" (1994) 10 *Neg. J.* 49 [Sander & Goldberg, "Fitting"].

traditional adjudication, in the Court. One size does not fit all, and the parties can choose. While adjudication is unilateral at the instigation of one party (the plaintiff), both ADR and JDR (within the Court currently) are based on the consent - indeed, the agreement - of all parties to the dispute. However, even under the New Rules, there will be no compulsion to JDR, but only compulsion (before trial, unless waived by the court) to one of: private ADR; a Alberta Justice coordinated dispute resolution process or “court annexed” process; or JDR - but the compulsion is only if a trial date is sought for adjudication - see proposed NRs 4.16 and 8.4 in Appendix 7.

Therefore, this new normative ordering having been stated and established - adjudication and JDR *within* the Court; I will proceed to discuss the terms applicable to JDR, the Survey result, and the challenges now, and in the future, in providing such a two pronged approach to dispute resolution within the proper bounds of the administration of justice under the rule of law - that is, what we need to do in the future to maintain - indeed, improve - the excellence of the JDR Program.

C. RIGHTS AND INTERESTS, AND THE RELEVANCE OF THE DEBATE

Some argue that the debate is about whether the resolution of disputes relates to rights *or* interests, and it can only be one. The debate defines many of the objections to JDR, and needs to be addressed head on.

1. THE THEORY

In my view, JDR is about rights (or entitlement) based resolution of disputes in active litigation, *and*, beyond rights, but dependant upon the

existence and advancement thereof, *related* interests based¹¹⁵ resolution of disputes¹¹⁶. Put another way, adjudication is about the determination of rights only - a trial justice has no jurisdiction to decide a case except on rights, and cannot take into account related, but unlitigated, interests - a matter that gives a disadvantage to adjudication over JDR. A JDR can also be - and often is - about rights determination. However, to the extent that *related* interests exist and can be identified, they, along with rights, or alone, may be the basis for a resolution by agreement of the parties. I say *related*, because, in my view, the interest must have a relationship to the litigated dispute for the JDR justice to have jurisdiction - e.g., as a hypothetical, JDR on a litigated motor vehicle collision cannot be JDRed to settlement based on the interests in an unrelated (and unlitigated) contract to which the parties are, coincidentally, also parties. Thus, the important creative key to JDR is to identify interests related to the litigation to add innovative settlement options - otherwise, one is left with a settlement based on the often limited options relating a prediction of rights resolution in an adjudication.

So, while that might seem simple enough, what are the theoretical and practical differences between rights and interests? We will see that it is generally

¹¹⁵ A number of authors are renown for advocating this interest-based process - indeed, it is largely what distinguishes adjudication (of rights) from ADR, whereas JDR as practiced in the Court may focus on rights and any existing and identified related interests. Morris, *supra* note 17 at 3, identifies the most renown authors that advocate this interest-based process as Roger Fisher, and William Ury, with Bruce Patton, ed. *Getting to Yes: Negotiating Agreement Without Giving In*. 2d. ed. (New York: Penguin Books, 1991)[Fisher et al, "Getting to Yes"].

¹¹⁶ However, note that while a Legal Education Society of Alberta (LESA) seminar provided a paper by Marlene Roza, "Shifting from Positions to Interests" (apparently "outside the courts"), the one dealing with JDR, never mentioned either rights or interests specifically, except to note (at 9) the "focus on the substantive issues rather than technical rigid aspects of the law", seeming even there to focus only on rights: David G. Tettensor, Q.C., "Dispute Resolution Inside the Courts", in Legal Education Society of Alberta, *Dispute Resolution Tools for Lawyers: Outside the Courts and Inside the Courts* (Calgary: Legal Education Society of Alberta, 1997)[Tettensor].

accepted that evaluative mediation focuses on rights or positions, whereas facilitative mediation focuses on interests or values, whereas I believe judicial mediation focuses on both, *subject to the will of the parties and the concurrence of the JDR justice*¹¹⁷, using a judicial mediator.

Adams and Bussin describe interest and rights based negotiations this way:

The aim of interest-based negotiations is to uncover, understand and explore the underlying interests of all necessary parties, in contrast to their stated positions and asserted rights. While positions or rights usually conflict, the underlying interests of parties often overlap in material ways.

117

I put emphasis on these words for two reasons.

First, it has always been a theoretical principle of JDR that the parties (and their counsel) determine what type of dispute resolution mechanism they want - facilitative or evaluative mediation, mini-trial, etc., and what type of process - caucusing, etc., but with the JDR justice's concurrence. However, in practice, at least until recently, with the parties and their counsel not being too experienced on the options, except for broad parameters of requests from counsel, the JDR justice might propose a mechanism (or hybrid) and process, to which the parties and their counsel consent. Now, with 13 years experience, and counsel (and some of their clients) being more knowledgeable on the options, they are often in a position to be more definitive as to the mechanism and process they want, but that must still be the subject of concurrence with the JDR justice. This concurrence is because, for example, some JDR justices do not believe that caucusing is compatible with the judicial role.

The second point is that the proposed New Rules specifically mandate the parties setting the procedure - NR 4.17, which provides for a "party-initiated framework for a judge to actively facilitate a process" for settlement, and NR 4.18 which requires the parties to agree on "the nature of the process", the "manner in which the process will be conducted", and "the role of the judge" and several other matters relating to the subject matter, date and location, materials, who will participate, and the "practice and procedure... including exchange of materials...". However, in the eyes of the Rules of Court Committee (RCC), and most justices, the NR do not make the right of concurrence by the JDR justice clear, leaving the JDR justice only with the option of refusing to participate if they do not agree with the mechanism and process proposed. It is expected that the latter problem will be resolved (by the substance of proposed RCC amendments) before the proposed New Rules (with) come into force in 2010, and I will make some recommendations herein on the way it should be handled between the parties (and their counsel) and the Court - specifically the JDR Booking Confirmation Form that I will propose - Appendix 8, Form 8.1.

In contrast,... rights-based negotiations focus primarily on the legal rights of the parties. The parties attempt to anticipate the outcome in court, and the dispute is approached using that prediction as a benchmark. Settlement may be facilitated by obtaining a neutral party's opinion as to the relative merits of the parties and positions in order to better predict the outcome if the case went to trial. However, some commentators have pointed to the existence of underlying and often overlapping interests in any dispute including the assertion of legal rights and the powerful role interest based negotiations can therefore play in resolving even 'legal disputes'¹¹⁸.

Danielson points out that interests are based on "underlying needs, desires, concerns and fears", and quotes from Macfarlane, who relies on *Getting to Yes* to make the point that "Your position is something you have decided upon. Your interests are what cause you to decide ...".¹¹⁹

Because, by definition, JDR only takes place within litigation, and traditionally at the latter stages of litigation, it is a process that is primarily related to the negotiation of and resolution of a dispute premised on rights. This, in itself, necessarily leads to the prospect of an evaluation of those rights in a dispute resolution or settlement context - that is, what is most likely to happen if the case proceeds to adjudication.

Macfarlane acknowledges and discusses this default to rights-based dispute resolution:

Even as we observe significant changes in the structural and procedural environment of legal practice, there are widely

¹¹⁸ Adams & Bussin, *supra* note 3 at 135, referencing Frank E.A. Sander, "Dispute Resolution Within and Outside the Courts: An Overview of the U.S. Experience", in Cochran ed., *Attorneys General and New Methods of Dispute Resolution* (Chicago: American Bar Association, 1990), at 15, and Fisher et al, "Getting to Yes", *supra* note 115.

¹¹⁹ Danielson, *supra* note 4 at 44, quoting Julie Macfarlane, *Dispute Resolution: Reading and Case Studies* (Toronto: Emond Montgomery Publications Ltd., 2003) [Macfarlane, "Reading"], also relying on Fisher et al, "Getting to Yes", *supra* note 115 at 141-2.

recognized and broadly accepted values that continue to dominate lawyering, regardless of context. ... these core beliefs [include] - a default to rights-based dispute resolution....¹²⁰

Moreover, in a JDR there are often - at least perceived to be - no “interests” (as defined in this context), but only rights - e.g. what are the damages to be awarded. Indeed, there is a danger that only rights will be recognized without a search for settlement enhancing interests:

A belief in the primacy and superiority of rights-based conflict resolution is introduced by legal education, reinforced by communities of practice, and memorialized in professional codes of conduct. Rights strategies are characteristically presented as the default or sometimes the only appropriate approach for a lawyer to take to conflict resolution. The practical consequence of this belief is that the basis of the lawyer’s role is rights-based advocacy. Although such a belief is critical to the function of a legal professional, adherence to this model often means that other forms and styles of advocacy and the promotion of client goals and interests are overlooked or rejected.¹²¹

Later she added:

The rights-based model assumes that the source of conflict is in all circumstances an uncompromisable moral principle or an indivisible good....

... Focusing only on a rights-based analysis assumes the essential moral basis of any conflict, since rights arguments are couched in terms of right and wrong rather than in terms of what is expedient, feasible, or wise.¹²²

And still later:

Despite the limitations on problem solving in a rights-based model, the danger of exploitation of secure resources, and the risks

¹²⁰ Macfarlane, *supra* note 25 at 47.

¹²¹ *Ibid*, at 49.

¹²² *Ibid*, at 50.

of over-commitment, a rights-based approach to legal disputing remains essential to the rule of law.¹²³

While that is often the case, it need not be always exclusively so. Accordingly, in any JDR (as any other settlement mechanism), to prevent this default, if there are relevant interests (loosely defined as considerations in addition to the issues being adjudicated that might be used to achieve a settlement) outside of pure rights, they should - indeed must - be examined, as they may lead to more creative opportunities for settlement. Thus, in my view a JDR is both a rights based analysis (i.e. on a “principled basis” - what is the most likely determination of rights at trial) and an interest based analysis (i.e. are there party centred - not necessarily identical - interests that can be recognized - or even “traded” - to avoid the need for a rights based determination at trial?). Another judge agreed, but with caution, when he said:

Lawyers, judges and academics, have introduced us in the United States to a new methodology, which if carefully employed, can be of assistance to the courts and litigating public without damaging the rule of law. We must be cautious in the use of any technique which impairs access to the courts, which threatens judicial impartiality or which removes constitutional or public policy matters from the adjudicatory process.¹²⁴

I conclude this aspect of the discussion about the dominance of rights, by reference to Macfarlane’s conclusion on the need for balance:

The problem lies in the belief in the universal application and superiority of rule-based adjudication, which makes advocacy via rights claims a dominant value for lawyering practice.... Instead of assuming that disputes will be resolved by an argument over rights before a third-party decision maker or judge, lawyers should recognize that they will usually be resolved through negotiation, which will take place *in the shadow of the law* and rights and entitlements but not be determined by it.

¹²³ *Ibid*, at 53.

¹²⁴ Richard A. Enslin, in “Alternative Dispute Resolution”, in the Pitblado Lectures, *supra* note 10 at 10.

While rights-based processes will continue to be crucial to the conflict resolution approaches offered by lawyers, they should not, and in practice cannot, be the only approach, nor should they be the default. In many cases, wise and transparent bargaining – with a keen appreciation of the legal parameters – towards the best possible settlement is a better strategy and one that more directly addresses clients’ needs, both legal and non-legal.¹²⁵

However, she elaborated further on the importance of the “shadow of the law”:

In order to settle disputes in a manner that feels just to the parties, reference to norms and principles, which are often legal norms and principles, is very important. ... Where the possibility for appeal to an adjudicator lies in the background, as it does in legal disputes, we should expect the role of formal norms to be even more pronounced. If the alternative to settlement is adjudication ... it is important that the parties understand what the outcome might be if the matter were to be resolved according to legal principles (or, at least, according to a realistic “best guess” of what this might look like). This evaluation will doubtlessly affect the disputants’ appraisal of the offers on the table. ... The so-called “shadow” of the law is an important predictive tool for when resort to law and a continuation to trial is a possible consequence of failure to settle.¹²⁶

In my view “*in the shadow of the law*” is a great expression, because it means that any settlement made on the basis of interests is always made in a JDR in the context of what is the law - the rights-based result, if interests do not prevail. Macfarlane later put it this way focusing on the lawyer’s role:

¹²⁵ Macfarlane, *supra* note 25 at 54 [emphasis added].

¹²⁶ *Ibid* at 168, referencing:
 - E. Waldman, “Identifying the Role of Social Norms in Mediation: A Multiple Model Approach” (1997) 48 *Hastings Law Journal* 703;
 - R. Mnookin and L. Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale Law Journal* 950; and
 - Center for Mediation in Law, <http://www.mediationinlaw.org/about.html>.
 Note that she says “appeal to an adjudicator”, not “appeal from an adjudicator”. I have left out of the text Professor Macfarlane’s comments about the slim possibility of a need for adjudication, but, in the JDR context, adjudication usually follows very quickly, if a settlement is not reached at the JDR. Mention is made about “evaluation” - it is the JDR justice’s evaluation of the right-based issues that provides the “shadow”.

It is critical that alternative strategies do not reject the expertise that lawyers have developed over generations in negotiating their clients' conflicts but, rather, build on existing skills, knowledge, and attitudes. Lawyers spend a lot of time negotiating and whatever the deficiencies of the structure and norms of [litigation negotiation], they have much practice wisdom. As well, their legal knowledge is vital in providing an assessment of the "shadow of the law", which is sometimes a decisive influence on the outcome of bargaining....

A first step is questioning the assumption that all conflicts necessarily implicate rights. Many do, and it is a critical underpinning of the principles of social democracy and respect for equality to deal with these within an adjudicative framework. Saying that not all conflicts implicate rights does not mean that none do. Interest-based bargaining and negotiation over rights entitlements can and must coexist. Adopting an interest-based approach to finding a feasible long-term solution does not exclude bargaining for a clear rights-based threshold.... The key to effective lawyering lies in discriminating between different types of conflicts and what are the appropriate means of addressing and resolving them in ways that meet both the needs of the disputants and society's interest in fairness¹²⁷.

In my view, this understanding is essential to the judicial participation in the JDR process - interests may prevail - and, may, indeed, lead to settlement. If that happens that is the end of it. However, interests are of little or no relevance to adjudication if there is no settlement. Therefore, in that context, interests should be measured in comparison to the rights that would otherwise obtain.

Macfarlane keeps coming back to this again and again - its importance cannot be understated. Here, she expresses it another way, namely that a lawyer's advice (or equally, in my view, a judicial evaluation) to a party:

... offers a set of possible norms for resolution and sometimes provides important benchmarks for legal rights and protections. In addition, law and the legal advice [and judicial evaluation] that clients [parties] receive from their lawyers [JDR justice] enables an appraisal of the risks and rewards of the options on the table at any

¹²⁷ *Ibid*, at 93 (later elaborated on, but not quoted, at 94).

one time. It is key to the development of intentional, realistic, and complete scenarios for what will happen if settlement cannot be reached. In this sense, predictive legal advice is an element of advocacy in negotiation and mediation.

The appraisal of risks and rewards inherent in potential resolutions is often described in conflict resolution literature as the best alternative to a negotiated agreement (BATNA).¹²⁸

To the extent that one or more parties, and/or counsel on their behalf, wish to advance, in addition to their rights which are being litigated, their related interests, or needs, ancillary to, but related to such rights, or the justice conducting the JDR wishes to ferret out those interests or needs that are important to settling rights-based disputes, there is no reason, in my view, why such interests cannot wholly, or in part, be the basis of the resolution of the litigated dispute. I agree with those (including Smith) that argue that a settlement of “interests” entirely separate from and unrelated to the litigation, or, in other words, “not before the court”¹²⁹, would not be appropriate to the judicial role. However, in my view, provided that it has a real connection to the litigation, I do not agree with the view that “a strict interest-based process does not give credence to the authority of the judge”¹³⁰. Rather, in my view, if the interest-based settlement resolves the litigation, that is precisely what gives “credence to the authority of the judge” because it means that the “in the shadow of the law” analysis which the JDR justice provides by way of evaluation assists the parties to understand that adjudication is their WATNA. Thus, to the same point, I agree entirely, in this context, with the view (as is the view in Quebec) that “resolution

¹²⁸ *Ibid* at 175, referencing, of course, Fisher et al, “Getting to Yes”, *supra* note 115 at 97-106. She goes on in the text (at 175-6) to explain the theory of BATNA, and in the related footnotes also talks about the worst alternative to a negotiated agreement (WATNA), or the most likely alternative to a negotiated agreement (I guess, likely to be called “MLATNA”, or “PATNA”, the most probable alternative to an negotiated agreement?).

¹²⁹ Smith, *supra* note 13 at 14.

¹³⁰ *Ibid* at 13.

parameters should be enlarged to offer a response to the conflict in all its dimensions” and should return “to the parties the qualification of their conflict and the construction of their solution”¹³¹ - no less in a JDR than in private mediation¹³².

Yet Smith argues that, even in mediation involving interests, JDR justices should “cause settlement of litigation, not conflict”¹³³. I agree that the priority is with the litigation, but I disagree with the implication. Why not do both? Moreover, the two go together because often the solution to the litigation is arrived at through the solution to the conflict. Indeed, solving the conflict may prevent further litigation, as we shall see. Thus, I disagree that, in a settlement context, by litigating a dispute, the parties are restricted to the pleaded definition of “the conflict in legal terms” and that there “should be no purposeful enlargement of the dispute beyond legal terms”. However, ultimately we may agree, as Smith permits that a JDR should be enlarged to include interests if, as it usually does, “the enlargement is a methodology used to cause the conversation to move forward” to settlement¹³⁴. Accordingly, notwithstanding statements by Smith that seem to argue the opposite, it appears that we agree

¹³¹ *Ibid*, relying on Louise Lalonde, “A New Role for the Judges and a New Offer of Justice for Citizens, on what Conditions?”, at *International Exchange Program for the Development of an Integrated System for Judicial Mediation*, National Judicial Institute and Court of Appeal of Quebec, Montreal, Canada, October 3-7, 2005.

¹³² However, what the Court permits in the JDR is considerably less than the similar principle applied by the Quebec Court of Appeal, where parties “are permitted to bring all of their litigation before the settlement judge, including matters commenced in different courts and tribunals, even though the appeal originally scheduled to be argued relates only to one piece of that litigation”: Smith, *supra* note 13 at 14, followed up by reference to Otis and Reiter.

¹³³ *Ibid*, at 16.

¹³⁴ *Ibid*, at 13-4.

that, by adding the interest issues to a rights dispute, and, “by broadening the object to include the enlarged conflict, a larger solution pool will emerge”¹³⁵.

On a related discussion raised by Smith, while I agree with Lalonde that “if judges determine the law outside of judicial processes, then the courts and judicial institutions will be diluted in their legitimacy”¹³⁶, it is my view that, in a JDR, the judges do “not determine the law”, nor is their role “outside the judicial process”. Rather, in my view, they are assisting the parties to “determine” a settlement result, whether based on rights and/or interests, that is within “the judicial process”.

Notwithstanding this discussion, the debate may be barren if “interests”, outside of “rights”, do not exist or are not revealed. Thus, interests have a role in the resolution only to the extent that the parties will identify and pursue them and the JDR justice is creative in helping to use them in the resolution of the dispute. The whole point is that when the rights dispute is settled, it is important to settle it in a way that *also* tries to settle interests that are the basis for the rights dispute in the first place, or are relevant to preventing future disputes. This seems common sense to me, but is detailed - indeed, expanded upon - in the literature.

Macfarlane spoke of this from the lawyer’s perspective in preparing the client for mediation or a judicial settlement conference, but it is a recognition that I believe is useful to the JDR justice’s awareness for settlement options:

The lawyer needs to ask sufficient questions to gain a broader picture of her client’s understanding of the conflict, including issues that may not bear directly on the strength of the legal case but that are important considerations for her client when considering settlement. The lawyer and client should review what the client will say in the meeting, what they will not talk about, consider any

¹³⁵ *Ibid*, at 13.

¹³⁶ *Ibid*, referring back to Lalonde at note 131.

background information about the personal relationship or past experience this client has had with the client on the other side and so on. Lawyers experienced in preparing clients for mediation characterize this dialogue as deeper and broader than the discussion that would precede either the planning of a litigation strategy or preparing the lawyer to negotiate on the client's behalf. The experience of preparing a client for mediation, negotiation, or another type of settlement discussion is quite different for a lawyer than preparing a client to ... to present testimony in the trial.¹³⁷

Much later, in the context of dispute resolution education (also relevant to JDR justices), Macfarlane added:

By focusing almost exclusively on a single, rights-based approach to conflict resolution, which is so removed from the reality of most legal disputing, legal education does worse than simply not educate future lawyers about how to use new dispute resolution processes effectively in their clients' interests. It also fails to foster the capacity for creative problem solving and reflexivity that is widely recognized as critical to twenty-first-century legal practice.¹³⁸

Mutatis mutandis, in my view, similar types of considerations are relevant for the JDR justice.

¹³⁷ Macfarlane, *supra* note 25 at 39.
 Otis & Reiter, *supra* note 7 discuss this at 389, referencing, *inter alia*:
 - Lon L. Fuller, "Mediation-Its Forms and Functions" (1970) 44 S. Cal. L. Rev. 305, at 311 and 314;
 - Andrew W. McThenia and Thomas L. Shaffer, "For Reconciliation" (1985) 94 Yale L.J. 1660, at 1664; and
 - Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994).
 Picking up on a theme that is raised here and discussed much in the literature - the relationship of the parties - MacCoun, Lind and Tyler assert that "less formal, and more conciliatory mediation procedures have several benefits for continuing relationships", in contrast to adjudication: MacCoun, Lind and Tyler, *supra* note 49 at 102.

¹³⁸ Macfarlane, *supra* note 25 at 229.

Therefore, in my view, it is wrong to suggest, as some do¹³⁹, that JDR is only, and must only be, about rights, whereas private mediation is (only?) about interests. For most disputes there are issues of rights and often related, but distinct interests pertinent to those rights. Therefore, no one size fits all¹⁴⁰ - the form of the resolution mechanism - private mediation or JDR - should be selected independent of the rights - issues continuum (discussed *infra*), with the caveat that the prerequisite for a JDR is a rights-based dispute - one that is otherwise going to be adjudicated to determine those rights (with no, or little, if any, power to satisfy ancillary interests). Accordingly, in my view, interests must be just that - ancillary to, not independent of, rights. In other words a JDR is not to resolve some dispute that is not identified in the pleadings, but may, in addition to settling the litigation, also resolve a dispute that is related to - that is, ancillary and related to - the pleadings.

Before moving on, it is necessary to recognize the mind set of the contrary view, although I will not examine it in detail here. I believe it goes back to the distinction between an adversarial view of adjudication as compared to a broader, and some may say, more holistic, view of dispute resolution. The description by Kronman as to the types of lawyers that represent these divergent views is, in my view, an appropriate way to examine this issue. Kronman, in commencing by stating “[t]wo old and antagonistic traditions of thought shape the modern field of legal ethics”, characterized lawyers into one of two schools - either the contractarian (adversarial), based on the philosophy of Hobbes and Locke, or the republican (more holistic), based on the philosophy of Aristotle,

¹³⁹ Smith, *supra* note 13 at 4, supported by some members of the Court. Specifically, the proposition put forward was that “The judge leading a settlement conference ought to assume an evaluative frame of mind based upon the judge’s court function, and ought to avoid incorporating interests as the foundation for settlements, other than as a matter of process.”

¹⁴⁰ Indeed, Agrios, *supra* note 12 at 4 reports one lawyer saying that cases in JDR are “like ‘snowflakes’: no two were ever alike, and they were all dissimilar”.

resulting in legal ethics “likely to appear in a different light depending on which view of the profession one takes”¹⁴¹. He described them in more detail.

Of the contractarians, he said “the legal order is merely a *modus vivendi* and no one’s self-sacrificed devotion is required to sustain it”. It is one where each contractarian seeks “merely to advance their own self-interest within the limits of the law, which they respect solely for the reasons of self interest too”, “by relying heavily on the concept of adversarial justice”¹⁴², “by serving his client as zealously as possible”, with all legally technical “experts, well-versed in the law”, but are not “public-spirited” and while they know the “law’s requirements”, they have no great “devotion to legal order”.¹⁴³ However, consequently, he notes that the contractarian lawyer has a conflict vis-à-vis his client because his self-interest includes the maximization of his fee, which may not be in his client’s self-interest.

¹⁴¹ A. Kronman, “The Fault in Legal Ethics” (1995-6) 100(3) Dickson Law Review 489 [Kronman, “Fault”], at 489 and 495.
Simon identifies similar characteristics which, compared to Kronman, he calls:
- the Dominant View (contractarian) - “zealous advocacy within the bounds of the law” - later asserting that this view is “anachronistic and incoherent”, and “wrong” (for several reasons);
- the Public Interest View (republican) - “law should be applied in accordance with its purposes, and litigation should be conducted so as to promote informed resolution on the substantive merits; with an apparent middle ground,
- the Contextual View (not articulated by Kronman) - “the lawyer should take such actions as, considering the relevant circumstances of a particular case, seem likely to promote justice”:
Simon, *supra* note 14 at 8-9, 12, and 19.

¹⁴² This certainly appears to be the case with the late Chief Justice of British Columbia, who, as Landerkin & Pirie reported, at 272, reportedly said: “ADR is often supported by well-intentioned people who, for a variety of reasons, are anxious to reorganize society and procedures of courts with naive, theoretical concepts of humanity and efficiency - society’s decent people need the no-nonsense, straightforward procedures of courtroom litigation to fight unreasonable claims and not the “soft” procedures ADR offers”: Attributed to Chief Justice A. McEachern in “Chief Justice Puts Boots to Alternate Dispute Resolution”, *Lawyers Weekly* (24 October 1989), at 2.

¹⁴³ Kronman, “Fault”, *supra* note 141 at 494-6.

In contrast, of the republicans, he said they have

... a respect for the law and a devotion to it to that other pursuits do not encourage to the same degree. Because of this, it is claimed, lawyers are particularly likely to possess an attitude of public-spiritedness and [are] uniquely well-positioned to carry this attitude into the wider sphere of private, and especially commercial, life, where self-interest is strongest and contractarian norms are widely embraced.¹⁴⁴

And republicans embrace the concepts represented as follows:

... 'what are the ideals toward which lawyers should aspire and how can these be achieved?' A republican's legal ethics will emphasize the obligation of lawyers to be an improving force.... It will stress that lawyers have a duty... to help their clients toward a better understanding of what their interest includes and in particular to see that it includes an other-regarding moral component whose presence is essential to the clients' own happiness and fulfillment as members of their community.... a republican's legal ethics will tend to be aspirational¹⁴⁵ and communitarian in character.

...

A ... characteristic of republican legal ethics is its emphasis on... the importance of the unrepresented.¹⁴⁶

Of the two of them he said that the republican point of view was in revival over the 10 years leading up to 1996, after much of the early part of the second half of the twentieth century being under the influence of contractarian ideas. He added:

¹⁴⁴ *Ibid*, at 494.

¹⁴⁵ Simon, *supra* note 14 at 14-15, spoke, indirectly of the difference between these two perspectives, in comparing the "Disciplinary Rules" of the American Bar Association's *Model Code of Professional Conduct* of 1969 - those being "specific and mandatory" (in effect, the contractarian view), to the "Ethical Considerations" - those that "were broad statements of principle that were characterized as aspirational", which he defined as "something lawyers should strive for but would not be disciplined for failing to attain" (the republican view). He said, with apparent lament, that the *Model Rules of Professional Conduct* of 1983 "dispensed with 'aspirational norms'" and only applied the Disciplinary Rules.

¹⁴⁶ Kronman, "Fault", *supra* note 141 at 497-8.

... those who see legal ethics from a republican point of view will be likely to insist that most adversarial relations can in fact be better understood as fitting the counseling model ..., thereby narrowing the domain of adversarial justice, just as contractarians seek to expand it.¹⁴⁷

For an interesting debate on what O'Dair calls the “competitive” (or adversarial) approach to negotiation, as opposed to the “problem-solving approach”, see the debate between Professors White and Fisher¹⁴⁸.

On an even broader scale of those who, like my colleague, Smith, criticize judicial (or, perhaps, any) mediation, Landerkin and Pirie note that:

Linking mediation to the works of Chomsky, Foucault, Habermas, Marx, Weber and others, these critics raise concerns about changing styles of social control, privatized justice, the de-emphasis of legal rights, mediation's informality and privacy helping to perpetuate systemic inequalities, and the harmful hegemony of harmony and pacification brought on by an excessive reliance on consensus.¹⁴⁹

Some, apparently embracing contractarian tendencies towards maintenance of the adversarial system, argue passionately that judges should be exclusively involved in it, and not in settlement, or, if involved in settlement, not anything other than evaluative opinions relevant to settlement - never mediation. The premise argued is the erosion of the judicial qualities that the judiciary had acquired and maintained under the adversarial system of adjudication, and the

¹⁴⁷ *Ibid.*, at 501 and 499.

¹⁴⁸ Richard O'Dair, *Legal Ethics: Text and Material* (London: Butterworths, 2001), at 292-301, referencing and quoting from the “fierce debate” between authors, Professor James White (James White, “Machiavelli and the Bar: Ethical Limits of Lying in Negotiations”, [1980] ABF Res. J. 916), and Fisher (Fisher et al, “Getting to Yes”, *supra* note 115).

¹⁴⁹ Landerkin & Pirie, *supra* note 25 at 260, relying upon A. Pirie, “Manufacturing Mediation: The Professionalization of Informality”, in C. Morris & A. Pirie, eds., *Qualification for Dispute Resolution: Perspectives on the Debate* (Victoria, B.C.: Institute for Dispute Resolution, 1994), at 165.

fear that adopting any other dispute resolution model will surely erode these qualities so that they disappear from the judicial adjudication model - or perhaps the judicial persona in any other role. The views I describe are the Evaluation Report of my colleague, Smith, who opens her paper with these words:

The judiciary gained its stature because of the positive political significance attached to adjudication. As judges become deal makers in settlement conferences, the role they perform increasingly resembles that of many private sector neutrals. Consequently deal-maker judges disentitle themselves to claim a position of unique authority. In their enthusiasm to embrace the role of settlement broker judges trade their much coveted stature and unique authority as dispute resolvers for a 'few paltry beans' [Jack and the Beanstalk] and, arguably, a lighter docket.¹⁵⁰

In my view, however, moving to an additional system of dispute resolution does not mean that a justice is required to leave one's judicial stature and principles behind, which I agree that they must not. In other words, it is not for me an "either/or", but rather a "both". I have a much higher confidence in collective - and individual - judicial abilities to make this move while maintaining those standards, as I believe the Survey results have demonstrated, and I reject the pessimistic view that all is, or will be, lost. To keep to Smith's fairy tale analogies, I reject the Chicken Little type view that the "sky is falling". Nevertheless, as I discuss *infra*, I believe the value to the debate of these dissident views, and where Smith and I agree, is that they re-enforce the need to maintain a high standard of judicial quality, and, at the same time to ensure an excellent adjudication system for the cases that should, or must, be adjudicated, or, while ripe for settlement, fail to settle. Thus, in this regard, I very much support Smith's statements that: "[f]air process grounded in courts' rules sets appropriate boundaries for judges leading settlement conferences [or JDRs].

¹⁵⁰

Smith, *supra* note 13 at 4 (emphasis in the original).

Reference to them may operate to retain public confidence in the judicial process”¹⁵¹.

However, before proceeding on, let me put to rest - indeed, reject - one further suggestion - that of the “lighter docket”¹⁵². There were the “old days” of “wood shedding” - as discussed, *infra*, by Landerkin and Pirie. Additionally, there may remain situations of a trial judicial system of what I call “cradle to grave” assigned cases (the individual docket system common in the United States), where a judge (usually a trial judge) could coerce the parties into a settlement so that, during that day, or week(s) of the trial, or generally, the judge would have time off from judicial duties. However, in the Court’s system (the master calendar system), there is no cradle to grave case assignment, the justice does not control his/her trial schedule, and the JDR and trial judicial functions are separated both functionally and for scheduling purposes. Thus, if a JDR justice assists in the settlement of a case s/he gets no time off, but just another JDR in that schedule. Similarly, if a judge is assigned a trial and it is settled by a JDR justice, there is usually another trial waiting in the queue to be assigned, or some other judicial assignment to be handed out. Therefore, while it is legitimate to say that the JDR

¹⁵¹ Smith, *supra* note 13 at 4.
See also, on a proceeding unrelated to JDR, but addressing similar broad principles, the Canadian Judicial Council, *Report of the Canadian Judicial Council to the Minister of Justice re the Honourable Paul Cosgrove*, Ottawa, 30 March 2009, <http://www.cjc-ccm.gc.ca> [“Cosgrove Final Report”], at para. 1, which states:

Public confidence in the judiciary is essential in maintaining the rule of law and preserving the strength of our democratic institutions. All judges have both a personal and collective duty to maintain this confidence by upholding the highest standards of conduct.

See also: *inter alia*, paras. 8, 24 and 34.

It is useful also to remember that: “In some cases ... the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. ...threatened the integrity of the judiciary as a whole”: Cosgrove Final Report, at para. 5, quoting *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 58. See also: para. 31, quoting *Moreau-Bérubé*, at para. 72.

¹⁵² Smith, *supra* note 13 at 4 (as quoted *supra*).

system in this Court was designed to promote access to justice by shortening the queue for trial dates, and thus shorten the trial list, it is not about any justice getting a “lighter docket”.

Returning more directly to the principles I was discussing, on the maintenance of a sound adjudication system, let’s be perfectly clear that, if settlement fails, or is inappropriate - that is, rights must be determined in any event of interests - an adjudicative model with adversarial skills and a contractarian attitude remains an option. Thus, in my view, JDR does not preclude the adversarial/adjudicative/contractarian model, but, instead of making it the default for resolution of a dispute, makes it merely the fallback, to a republican model. In either case, I agree that “the primary and intrinsic principle that the core role of the court in Canadian society is the administration of justice according to law”¹⁵³. Further, I agree that our Court, and its justices do, and must, follow that principle, and that it must remain vibrant.

2. THE THEORY PUT TO PRACTICE

Where do rights most commonly dominate a JDR and where are interests most likely to arise? If the parties had no previous relationship or connection to the subject matter forming the cause of action of the litigation, it is more likely that rights issues will dominate. Thus, in the typical automobile collision injury case, the issues are most often about rights - liability (both negligence and contributory negligence), and damages. In this context, the opportunity to be innovative may be limited, and the result is merely a “distributive approach”, described in various ways as: “zero sum”, with fixed resources to divide, as in, “divide the pie”; “value claiming”; and ultimately trying to get close enough together in extremes to “split the difference”, or “one side’s loss is the other

¹⁵³ Smith, *supra* note 13 at 7.

side's gain"¹⁵⁴. However, even there, issues, hidden or otherwise, may contribute to resolution - for example, a wish not to create a risk of a bad precedent may motivate a defendant, or a wish to "move on" or an early need for funds (or both) may motivate a plaintiff; and/or a pain clinic funded (in addition to other compensation) by the defendant. There are undoubtedly many others.

Alternatively, even if money is the only issue, a defendant may be able to justify the expenditure of funds for one purpose - say, a chronic pain clinic disbursement¹⁵⁵ - rather than, say, increased general damages. Moreover, a structured settlement (a lump sum of monies invested with the income and capital paid out over a period of time) may be in the interests of both parties - and, depending on the legislation in the jurisdiction (no longer a problem in

¹⁵⁴ Morris, *supra* note 17 at 2; and Macfarlane, *supra* note 25 at 76-7 and 178. Sanchez, *supra* note 36 at 771 also discusses this, calling "splitting the difference" a "mechanical compromise". Instead, referencing a forthcoming book (*Negotiating the 21st Century: From Roundtable to Globalization* (book-in-progress)) she suggests:

... a more vigorous ethic of compromise - an ethic of "creative compromise" - would be preferable. When looking at the settlement process through the lens of creative, rather than mechanical, compromise, judges, settlement managers, and other practitioners of ADR may be able to help the parties see the broader possibilities available to them through settlement that may bring into play more variables than the set of rights and resources originally at issue in the lawsuit.

This is what we have been referencing as "interests".

¹⁵⁵ Agrios, *supra* note 12 at 8, 14 and 50 (item 3).

Alberta¹⁵⁶) not available to a trial justice in an adjudicated result¹⁵⁷. Again, there may be many other examples.

Similar dynamics to the motor vehicle collision may arise in the typical slip and fall case, although there the defendant, if commercial, may also have interests of commercial reputation.

There may be many cases where there is, or may develop, a personal, professional or commercial relationship that may create interests in addition to, but related to the rights dispute. Indeed there are many other potential interests.

Interests are more likely to arise if the parties have a past and/or continuing relationship - usually a commercial or personal relationship. Thus, matters of interests are common in contract cases, including employment cases, or family cases - whether matrimonial, estate or otherwise. As opposed to the rights based distributive model, the interest based model is said to involve an “integrative” approach where: “problems are seen as having more potential solutions than are immediately obvious”; negotiations are about “value creating”: there is a real possibility of increasing the size of the settlement “pie” before dividing it; negotiations are also about “value creating” or creating “win-win”

¹⁵⁶ Section 19.1 of the *Judicature Act*, R.S.A. 2000, c. J,2., as amended.

¹⁵⁷ On this point, it is to be noted that often a settled result would not be one of the options available on adjudication, as is recognized by a number of sources: see, for example, Harold Baer, *supra* note 52 at 137, 141 and 142, referencing Deborah R. Hensler, “In Search of ‘Good’ Mediation: Rhetoric, Practice, and Empiricism”, in Joseph Sanders & V. Lee Hamilton eds., *Handbook of Justice Research in Law* (New York: Klumer Academic, 2001) 231, at 233-4. See also Adams & Bussin, *supra* note 3 at 144, who stated:
 Courts offering only trials are limited in their response to a legal dispute. One party wins and the other loses. Intermediate solutions, compromise and tailored outcomes to accommodate the parties' best interests are simply not available to judges. ... trials do not accommodate the important social and psychological elements of dispute resolution.

situations where a potential settlement has the ability to give something unique and valued to both parties¹⁵⁸.

Macfarlane put the differences between rights and interests this way:

Resource-based disputes characteristically enable outcomes in which the resource “pie” (for example, money, influence, status, and market control) can be divided among the parties. This allows for solutions that “expand the pie” – for example, by generating solutions that have value to one or both sides but that fall outside what is formally claimed, such as future business arrangements, apology and acknowledgments, or the bestowal of some other valued outcome by one party on the other. It also encourages parties to make explicit their priorities rather than claiming an entitlement to absolute victory, thus enabling both sides to achieve some of their objectives.¹⁵⁹

The concept of apology needs more development. One should never minimize the effect of an apology or a declaration of right (or, at least, no liability/forgiveness for a wrong). I have personal experiences as both a lawyer and a JDR justice with this phenomenon. In my experience, an apology, or the equivalent, can often lead to a very successful settlement by those who only want recognition of the harm done to them, and/or to forgive the one otherwise at fault. This is confirmed by research: “[t]he picture that emerges from research in the areas shows individual litigants to be considerably more concerned with issues of vindication and with obtaining an adequate hearing of their dispute than with the actual award that they obtain”¹⁶⁰.

¹⁵⁸ Morris, *supra* note 17 at 2.

¹⁵⁹ Macfarlane, *supra* note 25 at 53.

¹⁶⁰ MacCoun, Lind and Tyler, *supra* note 49 at 105.
Similarly, see:
- Macfarlane, *supra* note 25 at 179-80, who talks about this further in the context of “cognitive and/or emotional resolution”, or a “behavioral outcome”;
- Landerkin Evaluation Report, at 655, referencing F. Lind & T. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988);
- Sander, “Ohio Symposium”, *supra* note 38 at 709, referencing, in turn, Jonathan R. Cohen, “Advising Clients to Apologize” (1999) 72 S. Cal. L. Rev. 1009;

Macfarlane develops this theme, in some detail, in the context of a relational dispute:

Framing a negotiation issue only in terms of legal principles will always exclude practical options that may be acceptable to the parties. ... Legal principles ... are rarely sufficient to establish a future relationship because they rarely impact the origins of the conflict.

For example, relying on a wholly legal framework is unlikely to resolve long-term problems such as poor relation between trading or investment partners, co-parenting between acrimonious spouses, or workplace culture or productivity within a corporation. This is not only because a legal remedy is incomplete as a durable and long-term solution to the conflict but also because it obscures or overlooks other issues that may not admit clear legal arguments and redress. A legalistic approach to the problem is unlikely to enable resolution of the deeper underlying issues that caused the problem in the first place - for example, different parenting styles, poor workplace morale leading to high absenteeism, systemic discrimination or harassment issues, or ineffective or inadequate communication systems.¹⁶¹

Macfarlane also provided some additional examples relating to business and commercial relationships - trade partners, joint ventures, sale and purchase, preferred terms, forbearance, and tax advantages, and more. She observed that:

... disputes over commercial influence and market share, or the co-parenting of children, or the ending of an employment relationship, are not zero-sum. Each of these examples admits many possible creative

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- Baer, *supra* note 52 at 141-2;
 - Adams & Bussin, *supra* note 3 at 144, referencing Goldberg, Sander and Rogers *supra* note 33 (2nd ed.) at 137;
 - Joan I. McEwen, "ADR: Moving From Adversarial Litigation to Collaborative Dispute Resolution Models" (1999) 57 *The Advocate* 699, at 703, in an aboriginal child abuse context;
 - Agrios, *supra* note 12 at 8, 14 and 504, to which, in the first instance, he added "or a reference letter"; and
 - I am sure there are others.

¹⁶¹ Macfarlane, *supra* note 25 at 181. Later, at 182 she added the possibility, in this vein, of the addition of other related issues that weren't part of the original litigation, but might be a part of the solution.

outcomes in which giving one side some of what it wants does not *have* to mean less for the other.¹⁶²

Let's pursue this a little further. In a commercial dispute between, say, parties in the construction industry, a dispute might easily get resolved into a future contract directly or, more likely, indirectly. Perhaps they can work together on a new contract that one party can make happen, or they may be able, without impacting any third party, to joint venture or profit share or deal otherwise on a basis to provide compensation to cover the past incident, or one may become a preferred supplier to the other.

In employment, it is critical whether the plaintiff, perhaps dismissed, is entitled to have his/her employment back, as opposed to compensation in lieu¹⁶³. Does the employer wish to take the risk that it might have to take back an unwanted employee? Is the employee really wanting to return to a poisoned atmosphere? Is there some way they can resolve their BATNA and WATNA to approach their PATNA¹⁶⁴? Can the employer transfer the employee to another location that is desirable to the employee, or promote the employee to another sister or industry related employer, or give a good recommendation, or retrain the employee? Again the possibilities are endless.

¹⁶² *Ibid*, at 73 and 75. She added:

These examples demonstrate that it is critical to have the client present in order to ensure that the full range of operative interests are brought to the table and not just those that are easily translated into rights-based arguments. Creative agreements, which maximize the integrative potential, are more likely to be achieved on the basis of this richer range of interests.

¹⁶³ It is acknowledged that this is usually not adjudicated in the courts but most often arbitrated under a collective agreement, or the equivalent. However, it is hypothetically illustrative of the interest issue, and may materialize before a non-judicial mediator/adjudicator in such situations.

¹⁶⁴ See definitions, *supra*, at note 128.

To a seemingly never ending set of examples, and, more importantly, the nuances of ancillary needs, Macfarlane even adds more:

It is also a natural consequence of engaging the client more completely in the development of the case and a dispute resolution strategy is to expand the issues that will be considered and taken into account. If he is directly involved in planning for mediation, for example, a business client is likely to provide additional information on business needs and goals, both long-term and short-term, which can be effectively incorporated into planning a strategy for negotiation.... Instead of removing emotional and psychological issues from the negotiation, the inclusion of clients in planning may mean important and otherwise unspoken barriers to settlement can be raised and discussed.

...

In short, the greater involvement of clients in planning and decision making opens up the menu of possible topics and options for resolution and enables a different type of dialogue to occur in the settlement process itself.¹⁶⁵

Family litigation is rife with interests in addition to rights. In the non-matrimonial case, say the dispute over a parent's estate, there are often opportunities for win-win - one child does not want the "family farm", but wants its value, while another lives to farm and values the lifestyle more than a bigger bank account, or an ability to sub-divide, or some other appropriate solution. Again, the possibilities are endless. Continuing relationships are also often very important - or not.

In matrimonial family litigation, continuing relationships with children and their development are often key areas of interests. Where assets are an issue (even more complicated when children are involved too - although some

¹⁶⁵

Ibid, at 140-1.

interests come to mind¹⁶⁶), there are many considerations that may allow for resolution based on interests other than rights, or pure rights. However, there are dangers in these areas, as we shall see later in discussing judicial conduct, as there are often power imbalance issues in family cases that have to be avoided or ameliorated.

There is another dimension to interests and needs of parties that may not be directly related to the rights, but ancillary. In other words, there may be interests that affect a party's negotiations at a JDR. Without going into many examples, some are easily understood - a couple will suffice.

In times of economic recession, a party may have a good rights case in a substantial monetary judgment at long away trial, but without some funds now, may be facing bankruptcy - a lesser sum now may be in the party's business interests. Or alternatively, a judgment for the larger sum may be of no value if it cannot be enforced against the other side - again, say, due to bankruptcy.

A party to an estate dispute, such as the one referenced *supra*, may be entitled to a larger sum, but be prepared to take an asset - say a piece of property, such as the family cottage, that is not of similar value now, but may have sentimental value, may provide lifetime economical accommodation, or have a long term financial profitable development potential, any of which may represent an interest worthy of less than greater value now.

Failing health can be an interest that promotes settlement, sometimes in spite of legal rights.

¹⁶⁶ For example, transfer the matrimonial home to adult child(ren), who agree to allow one of the parents to reside there rent free. Surely, there are other examples.

In any of these cases, obtaining a lesser value now may be in the interest of the one side, rather than waiting for a risky potentially larger future value, and, at the same time, meet the off-setting interest of the other side.

There are many more examples - the number is infinite, where interests may reside along side, or ancillary to, but impacting on, related rights. As we can see, the potential "interests" and combinations are only limited by the lack of revelation, or knowledge, of the parties' true interests, or the lack of imagination of counsel or the JDR justice searching them out, understanding them and identifying them, or some legal constraints (such as affecting, unlawfully, some third party's interest).

The client needs to be challenged by the lawyer to identify the real motivations for a settlement. Additionally, the lawyer needs to question his client - indeed, cross-examine him/her - to learn of and understand his clients needs and interests, direct or tangential, and bring them forward in a timely and proper way. In the judicial context, it is important that this knowledge be available to the JDR justice as a source for resolution (preferably) before or (less optimally) during a JDR, and that the JDR justice brings them out and/or uses his/her creative skills in making them available (directly or indirectly) to a potential resolution, better than would otherwise be the case. Therefore, it is important that the JDR justice learn of those, usually in confidence (thus the value of caucusing to be discussed, *infra*¹⁶⁷), to assist in a settlement that maximizes each party's realization of their interests. Accordingly, the proper role of the JDR justice, in advance of the JDR, is to invite - indeed, encourage - the parties and their counsel to identify any underlying interests in an appropriate way and time,

¹⁶⁷ For an excellent description of how this - caucusing - (as opposed to joint sessions) can be used to draw out interests, and the rules of confidentiality (also discussed, *infra*) associated therewith works in practice is set out by Sherry Landry, "Med-Arb: Mediation with a Bite and an Effective ADR Model" (1996) 63 Def. Counsel J. 263 [Landry], at 263.

for strategic use, during the JDR. Moreover, even if the JDR justice does not directly use them in helping to create a settlement, it is often important for the JDR justice to know of these interests to understand any agreed settlement, which may, on first blush, cause concern (to the extent that the JDR justice has a role in that regard, beyond basic fairness¹⁶⁸), as being less than the rights to which the party is entitled - see the section on imprudent settlement, *infra*.

Thus, in these few examples we see that, no matter the theoretical concerns, JDRs are not just about rights but are also about interests. The JDR justice must be able to deal with them in a way that is consistent with the now modern, new normative, judicial role.

Additionally, while there are many costs/benefits to private mediation and this paper is not intending to argue those in general, in the context of rights v. interests, as we shall see *infra*, if the skills of a mediator (private or judicial) are equal, a JDR may be a better place to resolve disputes than a private mediation, because a JDR justice can equally assist the parties with interests, but may be better able to also assist in evaluating the risks associated with adjudicating rights. In either event, if there is litigation in place, and no resolution, another justice with a similar legal background is going to adjudicate those rights.

The bottom line of this discussion is that a JDR is about resolving disputes involving rights *and* interests, and JDR justices are judicially entitled and capable of assisting in the resolution of either or both.

D. TERMINOLOGY

¹⁶⁸ There can be no doubt that basic fairness of the process is essential, and the presiding JDR justice must ensure this. The fairness of the solution or settlement, as between the role of the parties, their counsel, and the JDR justice is more a matter of debate - again, *infra*.

It may be surprising - or not - that, almost 35 years after the Pound Conference that started the ADR movement, there is still some disagreement in the broad dispute resolution community - including the Court - over dispute resolution terminology.

The CPR Institute for Dispute Resolution in creating a vocabulary, noted that “[d]efinitions are not standardized, but flexible and creative like ADR itself”. The problem was explained this way:

... the myriad of possible ADR approaches has led to so much confusion in terminology. Sometimes participants in a process are not even sure what to call the technique that has helped them to resolve their dispute without costly litigation. The range of ADR devices and disputes they can address demand a vocabulary.¹⁶⁹

This lack of direction has, however, - and continues to - cause confusion. Moreover, the debate unnecessarily uses energy that could be better funneled to the substance, not the labels, of the processes available to resolve disputes. Thus, in my view, so that the JDR Program can proceed with clarity of operation and so that all the JDR energy can be focused on the substantive goals and purposes of the program, the terminology needs to be resolved now once and for all, for official use relative to the JDR Program, without stopping judicial independence from allowing justices and others to personally employ what terms they want for their own use. This is not only my view, but that of others. Sander was very recently alarmed that “it is remarkable that there is so much robust disagreement - and sometimes un-mediation-like characterization of the ‘other’ approaches”¹⁷⁰.

¹⁶⁹ CPR, “Glossary”, *supra* note 17 at 147.

¹⁷⁰ Frank E.A. Sander, “Keep Building ADR” (2009) 27 *Alternatives to the High Cost of Litigation* 6 [Sander, “Keep Building”], at 9, referencing Kimberlee K. Kovach and Lela P. Love, “Evaluative Mediation is an Oxymoron” (1996) 14 *Alternatives to the High Cost of Litigation* 31.

I have come to learn - rather late in my literature search - that very comprehensive sources of dispute resolution related definitions and terminology are readily available, some online¹⁷¹.

While the terminology to be used in this Evaluation Report is - broadly - listed in the “Symbols, Nomenclature, or Abbreviations” schedule *supra*, it requires some discussion - in many cases not just to tell the reader why I have adopted some short form of communication, but rather, because, as just noted, terminology is itself an issue in some dispute resolution circles and in the Court. Moreover, the terminology is often mis-used.

Singer describes the progression or continuum (from the least to the most engaging) of techniques for settling disputes to go from: avoiding the dispute; to negotiation; to mediation (including conciliation¹⁷²); to hybrids, which include evaluation, neutral experts, mini-trials, med/arb, and court-annexed arbitration; to arbitration; and, finally, to adjudication¹⁷³.

¹⁷¹ See *supra* note 17.

¹⁷² Defined by Singer, *supra* note 42 at 24, similar to facilitation, to indicate a mere coordination role, although the term is often misused. The term “conciliation” is most often used in a descriptive sense to mean conciliatory, as opposed to adversary: see Landry, *supra* note 167 at 264. See discussion by Morris, *supra* note 17.

¹⁷³ See, *inter alia*, Singer, *supra* note 42 at 15-29. See also Goss, “An Introduction”, *supra* note 29 at 3, 25-6 and 33, adding “Referees” in the middle section, referencing Alberta Law Reform Institute, *Dispute Resolution: A Directory of Methods, Projects & Resources* (Research Paper No. 19)(Edmonton: Alberta Law Reform Institute, 1990). On the latter point, there has been some discussion about a greater use of referees within the Court in recent times, but, in my view, in addition to other issues, they are rather limited to a form of adjudication (a narrow point with a recommended decision only), and thus don’t normally arise - not in the Alberta context, at least - as a JDR process.

There are some other terms relating to processes in play in the U.S. that have no relevance to our Court - including summary jury trials, and some other terms which are similar to some of our processes, such as non-binding arbitration (where there is a form of non-binding hearing, including witnesses), otherwise similar in concept to our Binding JDR¹⁷⁴. However, unlike our Court, where only JDR justices are used as neutrals, many of the U.S. court models use non-judicial neutrals employed by the court, or providing such service to the court or parties on a form of fee for service.

More recently - and not the topic of pursuit in this Evaluation Report, although Macfarlane and others discuss the first - are two relatively new processes devoted to resolving disputes in family law - collaborative law (leading to cooperative law) and parenting coordination. The first seems to have started in Alberta in Medicine Hat¹⁷⁵ and spread throughout Alberta, but there are some anecdotal suggestions that abuses have been creeping into the process, such that some counsel no longer will practice collaborative law¹⁷⁶ - this may be the motivation for the cooperative law, which is similar in focus, although not as structured, and less likely to result in abuses¹⁷⁷.

¹⁷⁴ ALRI, "Mini-Trial, at 9 and 16, suggests, in effect that the Binding JDR started in Alberta when "[s]ometimes a lawyer will add weight to the judge's opinion ahead of time by asking a client who is resisting settlement to agree, in writing, to be bound by it. It is too soon to assess whether this is a good approach".

¹⁷⁵ There are several references to Medicine Hat in Macfarlane's text, including at 144 and 250, footnote 76.

¹⁷⁶ See Sander, "Future", *supra* note 25 at 9, who acknowledges that there some problems with collaborative law - "some kinks to be worked out". Again, while not a topic for full discussion in this Evaluation Report, some of the alleged abuses include: one side dragging out the collaboration for ever, without results; lack of full or timely disclosure; abuse of the rule that lawyers must cease to act if they ever unilaterally go to court (therefore, no effective remedy for abuses); and other issues.

¹⁷⁷ Generally speaking, the principles at work are similar to collaborative law, but no rules that a lawyer must cease to act if s/he goes to court.

The second, parent coordinators, appears relatively new and, in my limited experience, growing in Calgary at least. Parent coordinators are usually agreed to by the parties, and/or appointed by the Court. The intent is to have an informed neutral who can help the parties sort out minor issues in a way that is less expensive and more productive than a formal court motion - e.g. what school a child of divorced parents should attend, changes in access schedule, etc. However, here too there are some “kinks to work out”, in relation to their role vis-à-vis the Court - are they mediators, or non-binding neutral evaluators, or independent arbitrators, or merely neutrals who help ensure compliance with court orders, or some form of hybrid, such as being arbitrators subject to objection to (a form of appeal), or confirmation by, the court. I favour the arbitration role, subject to objection, because the intent is to resolve the issue without the Court’s further involvement, although some things may need to be the subject of consent orders that flow from such processes - e.g. changes in primary parenting, parenting schedules, etc.

These matrimonial processes are discussed by Daniel Weitz in a recent, short article, which he opens with the line “[i]t seems we have added a couple of new doors to the matrimonial wing of our multidoor courthouse”, and later suggests that they are both appropriate for the right circumstance¹⁷⁸ - to use Sander and Goldberg’s term “fitting the forum to the fuss”¹⁷⁹. Some things Weitz says are worthy of a quick reference in passing: each has its own boundaries in the ADR continuum, collaborative law being between negotiation and mediation (but commencing before and in place of legal action, except for an agreed court decree of divorce), and parent coordination being between mediation and arbitration; the former is designed to be in pursuit of interest-based dialogue and

¹⁷⁸ Daniel M. Weitz, “Renovations to the multidoor courthouse” (2007), 14 *Dispute Resolution Magazine* 21.

¹⁷⁹ Sander & Goldberg, “Fitting”, *supra* note 114.

integrative solutions, whereas the latter is focused on high conflict and ongoing custody disputes post court decrees and generally under the loose supervision (perhaps closer to oversight) of the court; and other issues, worthy of a review for those interested.

Many of the techniques start with basic principles of negotiation. These are important, because the principles continue on to other methods of dispute resolution. As Singer points out¹⁸⁰, there are a number of “basic techniques for problem-solving negotiation”, as well articulated by Fisher and Ury. The techniques include: distinguishing interests from rights/positions; creating options to satisfy everyone’s interests; finding mutually acceptable standards (the “shadow of the law” discussed *supra* often sets a standard); recognizing constraints to settlement; and understanding the alternatives to agreement (again raising the “shadow of the law”). The alternatives to agreement as developed by Fisher and Ury have become symbolic in both the literature and practice regarding dispute resolution as the alternatives to a settlement: BATNA - the best alternative to negotiated agreement, which would be, for example, a 100% win at trial, rather than a settlement for less. In response two related terms have been added: WATNA - the worst alternative to negotiated agreement, which would be, for example, a complete loss at trial, rather than a settlement for more; or PATMA - the most probable alternative to negotiated agreement, which would be the likely trial outcome. All of these are a measure of what might otherwise happen at trial - what is sometimes called the “shadow verdict”¹⁸¹.

Brazil described it this way:

... parties can use ADR to determine more reliably whether trial is necessary to achieve their ends. Through an ADR process, they can learn more accurately what they could achieve through

¹⁸⁰ Singer, *supra* note 42 at 17-20, relying on Fisher et al, “Getting to Yes”, *supra* note 115.

¹⁸¹ D. Luban, “The Quality of Justice” (1990), 66 Denver U. L. Rev. 381 [Luban, “Quality”], at 387, as referenced by Bussin, *supra* note 5 at 481.

settlement. Thus, ADR can teach them more clearly what the alternative to trial really is.¹⁸²

1. ADR AND JDR

In my view, the issues of terminology in the dispute resolution circles, and particularly in the context of “ADR” or “JDR”, are a mess and an unnecessary area of controversy.

On the macro level, what is “ADR”¹⁸³ and what is “JDR” and is there a difference? In a very broad sense, generally, and in some dispute resolution circles¹⁸⁴, “ADR” means any mechanism short of a judicial *adjudication*, and thus, in this sense, the Court’s JDR program would be a form of ADR, because it does not result in a judicial adjudication (except in a “Binding JDR” discussed *infra*, which is another reason to separate “ADR” from “JDR”).

¹⁸² Brazil, “25 Years After”, *supra* note 14 at 128.
See to the same effect, Brazil, “Handbook, 2008”, *supra* note 60 at 69, including reference to feeling “centered in their decisions”, a matter to which I will return, in the context of ENE.

¹⁸³ There have been many corrupted acronyms - including:
- PDR (preferred dispute resolution);
- IDR (inappropriate dispute resolution) - Adams & Bussin, *supra* note 3 at 133, referencing Malcolm M. Lucas, “The 1992 and 1993 Frank E.A. Sander Lectures: National Institute Dispute Resolution Forum, Summer/Fall, 1993, at 4-5;
- EDR (effective dispute resolution);
- other uses of “ADR” (e.g., appropriate dispute resolution);
- and others.

¹⁸⁴ Niemic *et al*, *supra* note 17 at 2-3 and 7, report that the United States *Alternative Dispute Resolution Act of 1998*, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651-658 (Supp. 1998)), at 651(a) defines ADR in this broad way as:
... an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration.....

In another important sense, Landerkin and Pirie point to the argument that “ADR” is, in fact, a misnomer, because it is not an alternative to adjudication, but a part of it, a concept with which I agree - and have argued *supra* that the two form normative parts of a dispute resolution system. They also recognized, however, that it came to identify a complete “alternative to the courts, a keep-things-out-of-court kind of concept”, for all the motivations that could be identified¹⁸⁵. They go on to address the “link [between] the broader notion of Alternative Dispute Resolution (ADR) to JDR and find many similarities between these two acronyms”. Additionally, they spent much time talking about the various aspects of the “Modern Meaning of Mediation”¹⁸⁶, a matter that I will go into only in a cursory fashion.

It was the general nature of this ADR concept, but with the substitution of a judicial neutral, that motivated our Court whose leaders also

¹⁸⁵ Landerkin & Pirie, *supra* note 25 at 271-2, relying on:
 - C. Menkel-Meadow, "Dispute Resolution: The Periphery Becomes the Core" (1986) 69 *Jud.* 300, as to the “misnomer”; and
 - Goldberg, Sander and Rogers *supra* note 33 (2nd ed.) at 8, as to the motivations, most of which I observe are also the motivations for JDR.

¹⁸⁶ Landerkin & Pirie, *supra* note 25 at 250, and, see in detail, 252-62.
 Note that the concept of ADR itself is neither new or modern, but can be traced to community resolution going back centuries - see, *inter alia*:
 - Singer, *supra* note 42 at 5-6;
 - Otis & Reiter, *supra* note 7 at 356, footnote 17;
 - MacCoun, Lind and Tyler, *supra* note 49 at 102 - going back anthropologically to medieval times or before;
 - Baer, *supra* note 52 at 131, relying on: Singer, *supra* note 42, and Michael T. Colatrella, Jr., “Court-Performed Mediation in the People’s Republic of China: A Proposed Model to Improve the United States Federal District Courts’ Mediation Programs” (2000) 15 *Ohio St. J. on Disp. Resol.* 391. Baer notes that the concept of ADR has existed in some form in the United States “for centuries” and in China “since ancient times” - thus, care must be taken in anchoring an argument for adjudication as the sole legitimate method of judicial dispute resolution, when the literature also suggests that mediation skills predated adjudication in the formal sense (see Smith, *supra* note 13 at 6-7, referencing Judith Resnik, “Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes are at Risk” [2006] *Chicago-Kent Law Review* 81, at 106); and
 - undoubtedly others.

... saw benefits in making ADR less an alternative and more an integral component of their systems and functions. Despite the name and the criticisms it conjured up, ADR shared considerable common ground with the courts. Both ADR and the courts were concerned with disputes, how these disputes could be resolved fairly and effectively, particularly those that were the most pressing, and what would help or hinder these resolutions. ADR practices, goals, and ideology, much like mediation, were not necessarily mutually exclusive from the workings and interests of the legal profession or the formal justice system.¹⁸⁷

Thus, JDR became the official label or brand for the Court's new dispute resolution program, as more of a matter of selecting an appropriate name, than creating a new concept. The process of setting it up was very straight forward - there was no detailed development plan as with the Alberta Edmonton Provincial Family Court JDR program that followed very successfully, but with a very narrow focus, 4 years later, as described by Goss¹⁸⁸. Simply put, the concept was to have the Court's justices given assignments to act as neutrals, instead of civil trial justices¹⁸⁹, to apply various prescribed ADR methods *within* the life of a litigated action, at the voluntary request and agreement of all parties to the action - usually close to trial. The JDR Guidelines¹⁹⁰ set out the terms. Indeed, after a lot of internal soul (and, perhaps, "sole") searching at the Court¹⁹¹, it adopted the

¹⁸⁷ Landerkin & Pirie, *supra* note 25 at 272.

¹⁸⁸ Goss, "Judicial", *supra* note 68.

¹⁸⁹ In this way, like the Provincial Court JDR program, there was "no additional funding required ... as we [too] used existing resources which ... involved primarily reallocating judicial ... resources": *ibid*, at 513.

¹⁹⁰ "Guidelines for Judicial Dispute Resolution", June 14, 1996, *Consolidated Notices to the Profession*, September 15, 2004, Part E, Item 1, found in *Alberta Rules of Court*, at 1.0.19 and <<http://www.albertacourts.ab.ca/CourtofQueensBench/tabid/69/Default.aspx>>, and at attached hereto as Appendix 7 [Guidelines]. While he seems to be following a set of guidelines different from the official Court "Guidelines", for some useful comments on the substance, see Agrios, *supra* note 12 at 10-15.

¹⁹¹ And some good natured tongue-in-cheek fun by some judicial participants - who came up with names and acronyms such as: J.A.W.S. (Judges' Alternative

term Judicial Dispute Resolution (JDR). The term “JDR” was then being used for a similar purpose in the United States¹⁹², to signify that it was an alternative to the then normative judicial adjudication process, but very much a part of the judicial handling of actions within the Court - therefore, a service adjacent and ancillary to the judicial adjudication system - thus Judicial Dispute Resolution, or JDR.

Why was the term “judicial settlement conference” not used instead of “judicial dispute resolution”? It could have been, with the same result, but it was not. The term selected by the Court for the program was the JDR Program. Moreover, it was (and is) not, except in the broadest terms, a “settlement conference”. That term, although the terminology is not always pure, is usually used to refer to one aspect of a pre-trial conference (PTC). That is the case, as I understand it, in the Court of Queen’s Bench of Saskatchewan, whereas the Alberta JDR Program was never apart of PTCs. Rather they were entirely separate processes, with PTCs related strictly to the preparation for and identification of the issues and procedures to be used in adjudication at trial (thus “pre-trial”), on the one hand, and settlement on the other hand. Indeed, in a PTC in the Court the most that is normally done by the PTC justice would be to see if the parties and/or their counsel had tried to negotiate a settlement and if not, why not, and then to enquire if they had thought of a private mediation or a JDR, and if interested (by consent) in the latter they should contact the trial coordinator to book one with another justice on a timely basis before the scheduled trial.

Woodshedding Service); D.I.P.P.Y. (Disposition Intervention Procedure, for which the judges performing same would become “D.I.P.S.”); and some more colourful examples. Moreover, while a part of the discussion, there is little or no truth (again, I say, tongue-in-cheek) to the rumour that it was short for my initials.

¹⁹²

Landerkin & Pirie, *supra* note 25 at 251 (footnote 3) claim that the term “JDR” was “coined” in Alberta - which may be so, but I believe I was the first (or one of the first) members of our Court to find the name, in 1996 - and it was from the United States. If the Provincial Court of Alberta coined it earlier as Landerkin & Pirie intimate - I say in mock challenge - I will need evidence.

While some of the Court's justices have continued - and some still continue - and prefer, to use the term "settlement conference", it is not a settlement conference in purpose or name - it is a JDR. Yet there are justices of our Court that suggest (or imply) that the use of the term "judicial dispute resolution", or the acronym "JDR", or the phrase "judicial mediation" (on which I will elaborate, *infra*), or anything other than "settlement conference", to describe what JDR justices do is sacrilege. There are a couple of reasons for this. First, part of the reason is that the discussion *about* settlement efforts (as set out *supra* - not settlement discussions) was and continues to be part of the pre-trial conference process that Smith advised started in Alberta in 1969¹⁹³. Second, while the Court was feeling its way, with fears of jurisdictional limitations, there was a wish to tie the role to that aspect - the settlement aspect - of pre-trial conferences. That history and original reasoning and motivation is legitimate, but the collective will of the Court in adopting the JDR "banner"¹⁹⁴ showed that the leadership and majority of the Court put aside these baseless fears and moved forward. Now, especially with jurisdiction firmed-up, there is no reason to retreat. These same considerations apply, historically and motivationally, and in the result, not only to the term "judicial dispute resolution", and the acronym "JDR", but also to the use of the phrase "judicial mediation", instead of "judicial settlement conference". Thus, in a very broad sense, do justices of the Court do judicial settlement conferences? The answer is "definitely", but we also do mini-trials, and judicial mediations - facilitative mediation and evaluative mediation, and, yes, even Binding JDRs, and we call them all JDRs.

Similarly, as I will discuss in more detail *infra*, I disagree with the assertions that "[j]udges are not mediators, nor should they become

¹⁹³ Smith, *supra* note 13 at 5.

¹⁹⁴ *Ibid.*

mediators”¹⁹⁵. Those assertions are clearly true in any private context or in relation to any dispute that is not the subject of an action before the Court (because for those justices have no jurisdiction). However, in relation to the settlement of actions commenced in the Court, I believe, for reasons to be developed *infra*, that justices of the Court may, and as the legitimate need arises should, act as “judicial mediators”.

I say “with jurisdiction firmed-up”, but, notwithstanding that this Evaluation Report is not here to prove jurisdiction to the Court to do JDR - indeed, it goes beyond that - I should state the initial basis for this conclusion. It is, *inter alia*, *Reference re Succession of Quebec*, [1998] 2 S.C.R. 217, of which Dr. Graeme A. Barry, in 1999, stated:

... the Supreme Court of Canada stated that the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may confer on the courts legal functions other than strictly judicial functions. Thus provincial superior court judges may act as mediators.¹⁹⁶

Since then, the Alberta Court of Appeal has also confirmed the authority of the Court to do mediation - even, binding mediation, or Binding JDR¹⁹⁷.

Barry, however, added:

A more explicit conferral of authority in relation to court-annexed mediation would be preferable. In a process governed by the rule of law, personal confidence in the abilities of those who presently

¹⁹⁵ Smith, *supra* note 13 at 14. Agrios, *supra* note 12 at 31.

¹⁹⁶ Barry, *supra* note 11 at 1-2.

¹⁹⁷ *J.W. Abernethy Management & Consulting Ltd. v. 705589 Alberta Ltd.*, 2005 ABCA 103, 367 A.R. 38, 44 Alta. L.R. (4th) 24, 253 D.L.R. (4th) 472, [2005] 9 W.W.R. 453, 27 Admin. L.R. (4th) 153, 11 C.P.C. (6th) 155, 138 A.C.W.S. (3d) 664, 2005 CarswellAlta 451, [2005] A.J. No. 370 [*Abernethy* (C.A.)], affirming 2004 ABQB 312, 25 Alta. L.R. (4th) 326.

administer the system is not a sufficient substitute for explicit rules which inform the participants.¹⁹⁸

The latter reassurance is proposed to be included in the New Rules, at NR 4.17-4.21 (Appendix 7, *infra*). However, he arrived at this principal conclusion, notwithstanding the earlier recognition that the remarks of Former Chief Justice Dickson¹⁹⁹ dealing with “principles of fundamental justice which underlie our judicial system” included the comments:

... principles are not merely institutional practices, but constitutional values which emanate from the rule of law. The impartiality, independence, separation of powers, and core jurisdiction of the provincial superior courts must be considered in relation to the interaction of ADR methods with the judicial system.

Notwithstanding Barry’s robust assertion of jurisdiction, he went on to admonish that jurisdiction could be lost in an individual case if care is not taken (a matter to which I will return), but concluded that “[i]f designed carefully, the improvements to the civil justice system which ADR promises may be secured without diminishing judicial constitutional values”. He later added, in concluding his paper:

The challenge which ADR poses is to discern how it will affect judicial constitutional values, and how judicial supervision of ADR will influence ADR's processes. If this issue of interaction is carefully considered, ADR can contribute significantly to the effectiveness of the civil justice system as it operates from its position in the shadow of the rule of law.²⁰⁰

¹⁹⁸ Barry, *supra* note 11 at 5, referencing Bernard Schwartz, "Fashioning an Administrative Law System" (1988) 37 U.N.B.L.J. 59, at 66-67.

¹⁹⁹ Dickson, *supra* note 14 at 234 and 241-2.

²⁰⁰ Barry, *supra* note 11 at 8.
It is important to be careful with the use of the term “ADR” in this context and in the context of “judicial supervision”, because, as noted *supra*, many systems have the judiciary supervising private or court-employed non-judicial neutrals, whereas our Court at this time does none of that, but uses only judicial neutrals, except for staff JDR scheduling and coordination functions. This must be kept in mind for all such references in this Evaluation Report.

I believe that this has been done in the Court's JDR Program, and it is now the responsibility of the Court, individually and collectively, to maintain this jurisdiction in a way that is positive to disputants.

For these reasons, in this Evaluation Report, I will use the term "adr" or "ADR" to mean an alternative to "traditional litigation"²⁰¹ - that is, any process that involves a judicial officer²⁰² in resolving a dispute, whether in litigation or not. Correspondingly I will use "jdr" or "JDR" to mean any process that involves a justice, or judicial officer, in resolving a dispute, after litigation has commenced in an action before the Court (thereby invoking the jurisdiction of the Court to do a JDR with the parties' consent²⁰³), that is different from a "pure adjudication" - thus, a "Binding JDR" is a form of JDR. "JDR" unless otherwise defined will be used to refer to the Court of Queen's Bench of Alberta's "JDR Program".

Landerkin and Pirie discuss²⁰⁴ the origins of "ADR influence on the courts" and the confluence of it and JDR, pointing to the 1976 Pound Conference²⁰⁵ as,

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- ²⁰¹ Thus, the same way as defined by my former "judicial cousin" on the Ontario Court of Justice (General Division), now a highly respected private mediator - Adams & Bussin, *supra* note 43 at 133.
- ²⁰² I use the term "judicial officer", because while JDR (as defined herein) now involves only the Court's Justices, it is possible in the future, that Masters, or Case Management Officers, or some other "judicial official", could have a JDR role.
- ²⁰³ While perhaps trite, consent is a necessary part of JDR - as recognized by Smith, *supra* note 13 at 10. Under the new rules, while some form of dispute resolution will be mandatory before trial, consent will still be necessary to choose JDR as the method.
- ²⁰⁴ Landerkin & Pirie, *supra* note 25 at 272-6, referencing, *inter alia*, Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) at 15, 18 and 27.
- ²⁰⁵ See the insightful recounting of this history by Singer, *supra* note 42 at 7-8, flowing from the 1906 Pound address - see: R. Pound, "The Causes of Popular Dissatisfaction With the Administration of Justice" (Address to the American Bar Association Annual Meeting, St. Paul, Minn., 1906) reprinted in (1964) 10 *Crime and Delinquency* 366, at 357.

perhaps, the genesis of this process, for achieving dispute resolution, using private or judicial mediators, rather than judicial adjudication only, while arguing that the root causes identified by Pound in 1906 continue to “resonate today”.²⁰⁶ The result has been called, by some, “appropriate dispute resolution” to “eliminate the two solitudes [adjudication and private mediation] ADR could create”. Indeed, by 1996, when the Court’s formal JDR Program was launched, the Canadian Bar Association’s Task Force on Systems of Civil Justice called ADR, excluding trials, “a range of processes for resolving disputes”, “not as alternatives to the civil justice system but as integral components of it”, to create Canada’s own “multi-option civil justice” system, such that “[j]udicial interventions in the trial process of one sort or the other to encourage just, speedy and inexpensive results could fall under the JDR definitional umbrella”.

Sanchez, *supra* note 36 at 674 said that Pound:

...suggested that the contemporary American legal system should ‘adjust’ its principles, doctrines, and institutions of justice from a purely ‘mechanical,’ rule-centered approach to one that considered ‘the human conditions they are to govern . . . putting the human factor in the central place . . .’ It was a vision that aimed at tempering the ‘ethic of justice’ with an ‘ethic of care’....

referencing Roscoe Pound, “Mechanical Jurisprudence” (1908) 8 Colum. L. Rev. 605, and his 1906 lecture to the American Bar Association pertaining to “[t]he most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules[.]”: Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice”, reprinted in (1937) 20 J. Am. Judicature Soc’y 178, at 179.

Sander, who was there from the beginning, subsequently postulated 3 periods of ADR history - 1975-82 - the “let a thousand flowers bloom” period; 1982-90 - the “cautions and caveats” period (later referenced as the “separating the wheat from the chaff” period); and 1990 - present, the “institutional” period: Sander, “Future”, *supra* note 25 at 4-5.

See also: Sander, “Keep Building ADR”, *supra* note 170 at 9.

206

On the same point and its progression to Canada, and Alberta today, see the good, short, analysis written by Danielson, *supra* note 4 at 26 - 31, where she notes that “[t]he ADR movement is generally credited to the [1976] Roscoe Pound Conference, when members of the American Bar Association called for reform of the civil justice system”.

Since then the alternative aspects of the civil justice systems has been, and continues to be, debated²⁰⁷. As the pendulum swings from adjudication to ADR (sometimes called “litigation lite”²⁰⁸), and now increasingly to JDR, but with the prospect of increased regulation and requirements (some recommended by this Evaluation Report), some worry that the pendulum will start to swing back. The concern is about the return to a form of process more and more “regulated” by the court system - “ADR being institutionalized and transformed into the adversarial adjudicative process in a manner that may limit options for litigants rather than expand them”²⁰⁹.

At the same time, others have argued for some time against the impact of dispute resolution mechanisms other than adjudication - my colleague, Smith, and others come to mind. Smith is correct when she said that, certainly in the Alberta context, “[d]ivergences of opinion exist amongst the members of the judiciary over the role that a judge should fulfill in a settlement conference and the manner in which that function is best delivered”.²¹⁰ However, in my view, in

²⁰⁷ Twenty five years later, Sander stated ‘[w]e have accomplished many impressive things in the twenty-five years since Pound’: Sander, “Ohio Symposium”, *supra* note 38 at 705, referencing his “partial list” in his earlier article, Sander, “Future”, *supra* note 25.

Brazil, in “25 Years After”, did a major review of the accomplishments “in the twenty-five years since Pound, especially at 95-114. For a relatively modern day perspective on the history and where we are at, this is a significantly astute perspective from a highly respected U.S. justice - a “must read”.

²⁰⁸ Landerkin & Pirie, *supra* note 25 at 278, referencing J.M. Sabatino, “ADR as ‘Litigation Lite’: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution” (1998) 47 *Emory L. J.* 1289.

²⁰⁹ Landerkin & Pirie, *supra* note 25 at 276 *et seq.*, referencing:
 - J. Resnick, “Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication” (1995) 10 *Ohio St. J. Disp. Res.* 211, at 261-3; and
 - C. Menkel-Meadow, “The Many Ways of Mediation: The Transformation of Tradition, Ideologies, Paradigms, and Practices” (1995) 11 *Neg. J.* 217 [Menkel-Meadow, “The Many Ways”]; “Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR” (1991) 19 *Ff. St. U. L. Rev.* 1; and “When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals” (1997) 44 *U.C.L.A. L. Rev.* 1871.

²¹⁰ Smith, *supra* note 13 at 5.

our Court, over time, and with experience and training, those divergences of opinion are generally and gradually lessening, or even largely disappearing. I believe that the view of most JDR justices is that they will use all the tools available, combined with judicial best practices in the “craft” and proper judicial conduct (addressed *infra*), to help consenting parties to settle their disputes (and the root causes) short of adjudication, if possible and appropriate, and, their disputes (but *not* the root causes) by adjudication, if not settled.

In the result, Landerkin and Pirie state the issue thus - “[t]he essence of the debate is how can and should ADR and adjudication work, both together [as “co-mingled systems”] and apart”²¹¹, and questions about what should be the parameters of the mix, such as:

... ‘(a) what types of ADR mechanisms or approaches are appropriate for judicial incorporation? (b) what ADR techniques are best left to privatization? (c) what degree of supervision should courts exercise over private ADR? (d) what ADR methods should be tightly regulated, discouraged or even prohibited by the court?’²¹²

Perhaps Stempel best said it all: “[t]he judicial system must adapt and expand its range of services but must retain enough of an adjudicary role to cast the ‘shadow of the law’ that enables ADR settlement to function effectively”²¹³.

²¹¹ Landerkin & Pirie, *supra* note 25 at 278.

²¹² Landerkin & Pirie, *supra* note 25 at 279, quoting Stempel, *supra* note 86 at 302. In framing the debate, Landerkin & Pirie, *supra* note 25 at 277-80 also make reference to:
 - O.M. Fiss, "Against Settlement" (1984), 93 *Yale L.J.* 1073, at 1085;
 - J.M. Sabatino, "ADR as 'Litigation Lite': Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution" (1998) 47 *Emory L. J.* 1289;
 and
 - C. Menkel-Meadow "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR" (1991) 19 *Ff. St. UL.Rev.* 1, at 4-5, where even further questions are raised, as reported by Landerkin & Pirie at 280.

²¹³ Stempel, *supra* note 86 at 308, as reported by Landerkin & Pirie, *supra* note 25 at 280.

Otis and Reiter put it this way, in terms of the classical judicial dispute resolution system:

The principal formal mechanism for resolving legal disputes remains the trial, which employs an adversarial and contradictory procedure that has the effect of juridicizing the conflict. The power of the adjudicative paradigm is such that even other "alternative" modes of dispute resolution draw strength from their position in "the shadow of the law," and the adjudicative norm still colors their disputes, gives urgency to their resolution, and provides at least an implicit threat to keep them on track.²¹⁴

They went on to note the reality that the original classical norm of adjudication to a decision was without judicial regard to the "cause and the resolution of the broader conflict behind the legal dispute"²¹⁵. This is one of the significant realizations that makes mediation principles so important in settling not only the dispute, but its related causes, both matters being those which the judiciary in the Court can now address through the JDR Program.

These are all matters - strengths and challenges - that I will touch on, at least in part, in this Evaluation Report, as I evaluate the future scope of the Court's JDR Program.

2. NEGOTIATION

Negotiation is a broad term. It fits within the spectrum or continuum discussed *supra*²¹⁶ between ignoring and mediating a dispute. It is traditionally used in the context of discussions between the parties to a dispute themselves, and/or with their counsel. Thus, the focus of this Evaluation Report is not

²¹⁴ Otis & Reiter, *supra* note 7 at 358, referencing R.Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979), 88 *Yale Law Journal* 950.

²¹⁵ Otis & Reiter, *supra* note 7 at 359.

²¹⁶ *Supra*, note 173.

negotiation, or the skills or “ethics” associated with it. Nevertheless, because the parties, and their counsel, will also negotiate during a JDR and in the presence of a JDR justice, it is touched on here.

Negotiation is defined as “a process in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement or conflict”²¹⁷. Sometimes counsel or other persons - negotiators - assist the parties in negotiations, but in the normal case there are no other third parties present.

3. MEDIATION

Mediation is a concept that is used where direct negotiations fail.²¹⁸ Moreover, it is a process that is useful, or, put another way, “only works where the parties are prepared to be flexible and seriously consider compromise”²¹⁹.

²¹⁷

Morris, *supra* note 17 at 2.

See also Adams & Bussin, *supra* note 3 at 136, who state, referencing Fisher et al, “Getting to Yes”, *supra* note 115 and several other sources:

Communications in negotiations centre on the search for common ground and compromise. Traditional negotiations, however, involve the incremental change in 'positions' as the primary communicative device. In contrast, more 'principled' negotiations focus on underlying interests and utilize a problem-solving method characterized by brainstorming for outcomes to which both parties can say 'yes'.

To me the phrase “principled negotiations” is significant and I use it in all my JDRs to indicate simply that - negotiations based on the principles of the law (the “shadow of the law”) that relate to parties’ rights and their legitimate interests underlying, relating to, or existing along side, those rights.

Goss, “An Introduction”, *supra* note 29 at 5, adds the perspective that “[e]ach party’s limitations are respected and a party is only expected to make a shift in its approach to the problem if it becomes convinced that it is reasonable to do so”, where, I believe “limitations” means “bottom line”.

²¹⁸

Singer, *supra* note 42 at 20.

See also: Adams & Bussin, *supra* note 3 at 137.

²¹⁹

Tettensor, *supra* note 116 at 3.

There are many authors writing about the definition of “mediation”²²⁰, but in general terms it has a quite generic meaning - in effect, a process where a neutral or impartial third party, without decision making power, tries to help disputants settle their dispute. This definition includes mediation that has either a facilitative (organizational, but also a distinctive role in “assisting the parties in communicating and negotiating more effectively”²²¹) or evaluative (weighing the risks of a decision - the BATNA or WATNA component)²²².

220

See, *inter alia*, Danielson, *supra* note 4 relying on:
 - Kenneth Kressel, “Mediation”, in Morton Duetsch and Peter T. Coleman, *The Handbook of Conflict Resolution, Theory and Practice* (John Wiley & Sons, Inc., San Francisco, 2000), at 522;
 - M. Jerry McHale, Q.C., “Mediation in British Columbia”, in *Negotiating the Future - A National Conference on Court-Annexed Mediation*, November 14-16, 2001, Calgary, AB, Appendix 3, at 12-3; and
 - Cinnie Noble, L. Leslie Dizgun and D. Paul Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery Publications, 1998), at 2.
 See also: Morris, *supra* note 17 at 3, relying on Michelle LeBaron, *Conflict and Culture: A Literature Review and Bibliography*. Revised edition. (Victoria, BC: Institute for Dispute Resolution, University of Victoria, 2001).
 Similarly, see Landerkin & Pirie, *supra* note 25 at 254-5, relying on:
 - J. Macfarlane, “The Mediation Alternative”, in J. Macfarlane, ed. *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications, 1997)[Macfarlane, “Rethinking”], at 2;
 - J. Folberg and A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Litigation* (San Francisco: Jossey-Bass, 1984), at 7;
 - C. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (San Francisco: Jossey-Bass, 1996), at 15 (note that there are later editions in 1999 and 2003); and
 - H. Astor and C. Chinkin, *Dispute Resolution in Australia* (Sydney: Butterworths, 1992), at 61.
 See also Singer, *supra* note 42 at 20-5.
 There are, undoubtedly, many others.

221

Goss, “An Introduction”, *supra* note 29 at 5.

222

Relatively recently, Sander expressed concern about the issue of terminology: “I’m concerned about the internal struggles that are developing within the mediation community about what mediation is or what it is not. For example, there is the debate about evaluative versus facilitative mediation...”: Sander, “Future”, *supra* note 25 at 7.

It is important to understand - indeed, the concept is much of the basis for the debate, *infra*, on judicial conduct - that, in addition to its normal meaning, the word “impartial” has a special meaning in a judicial context:

Independence and impartiality are normative requirements of judicial adjudication. Independence and its corollary, the separation of powers, deal with the relationship of the judiciary both individually and institutionally with others, whereas impartiality refers to an unbiased state of mind. Although judicial independence is a distinct value from judicial impartiality, it is intended to be a cornerstone in promoting a reasonable public perception of impartiality. ... it is imperative that the judiciary possess a high level of independence and impartiality because adjudication²²³ is a form of third party conflict resolution, and a judge must be a genuine third party. Justice could not be done and public confidence in the process could not survive if the judges were allied with certain parties involved in disputes. Ultimately, the dominant purpose of judicial impartiality, independence, and separation of powers is to enhance the citizen's confidence that a judge will hear and decide a case free of governmental or private pressures in accordance with the law.²²⁴

Morris states that evaluative mediation provides “suggestions or recommendations” and that “[e]valuative, right-based mediation processes are similar to adjudicative processes such as non-binding arbitration”²²⁵.

Evaluative mediation includes things such as “substance-orientated mediation”, or “rules-centred mediation” or “rights-based mediation”, where the mediator “focuses on the substantive issues of the dispute and then defines the

²²³ And, I would add “- and mediation, too -”.

²²⁴ Barry, *supra* note 11 at 2, referencing *R. v. Lippe*, [1991] 2 S.C.R., at 139-40, and Garry D. Watson, “The Judge and Court Administration” in Allen Linden, ed., *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, York University, 1976) 163 at 183. In addition to “hear and decide”, I would add “or mediate, or opine upon”.

²²⁵ Morris, *supra* note 17 at 3. See also Yarn, *supra* note 17.

rights of a party within those issues” - or tries to help to do so, usually with a court adjudication as the benchmark.²²⁶

“Conciliation”, broadly speaking, is a form of mediation. Morris had this to say about it:

Many authors distinguish carefully between ‘mediation’ and ‘conciliation’, but there is no universal consensus as to precise definitions of each of these terms. The term ‘conciliation’ has often been used interchangeably with ‘mediation’. In Canada, the term ‘conciliation’ generally refers to a process of dispute resolution in which ‘parties in dispute usually are not present in the same room. The conciliator communicates with each side separately using ‘shuttle diplomacy’. The term ‘mediation’, by contrast, is generally used in Canada to describe third-party intervention in which the parties negotiate face to face. The distinction between ‘mediation’ and ‘conciliation’ often breaks down, since in ‘mediation’ separate caucuses are often held with the parties, whereas in ‘conciliation’ some face-to-face meetings may be held....²²⁷

QB JDR justices usually don’t use the term “conciliation²²⁸” but often employ a combination of all three of “face to face” (or joint session), caucusing and “shuttle diplomacy”, often in the same JDR. I will discuss caucusing in greater detail *infra*, but should touch on “shuttle diplomacy” now. In my experience, JDR justices use this technique in a number of situations, including where: the parties have sufficient animosity one to another (occasionally including security risks or power imbalances) that settlement is better (only?) able to be achieved with the parties in separate break-out rooms and the mediator being the “shuttle diplomat”; in the view of the party and/or his/her

²²⁶ Danielson, *supra* note 4 at 40, referencing M. Jerry McHale, Q.C., “Mediation in British Columbia”, in *Negotiating the Future - A National Conference on Court-Annexed Mediation*, November 14-16, 2001, Calgary, AB, Appendix 3, at 12-3.

²²⁷ Morris, *supra* note 17 at 2 - 3.

²²⁸ See Smith, *supra* note 13 at 14, in discussing “conciliation”, as used in Quebec (at least as to “evidentiary problems”, and, as to its meaning and usage, referencing Otis & Reiter, *supra* note 7).

counsel, the mediator may be able to communicate an offer better than a party or their counsel if the parties are caucusing separately (perhaps allowing a party to save face in a concession and/or allowing the mediator to put an offer in its best light or with less adversarialism, etc.)²²⁹; and, again at request and with consent, sometimes the mediator can “try a proposal on” another party when there is no formal offer, but there is a need to “feel out” the other side’s position. The number of situations is not limited to these.

Returning to discussing “mediation” more directly, in my view, words used to describe what JDR justices do in a JDR should be descriptive of the activity, not prescribed by some pre-determined, and, often in my opinion, wrong view or bias, recognizing that there may be more than one term or phrase to describe an activity.

There are different types of mediation styles or what Landerkin and Pirie call the “core or essential” mediation ideology²³⁰, most of which, for purposes relevant to this Evaluation Report, are forms of facilitative and/or evaluative mediation²³¹. In this regard, the authors end the theoretical discussion on what is

²²⁹ However, while trite, to be clear, communicating offers should never be done by the neutral, except at the request, and with the consent, of the party and their counsel.

²³⁰ Landerkin & Pirie, *supra* note 25 at 258-61, quoting extensively from:
 - Menkel-Meadow, “The Many Ways” *supra* note 209 at 228-30; and
 - R.A .B . Bush & J. Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994); and referencing
 - L.R. Riskin, "Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed" (1996) 7 Harv. Negotiation L. Rev. 23.

²³¹ See Smith’s discussion on the subject (Smith, *supra* note 13 at 17-9), referencing C. Menkel-Meadows *supra* note 209 at 259. Note that “evaluative mediation” could be used to refer to either information or possible resolution provided by a judicial or non-judicial mediator, or an opinion (non-binding) provided by a judicial mediator.
 On the subject of evaluative mediation, Smith also referenced Baer, *supra* note 52.

“modern mediation” by talking about these two types of mediation and mediation in general:

Different core or ideological understandings of mediation naturally yield very different results. For example, if mediation is understood, at a philosophical level, as essentially a facilitative process and a valuing of consensus, a mediator's practices (skills, underlying theories, techniques) would vary from a mediator who strongly believes that an assertive evaluative approach generally works best. ... It is only as more ideological details are added, that the day-to-day reality of a mediation becomes clear. It is mediation's core or essential meaning that determines best practices, achievable goals, and other mediation attributes . Because no singularly correct ideology exists, there is ample scope for many iterations in how mediation is presented and understood.²³²

Before moving on, we should stop to focus on the broader picture - what is the goal of mediation? What are we trying to accomplish? When we review the Survey results, what will we hope to have accomplished? Brazil reported their U.S. experience which, I believe, is not really different from what the Survey demonstrates:

... over time we began to absorb and be moved by the broader, richer spirit that has informed much of the mediation movement. We began to see that parties in our court could use mediation to pursue a much wider range of values than they could pursue effectively through litigation.... We began to appreciate that mediation was a far superior tool for certain kinds of communication..., for giving appropriate play to emotion, for repairing a person's sense of self, for preserving old relationships or forging new ones, and for encouraging parties to be more open to accepting responsibility for their present circumstances and for how to improve them.

As important, we came to understand that offering mediation democratized our institution in potentially profound ways because mediation permitted, in fact actively encouraged, the parties to

²³²

Landerkin & Pirie, *supra* note 25 at 260-1.

decide for themselves which values were most important to them, then to use ADR to pursue those values.²³³

a. FACILITATIVE MEDIATION

Facilitative mediation, or facilitation, provides only process assistance for the parties to negotiate, usually using primarily interest based mediation. Morris defines “facilitation” as “a process by which a third party helps to coordinate the activities of a group, acts as a process facilitator during meetings, or helps a group prevent or manage tension and move productively toward decisions”, and says that facilitation “tends to foster the avoidance of mediator recommendations or suggestions in order to preserve mediator neutrality and to encourage party control of outcomes”, although she concedes that it “can be placed on a continuum from simple group coordination and meeting management to intensive multi-party dispute mediation”²³⁴. While I believe all JDR justices who provide any JDR services, other than a “pure” mini-trial, use facilitative mediation principles²³⁵, I believe few QB JDR justices use this type of mediation *solely*. Rather, many - indeed, most JDR justices, in my understanding - use it along with evaluative techniques. However, paradoxically, Smith and at least one other colleague, argue that a JDR justice should not do the former but only the latter, on the basis that only private mediators do the former. I reject that view, for two reasons: first, the term “facilitative mediation” or “mediation” alone, is merely descriptive and not reflective of the rights/interests dichotomy. Second, even if

²³³ Brazil, “25 Years After”, *supra* note 14 at 110.

²³⁴ Morris, *supra* note 17 at 3 - 4.

²³⁵ As to “pure” versus “impure” or hybrid mini-trials, see the discussion by Agrios, *supra* note 12 at 24. I say a “pure” mini-trial, because, if it is not “pure” - that is, if it is a hybrid - my experience in Calgary after 1996 has been that negotiations and judicial facilitated (and/or evaluative) mediation often take place following a mini-trial opinion. This is, indirectly, apparent as seen in an early LESA paper on the subject, which stated that, at the end of a mini-trial there was “the possibility of settlement negotiations resuming immediately after the judge renders the opinion”: Tettensor, *supra* note 116 at 4.

s/he were to reference only (related) interest based principles, there is no reason why a JDR justice should not engage in same - indeed, in my view, should be open to do so - provided that those interests have a relationship to the dispute that is being litigated.

Thus, as to facilitative mediation alone²³⁶, it primarily provides organization and communication assistance to the disputants. In a private ADR with a non-judicial neutral, especially where there is no existing litigation commenced, the emphasis is more often on interests, rather than rights. Where litigation has been commenced, facilitative mediation, whether with a private ADR or a judicial JDR “neutral”, rights are usually very much on the table. Nevertheless, in a pure sense, neither advice, nor evaluation, nor opinions, are provided about rights or positions with a solely facilitative mediation. To the pure facilitative mediator, evaluative mediation is an oxymoron, and “facilitative mediation” is redundant, because all mediation is facilitative²³⁷. Thus, facilitative mediation is often - usually - the only role that a private mediator can play, because often they do not have the expertise (actual, perceived, or consented to) to provide an evaluation or opinion. The Court’s justices, however, have (or are perceived to have) that expertise, and if they have obtained facilitative training, they can, with the consent of the parties, provide both facilitative and evaluative mediation. Indeed, it is noted that a strong view of the motivation for a JDR, as seen in the Survey results, was to get the evaluation of the JDR justice. Thus, in my view, whatever they call it, most JDR justices provide a combination of both facilitative and

²³⁶ See also Danielson, *supra* note 4 at 43-8. However, I should register my disagreement with her (at 44 and 45), at least in the JDR sense, that facilitative mediation, unlike evaluative mediation, is focused with “the emphasis ... on the process, not the result”. While there may be more focus on process in the former, in my experience, the real motivation in each, in a JDR, is settlement of the dispute.

²³⁷ Danielson, *supra* note 4 at 45, referencing Kimberlee K. Kovach and Lela P. Love, “Evaluative Mediation is an Oxymoron” (1996) 14 *Alternatives to High Cost Litigation* 31.

evaluative processes, which, again in my view, makes it a *judicial* facilitative/evaluative mediation, or, simply a “*judicial* mediation”.

Conversely, while a number of JDR justices purport to do evaluative mediation alone - particularly some Edmonton justices it seems - it does not mean that they do not use facilitative mediation processes. Rather it seems to mean - going back to the interest/rights dichotomy - that they do not consider interests, but only rights. Again, however, with what I believe to a wrong use of the terminology, I believe most QB JDR justices do use a form of evaluative mediation, along with facilitative mediation, as the former is a style that provides suggestions and recommendations, and the latter is merely a process that aids negotiation. Put another way, for those JDR justices that do not want to mediate interests, but only rights, they should say, correctly, I use facilitative and evaluation mediation techniques, but I do not mediate interests, I only mediate rights. Here too, however, they feel they cannot use the term “mediation” because, again wrongly in my view, they define that to refer to interests only, never rights. I believe that it can be either or both.

b. EVALUATIVE MEDIATION

Danielson discusses evaluative mediation at some length, and specifically addresses the judicial aspect of evaluative mediation, correctly in my view:

In evaluative mediation, the expertise, education and knowledge of the mediator becomes a powerful resource to the parties. When the mediator is a member of the judiciary, participants assume that they have the requisite specialized knowledge that they are seeking, plus the ability to give a credible assessment about probable and fair outcome were the matter to proceed to trial.

...

Many litigants select a JDR specifically for the availability of the evaluative approach²³⁸. Lawyers trained in civil litigation are comfortable with a rules or rights-based analysis. ... 'It provides a relatively inexpensive evaluation of the legal case, by a respected jurist of their choice. They can achieve this at the time of their choosing, and without the time constraints of a pre-trial or the evidentiary constraints of a trial'.²³⁹

Danielson also adds a comment which focuses on some parties who have no ongoing relationship interests (such as insurance cases), who seem to focus on rights rather than interests (the Survey data would seem to suggest that this is the case in some Edmonton JDRs, at least) and, in my view, some justices - such as Smith - who prefer the rights-based, rather than, or in priority to, the interest-based (or both) approach(es):

Participants who are given the choice of the type of mediator, will choose the evaluator when they desire the opportunity to assess their positions anew, with the advantage of a fresh, impartial critique of their case. These individuals will not reach agreement without having considered legal rights as part of the decision-making process. When the evaluative approach is applied within the JDR, individuals who wish to resolve their dispute within a 'rights-based analysis', are given the opportunity to have their dispute analyzed by a judge on the basis of the legal concepts of fairness. For many litigants, the rule of law is the predominant interest, and the concept of fair treatment is integrally aligned with

²³⁸ The Survey results suggest this is a high motivational component of selecting JDR. Indeed, this is not surprising, because as early as 1985, Brazil reports that of a survey response of almost 1,900 lawyers in 4 areas of the U.S. ... one of the most revealing questions in the survey ... about the most successful settlement facilitator ... [t]he factor cited far and away the most often is willingness to express an opinion, to comment specifically on the strengths or weaknesses of evidence or arguments, or to offer a valuation of the case ... expression of informed opinion.

This was the case with "especially positive feelings about the usefulness" of such an opinion in private caucus: Wayne D. Brazil, "What Lawyers Want From Judges in the Settlement Arena" (1985) 106 F.R.D. 85 [Brazil, "What Lawyers Want"], at 86-7. This is proven by the Survey.

²³⁹ Danielson, *supra* note 4 at 41-2, as part of her discussion at 41-3, relying on Cinnie Noble, L. Leslie Dizgun and D. Paul Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery Publications, 1998), at 8.

a rights-based analysis. *Their legal rights are their interests.* The determination of the merits of each side’s position and the prediction of likely Court outcome helps to establish the fair and right parameters for a just settlement. [Emphasis added.]²⁴⁰

Brazil argues against an evaluation only mediation style, as advocated by Smith, because he says “[t]he capacity to tap the potential of non-evaluative mediation processes would be lost if court programs encouraged or recognized only forms of mediation with a substantial evaluative component”²⁴¹.

This discussion raises the issue of choice of JDR justice for those seeking one or other (or both) alternatives. I note that the evaluation of the Ontario trial court’s mandatory adr program²⁴² recommended that “some element of party choice of mediator should be built into the future provision of ADR services”²⁴³. That recommendation is not required here (except to maintain it) as it is already a part of the Court’s JDR system - and an important one to the parties, as seen in sections L3-5 of the Survey. However, to be meaningful the parties need to know the JDR justice accepted practices in this regard - for that reason I recommend the use of JDR Justice Profiles, as more fully discussed and recommended *infra*, a sample of which is provided in Appendix 8.

c. FACILITATIVE/EVALUATIVE MEDIATION HYBRID

A comparison of mediation to evaluation is often difficult, because many of us JDR justices use both facilitative and, if the parties wish, evaluative,

²⁴⁰ Danielson, *supra* note 4 at 42 [Emphasis added].

²⁴¹ Brazil, “25 Years After”, *supra* note 14 at 144.

²⁴² Bussin, *supra* note 5 at 466, referencing Julie Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Toronto: Ontario Ministry of the Attorney General, 1995).

²⁴³ Bussin, *supra* note 5 at 468.

mediation together. Sander relatively recently lamented that there is a “paucity of hard data concerning the impact on parties and disputes of different styles of mediation (e.g. ‘evaluative’ v. ‘facilitative’...)”²⁴⁴. The Survey now provides some evidence on that point - from the integrated analysis of section E1 of the Lawyers’ Survey (see Mediation/Evaluation Analysis - Table 6.7). This data indicates that of those who used mediation: those involved in “pure” mediation were 20% in Calgary, 10% in Edmonton and 29% in Lethbridge; those involved in evaluative mediation were 57% in Calgary, 67% in Edmonton, and 59% in Lethbridge; with the hybrid numbers being 22% in each of the two larger cities, and 12% in Lethbridge.

In the result, I believe that Danielson’s perception is generally correct on two fronts. First, she provides a justification for any emphasis on evaluation:

... it is reasonable that Justices would align their personal goals with that of the Court – settlement and removal of the litigation from the trial list. Indeed, with such external influences affecting goals of settlement, it is difficult for a Justice to be purely facilitative during a JDR.²⁴⁵

Nevertheless, not wishing to provide an evaluation unless sought, I have often done JDRs without providing an evaluation.

Next Danielson postulated fewer differences than believed:

Interviews confirmed the impression of the writer that there were fewer differences between Edmonton and Calgary than believed. Justices in both cities described a type of risk assessment, which is evaluative. Justices in both cities described the use of positive communication techniques, which could be properly described as facilitative methods.²⁴⁶

²⁴⁴ Sander, “Ohio Symposium”, *supra* note 38 at 707, footnote 6.

²⁴⁵ Danielson, *supra* note 4 at 47.

²⁴⁶ *Ibid*, although, at 71, she noted that “there are certain distinct practices unique to a small number of Justices of the Edmonton Court...”.

The Survey data proves that she is correct only as to the Edmonton emphasis on evaluation, meaning a focus on rights, although I believe she is incorrect on her perception that there are few other differences in process between the two major cities. As the Survey results prove, and her research did not pick up, the use of mini-trials predominate in Edmonton, but are rare in Calgary.

While encroaching on my discussion *infra*, I should note here that Morris states that “[e]valuative, rights-based mediation processes are similar to adjudicative processes such as non-binding arbitration”²⁴⁷. Menkel-Meadow defines it as “a hybrid of mediation and arbitration where the solution remains technically in the hands of the parties but the mediator provides information on legal ... outcomes...”²⁴⁸. These concepts do not apply to the Court (although the results may be similar), because the Court does not do arbitration at all - indeed, there is a specific statutory prohibition against in, except in special circumstances²⁴⁹. Rather, the only binding role that QB justices do is adjudication. Accordingly, QB justices do not do “non-binding arbitration” *per se*, which seems as much an oxymoron as a “Binding JDR”, which, in the context of the Court’s JDR Program, means non-binding mediation to settlement, if possible, followed by binding adjudication (Binding JDR “opinion”, or Binding JDR “decision”²⁵⁰, to the extent that the latter was or may become legally

See the discussion on risk assessment by Agrios, *supra* note 12 at 46-8.

²⁴⁷ Morris, *supra* note 17 at 3, referencing Ellen A. Waldman in two articles: “Identifying the Role of Social Norms in Mediation: A Multiple Model Approach” (1997) 48 *Hastings Law Journal* 703-769; and “The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence” (1998) 82 *Marquette Law Review* 155 - 170.

²⁴⁸ Menkel-Meadow, “The Many Ways” *supra* note 209 at 228-30, as related by Landerkin & Pirie, *supra* note 25 at 258.

²⁴⁹ S. 56(1) of the *Judges Act*, R.S.C. 1985, c. J-1 - see *Abernethy (C.A.)*, *supra* note 197 at paras. 15-23.

²⁵⁰ For clarity, I should make clear that I use the terms Binding JDR “opinion” and Binding JDR “decision” as set out and defined in the List of Symbols,

possible - see *infra*), if settlement is not possible, which some of the Court's justices do²⁵¹. This process is usually defined in the literature as mediation-arbitration or med-arb (or in the Court's case "med-adj"). The closest that QB comes to "non-binding arbitration" or "non-binding adjudication" is a mini-trial opinion, discussed *infra*.

Brazil argues against facilitative/evaluative hybrids, trying to separate the two - so that the focus is on either rights based, or interest based, not both at once²⁵². This seems to support the Smith argument that judges should be restricted to the first and private mediators should be restricted to the second. In one of the few areas where I disagree with Brazil, I see no reason why, if the neutral has the skills, both rights and interests should not be examined. That provides the reality that, absent settlement, rights alone will be adjudicated, but at the same time interests can be used to try to achieve a meaningful settlement. A focus on evaluation only, leaves the equation without an essential piece. Moreover, it may be that private mediators focus only on interest based, facilitative mediation because they do not have the expertise, and/or do not wish to take the risk to provide evaluations, and can concentrate on interest based settlements alone. That does not mean that judges cannot acquire mediation skills to seek out relevant interests, while, at the same time, using their expertise to provide evaluations in a proper manner, with the protection of this being part of the now normative judicial function.

Morris identifies other styles of mediation in the context of the role the mediator plays - the "activist", an interventionist role to make sure parties are represented and "power balances are addressed"; the "transformative",

Nomenclature or Abbreviations (*supra*).

²⁵¹ See Smith, *supra* note 13 at 17.

²⁵² Brazil, "Continuing", *supra* note 14 at 34-5, and "25 Years After", *supra* note 14 at 143-5.

concentrating on building future relationships; and the “narrative”, a joint participant to create future opportunities²⁵³. QB JDR justices, while not in any way or sense representing parties, try to prevent power imbalances - indeed, have a duty (although conflicting, in theory, with their “impartiality”, as we shall see *infra*) to do so. They may also have a small part in the other two where interest based issues are very active, but, I believe it is relatively rare or minimal. Their concentration is a settlement of the existing dispute, more that forging new relationships for the future. To the extent that such an interest assists in the settlement and/or prevents further litigation, they will engage it, but that is not the primary role. While also concentrating on settlement, such a primary relationship building role is more commonly left, in my experience, to private mediators - often those with a particular expertise in the area of the dispute. To the extent that there is a choice between private and judicial mediation, “the market place becomes the final arbiter of what is best in a given case”²⁵⁴.

Landerkin and Pirie discussed the “Modern Meaning of Mediation” in much detail - noting that the base concept is not modern²⁵⁵, and that mediation “enjoys widespread popularity” in Canada, recognizing that modern mediation “has evolved from a bold, innovative challenge to conventional methods of decision making and dispute resolution to a more professionalized and institutionalized practice”²⁵⁶. In general, with some exceptions that follow, I shall allow the reader here to become the reader there. They said that “mediation [amounts] to a major part of the JDR makeup” and note that the “flexibility in the practices, goals and understandings associated with modern mediation means a

²⁵³ Morris, *supra* note 17 at 3.
See also: Menkel-Meadow, “The Many Ways” *supra* note 209 at 228-30, as related by Landerkin & Pirie, *supra* note 25 at 258-9.

²⁵⁴ Landerkin, “Conflict” *supra* note 66 at 8.

²⁵⁵ Landerkin & Pirie, *supra* note 25 at 252-3.

²⁵⁶ *Ibid*, at 253, quoting from Menkel-Meadow, “The Many Ways” *supra* note 209.

similar versatility exists for utilization by the judicial mediator²⁵⁷. They note, that: at its most, mediation means “some type of third party neutral helping disputes settle²⁵⁸; the parties, not an adjudicator or arbitrator, have the opportunity to exercise the decision making power; the result is “more enduring agreements, economic efficiencies and ... preservation of relationships²⁵⁹; and that “mediation exhibits high degrees of variability and indeterminacy regarding procedures, goals being pursued, and ultimately core meaning”, leading to a discussion on mediation procedures²⁶⁰.

As to mediation procedures, Landerkin and Pirie noted that there are many different ones depending on the setting (e.g. employment, commercial, contract, tort, family, etc.) and the legal nature of the issues and the parties. These procedures may include one or more of “shuttle”, face-to-face (joint session) or caucusing mediation. Each may use different techniques - such as behavior modification, active listening, brainstorming, reframing, “narrowing the gap”, open or closed²⁶¹ questioning, emotion “capped or explored”, time limited (sometimes spontaneous or “pragmatic²⁶²) or unlimited²⁶³ - all usually, in a pure

²⁵⁷ *Ibid*, at 252.

²⁵⁸ *Ibid*, at 252 and 256.

²⁵⁹ *Ibid*, at 255.

²⁶⁰ *Ibid*, at 256 *et seq.*

²⁶¹ “Determined by how much control the parties have over the process as opposed to the outcome”: Menkel-Meadow, “The Many Ways” *supra* note 209 at 228-30, as related by Landerkin & Pirie, *supra* note 25 at 259.

²⁶² “Spontaneous”, “pragmatic” or “on-the-spot”, as in a crisis situation (e.g. police officer): Menkel-Meadow, “The Many Ways” *supra* note 209 at 228-30, as related by Landerkin & Pirie, *supra* note 25 at 257-8.

²⁶³ The JDR Program works on scheduling units of 1 day, although they may last a shorter (if settlement or impasse is reached) or longer period on request, agreement, or as the circumstances dictate - although, there are not usually adjourned to a future date once commenced.
For a general understanding of how JDR scheduling works (albeit, dated - now much of it is electronic), see: Tettensor, *supra* note 116 at 11-2.

sense, without recommendations or evaluations. None is the “singularly right method or way to do mediation”, but, is, in essence, what works best - i.e. the mediation flexibility to address the flexible “goals” of mediation in the circumstances of the dispute and the parties.²⁶⁴

Potential mediation goals include - substantive, procedural (sub-sets include: saving time and/or money, empowerment, re-establishing relationships, enduring agreements, model for future potential disputes, privacy, etc.) or psychological (sub-sets include: avoiding stress, changing behavior, maximizing security or minimizing violence, healing, reconciliation, etc.)²⁶⁵.

However, under the New Rules of Court (Appendix 7), the parties are to play a big role by their agreement, subject to the JDR justice’s concurrence, to set the style of the mediation²⁶⁶, and, subject to that concurrence, are open to ask a JDR justice to try some of these approaches, if it is believed any will be relevant to settle the dispute in issue.

²⁶⁴ Landerkin & Pirie, *supra* note 25 at 256.

²⁶⁵ *Ibid*, at 257-8.

²⁶⁶ Smith’s well founded concern (Smith, *supra* note 13 at 29-30) about the Alberta Law Reform Institute’s drafting of proposed New Rules, now NR 4.17 and 4.18, to not give the Court’s justice even a right of concurrence in the JDR format the parties seek, has been accepted by the Alberta Rules of Court Committee (RCC), but at the date of the release of this Evaluation Report, June 1, 2009 has not been confirmed by the Minister of Justice. I agree with the comments of Otis & Reiter (Otis & Reiter, *supra* note 7 at 381, footnote 130, referenced *infra*), that the proper stance should be “As a consent-based procedure, the parties determine the scope of the issues to be mediated, in consultation with the judge-mediator, of course”.

d. JUDICIAL MEDIATION

Some of my colleagues have shied away from the term “judicial mediation”, even though it is commonly used by other courts²⁶⁷ - or even more pointedly suggested that it is a judicial “sin” to even mention it. Smith is one of those, as is evident from the comments within her paper although, paradoxically, she uses the term in the title to her paper. Some others are equally conscious objectors to the term.

Agrios is one of them, but with his knowledge and skills, if not his propensities, he should not be. He argues that it is “[a] most unfortunate term [that] has crept into dispute resolution language ... it is an oxymoron and it is also dangerous”²⁶⁸. He comes to this conclusion in this way. First, he says that, while judges in a JDR are not to be “judgmental” because “classic mediation” (“facilitative mediation” in my terminology) is “totally non-judgmental” where the “mediator is supposed skillfully to massage the ... parties into reaching ... their own solutions” - I agree. Second, he notes that there are “versions of mediation which are judgmental” (“evaluative mediation” in my terminology) - again, I also agree. He adds that judges are “skillful at evaluating a case” and “can be very effective in terms of bringing a touch of reality to the parties” (and their lawyers) - I agree even more. Nevertheless, he seems to come to his conclusion²⁶⁹

²⁶⁷ For example, the dispute resolution progressive B.C. Provincial Court: Joan I. McEwen, “ADR: Moving From Adversarial Litigation to Collaborative Dispute Resolution Models” (1999) 57 *The Advocate* 699, at 701.

²⁶⁸ Agrios, *supra* note 12 at 31-2.

²⁶⁹ Agrios, *supra* note 12 at 32-3 also raises the jurisdictional issue, saying we “should work hard to avoid pretending we are mediators”. While this was of some concern by some of the Court’s justices in the past, for the reasons discussed herein, I believe is no longer a concern, as he acknowledges later (at 39) based on the Court of Appeal’s decision in *Abernethy*, which he, in his inimitable style, calls “thoughtful, detailed, well-crafted, readable, [and] correct”.

because he says “a low percentage of Judges ‘have the patience and skill to be mediators’”; that
 “Judges are naturally judgmental. They are not mediators”²⁷⁰; and that mediation
 “is simply not a judicial function or one which comes naturally to most Judges”.
 Here, I disagree. His arguments, in my view, are contradictory and not supported
 by either logic or the facts. The Court’s justices are (or are becoming) mediators
 by education, training and experience, and mediation is now a normative judicial
 function. Thus, JDR justices are mediators and the work they do in a JDR is
 often judicial mediation.

Brazil, in a passage that he admitted was laden with hyperbole so as to
 make the point, theorized as to the extreme type of judge that was being
 portrayed that fit into this anti-JDR (as in Smith) or anti-mediation (as in Smith
 and Agrios) category was one who might, hypothetically, say:

‘ADR threatens to change the character of my institution and of my
 job; it threatens to demand behaviors from me that I do not want to
 provide or would be no good at. ADR threatens to reduce my
 importance ADR threatens to reduce the number of occasions
 on which I can exercise my power. ADR is, at its core, a criticism
 and denigration of the centuries old system in which I have
 flourished and at the top of which I sit.’

He quickly added that the proper response to such hyperbole was to the
 following effect:

... our goal is not to radically change the character of judicial
 institutions or the kind of work most Judges spent most of their time
 doing. Instead, the goal is to supplement the core services courts
 long have provided and to add to those services rather than to
 displace or subtract from them. We... respect the hallmark features
 of the civil adjudicatory system..., and .. [we] completely ... agree
 that the preservation and strengthening in that system is essential
 to the long range health of society. There will always be a place for
 litigation -- a big, central, indispensable place. One of our goals is

²⁷⁰ Yet, at 50 (item 2), he (correctly) asserts that “Judges are ideal facilitators” - I agree.

to help make sure that the societal resource that our civil adjudicatory system constitutes is well used and really is available when it is needed to perform the critical functions only it can perform.²⁷¹

With this in mind, in response to Agrios and Smith, I note that JDRs in Alberta are part of the job of being a justice of the Court - thus, it is a judicial function. Subject to that, even if Agrios were correct as to judicial abilities (I don't agree with him, with perhaps an exception or two), in my view, that does not make the terminology wrong - or dangerous. Rather, in my view, it means that when the Court's justices perform their judicial function as a JDR justice, they need to put away their judgmental qualities when they do facilitative mediation, use them sparingly when they do evaluative mediation, and bring them out fully and fairly when they provide a non-binding JDR opinion in a JDR (in a mini-trial or Binding JDR) - or when they perform their equally important judicial function as a judicial adjudicator. And, as to "skill" to know and perform the different judicial functions - see my comments on training *infra*. Thus, instead of being uni-talented and "work[ing] hard to avoid pretending we are mediators", I believe that JDR justices should "work hard" to prove that we are effective and fair judicial mediators.

To deal with other arguments, based on the analysis that follows, I reject, what I consider to be artificial views, perhaps of the "faint at heart", that think and/or express that something that is descriptive, like "judicial mediation", or "judicial evaluation", or other term, should be modified, cloaked or otherwise buried out of sight because of either some judicial "loftiness" - to "set judges apart", or any concern for confusion - the former was at least a half century ago, not now, and there should be no confusion if the proper terms are used, and JDR justices properly perform their judicial function as JDR justices²⁷².

²⁷¹ Brazil, "25 Years After", *supra* note 14 at 131-2.

²⁷² I say "artificial", but it is not just my view:

I earlier used the word “artificial”. What I consider to be the “artificial” view is that clearly both articulated and endorsed by Smith, and, to a lesser extent, Agrios, about judicial mediation. Smith said, without convincing justification in my view, that “the term mediation ought to be removed from judicial settlement lexicon”. Agrios quite similarly said (as noted *supra*) that mediation is not “a judicial function”.²⁷³ The nominal justification Smith used is that “[t]he act of borrowing private-sector-born terms has burdened the judicial settlement

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- I point out, *supra*, note 41, the ease with which it was used by Macfarlane, *supra* note 25 at 37, 224 and many other places;
 - note too that it was used by the Bar in Alberta early in the life of the JDR Program: Tettensor, *supra* note 116 at 1, and throughout;
 - similarly, I note from Danielson, *supra* note 4 at 3, that “[t]o most Alberta lawyers, the terms JDR and judicial mediation are synonymous”, although “not all Alberta Justices agree...” - see also statements, at 5-6, such as “many participants consider the JDR Program as a valid form of mediation”;
 - it is articulated, if not endorsed, by Landerkin & Pirie, *supra* note 25 at 262, except to say:

Appropriate and judiciously considered combinations of various understandings of mediation will be the obvious way to develop an overall characterization of judicial mediation in Canadian courts. In any event, the ideology of mediation in the courts, with its own unique goals and procedures, needs to be carefully developed.

This is particularly so, in my view, when a thoughtfully configured JDR can be brought to the public in a fashion which maintains efficiencies and is consistent with the proper judicial role;

- McEwan adds:

If one defines mediating as ‘intervening between parties to produce agreement’ - and the Oxford dictionary does - then a growing number of judges, even those who eschew the concept of ‘judicial mediation.’ are using ADR to resolve disputes short of trial.

...

Whatever the merits of those arguments [against judicial mediation], the final ruling on JDR will likely come not from judges or lawyers, but from clients. ... the ‘judicial mediation’ option may well become the preferred method of resolution of disputes.

Joan I. McEwen, “JDR - Judicial Dispute Resolution” (1999) 8:7 National 36, at 43; and

- see also numerous references to the term by Otis & Reiter, *supra* note 7 and others in the passages *supra*.

²⁷³

Smith, *supra* note 13 at 21. Agrios, *supra* note 12 at 32-3.

conference with confusion over boundaries for behavior, and has led the judiciary to stray from the role it is authorized to perform, and that the public wants it to provide.”²⁷⁴ In my view, nothing could be further from the reality of JDR. In my view, terminology is appropriate if it properly describes what is, in fact, being performed. Moreover, in my view, there is no evidence that the Court’s judiciary have “stray[ed] from the role it is authorized to perform”, and - most important of all - the Survey proves that, with minuscule exceptions, *what is being provided by JDR justices is exactly what the “public wants”*. Worse still, Smith states of “mediation” that “[t]here will always be things done in private by judges which do not dignify the judicial office. It is quite another matter to institutionalize judicial behavior which in the long term undermines the administration of justice”²⁷⁵. In my view, this is preposterous, and collectively defamatory to, at least the JDR judiciary, who every day work diligently, with high principles and decorum, to assist parties to achieve settlement of litigation before the Court.

Moreover, the survey results show no confusion in this area, although, thanks to this debate, I will recommend that the JDR Program be even more clear on the terminology and use of processes in the future. Indeed, the only area where I have noted confusion from the Survey results seems to be the client’s (and sometimes the lawyer’s) use, particularly in Edmonton²⁷⁶, of the term “decision” to describe what is, in fact, a non-binding mini-trial²⁷⁷ opinion or evaluation - this can be easily corrected by using proper terminology in initiating documentation (such as the JDR Booking Confirmation Form recommended herein - Appendix 8) and more careful judicial usage of terms.

²⁷⁴ Smith, *supra* note 13 at 21.

²⁷⁵ Smith, *supra* note 13 at 22.

²⁷⁶ I wonder if this originates from those few - and growing fewer - on the Court who do JDR reluctantly, pining for the days of return to adjudication only.

²⁷⁷ This can be determined by searching the word “decision” in Appendices 4 or 5.

Danielson noted the views by some on judicial mediation and then reported on a related issue:

A small number of Justices were very clear in their opinion that JDR is not mediation. It is the conclusion of the writer that the strong opposition by some Justices to the notion of JDR's as mediation is clearly linked to those Justices who align themselves with the historical adjudicative function of a judge²⁷⁸.

She went further in the supporting footnote 246, to note, as I have heard from at least one of my Edmonton colleagues, that avoidance of the “‘mediation’ terminology, [is] in part due to opposition from the Alberta Bar. As one mediator has told a member of the judiciary, ‘Look, I just want you to know, you are not mediating’”²⁷⁹ She concluded that, while some justices interviewed thought that the difference between JDR and mediation was “apples and oranges” (see Danielson, *supra* note 4 Appendix F, at p. 3), it was her “strong opinion that the JDR process, as practiced in the Court of Queen’s Bench in Alberta, is mediation”.

Sander’s comment, seems to put the nail in the coffin of this destructive debate:

... it seems contrary to the very spirit of mediation for some of the leading people to say in effect, ‘What *you’re* doing is not mediation; only what *I’m* doing is true mediation.’ A similar troubling development is the turf battles between lawyers and other disciplines about who should do mediation. All these battles are retarding forces that are unfortunate for the future development of the field. We need to be more open and eclectic and recognize that there are many different kinds of mediation that are appropriate in different settings.²⁸⁰

²⁷⁸ Danielson, *supra* note 4 at 72.

²⁷⁹ *Ibid*, at footnote 246.

²⁸⁰ Sander, “Future”, *supra* note 25 at 7 - 8 (emphasis in original).

He later (at 8) added “you shouldn’t leave it to the litigants or their lawyers to determine how to allocate the courts’ resources”.

My response to the reporting of this revelation is that, while the Court wishes to provide, and the Survey shows that it does provide, a service that is valued by the Alberta Bar, and their clients, it is not tailored to meet (or avoid) the terminology of private Alberta mediators. While I know of no studies on the quality of their work, I believe that they, as a class, and, I am sure, individually, are providing a very valuable and professional service. There is enough work and demand for both - there is no need to modify/avoid terminology.

To move to the close of the debate, it is recognized that the view is strongly and sincerely held by some that the term “judicial mediation” should not be used²⁸¹ because “mediation” refers to interest based dispute resolution. I have demonstrated herein that JDR justices are not, and should not be, excluded from such a role. Indeed, the word “mediation” merely means a impartial or neutral third party, who does not have the power to impose a binding solution, but is rather helping others to resolve a dispute²⁸². The skills do not need to be conceptually any different if it is “private mediation” or “judicial mediation” or any other derivative of “mediation”, although there are many definitions²⁸³.

I want to end this section by touching again on a matter that I raised *supra*, but here more inter-related to the debate over judicial mediation. The same people who argue against “judicial mediation” say it should instead be

²⁸¹ Indeed, Landerkin and Pirie noted six years ago, but not for these reasons, that “The judge as mediator is the most obvious yet controversial image in the rapidly developing JDR picture”. They went on to deal with the “modern meaning of mediation and the tensions arising from the pairing of the judicial and mediation roles”: Landerkin & Pirie, *supra* note 25 at 250.

²⁸² *Supra* note 220.

²⁸³ Again, see Landerkin & Pirie, *supra* note 25 at 252-62, for relevant “modern” definition(s) of “mediation”.

called “settlement conferencing” or “Judicial Settlement Conferencing” (JSC). As I addressed *supra*, there is no problem in my mind with these terms, especially in the generic sense. Indeed, before deciding on JDR, JSC was actively considered (but later rejected) by the Court as a close second choice - because it is descriptive of what a JDR justice is doing, using a meeting or conference (although, as noted *supra*, not as a part of a PTC in Alberta, although it may be in other jurisdictions) to settle a litigated dispute, but it need not be exclusive or the sole appellation - moreover, in a proper noun sense, it is inappropriate in Alberta, because it is confusing with the real name of the JDR Program.

The bottom line is that I see no reason not to use the descriptive term “judicial mediation” to refer, accurately, to what JDR justices do daily.

e. **MEDIATION CONCLUSION**

Whatever the debate about the type of mediation used²⁸⁴, in the final analysis, the Survey proves Danielson correct when she says (without measurement) “In the writer’s view, all approaches to mediation have the ability to create client satisfaction”²⁸⁵ - that is exactly what the Survey demonstrates. Indeed, the numerical Survey data proves her attitudinal survey that “there is no appreciable difference between the settlement rates for those Justices who conduct evaluative mediation and those who rely on a more facilitative approach, or those who use a combination of approaches”²⁸⁶.

²⁸⁴ Danielson, *supra* note 4 at 48, footnote 157, says that Tania Sourdin, *Alternative Dispute Resolution and the Courts* (Annadale, NSW, Australia: The Federation Press 2004), at 70, provides a “provocative article which canvasses many of the same issues facing the Alberta Justices” in this debate.

²⁸⁵ Danielson, *supra* note 4 at 46.

²⁸⁶ *Ibid*, at 47, wondering about the reasons for the judicial debate on the type of mediation, perceiving that most use some of both evaluative and facilitative techniques. In my view, she could not be more correct - the debate debases the positive reputation of the “unhyphenated” service - judicial mediation. She put it

Before moving on, there are some other terms to clearly define, so that there is no confusion.

4. MINI-TRIALS

The closest that the Court comes to “non-binding arbitration” or “non-binding adjudication” is a mini-trial opinion after briefs and argument²⁸⁷. Indeed, Morris²⁸⁸ calls “mini-trials” a form of non-binding arbitration:

In non-binding arbitration, the disputing parties put their case before an impartial third party who renders an opinion or recommendation, which the parties may choose to accept or not. Thus, the process is adjudicative, or determinative, but not binding or enforceable. In a “mini-trial”, counsel for the disputing parties, and possibly the parties themselves, appear before a judge ... who hears the case for both sides and renders an opinion as to what a judge might award in the case.

this way, at 72: [t]he more educated and experienced a mediator becomes, the more he/she has the ability to freely walk the ADR continuum as the case requires”.

²⁸⁷ Here, we are talking of a “judicial mini-trial”, not a “private mini-trial”, the difference of which is explained by ALRI, “Mini-Trial”, *supra* note 2 at 1-4. Essentially, the “private mini-trial” has a history from a 1977 complex patent infringement case but is used in more recent private disputes, mostly commercial or business cases: ALRI, “Mini-Trial”, *supra* note 2 at 1-2, referencing:
- Eric D. Green, “Growth of the mini-trial” (1982) 9 *Litigation* 12, at 12; and
- Michael F. Hoellering, “The mini-trial” (1982) 37 *The Arbitration Journal* 48, at 50.

The “judicial mini-trial” is a settlement technique introduced to resolve civil litigation, involving a judicial officer who provides a non-binding opinion as to the merits of the case: ALRI, “Mini-Trial”, *supra* note 2 at 3-4, apparently adapted by the British Columbia Supreme Court. It has some characteristics similar to a U.S. summary jury trial or summary bench trial.

²⁸⁸ Morris, *supra* note 17 at 6.
For a direct description of the Alberta mini-trial, see by Landerkin & Pirie, *supra* note 25 at 266, who introduced the subject with the words “Canadian judges led many procedural reforms”. See the article by: W.K. Moore, “Mini-Trials in Alberta” (1995) 34 *Alta. L. Rev.* 194 [Moore, “Mini-Trials”].
See also: Canadian Bar Association Task Force on Alternative Dispute Resolution, *Alternative Dispute Resolution : A Canadian Perspective* (Ottawa : Canadian Bar Association, 1989).

This is different from mediation which:

... only works where the parties are prepared to be flexible and seriously consider compromise, [while] a mini-trial can be useful where one of the parties is convinced of inevitable success in the action. The judge's opinion may convince the parties to reassess their risks in the litigation²⁸⁹.

Adams & Bussin provide a definition of "mini-trial"²⁹⁰. Their description is that of the historical origin - using "senior executives" of the parties - not how the Court now conducts them. The Court now conducts a "pure" mini-trial by rendering a formal, but non-binding, opinion to the parties whether corporate or personal (originally, and occasionally still, in a courtroom like an oral decision at trial, but not "on the record" - although now, more frequently in a JDR "mediation room") after reviewing briefs, and submissions and presentations by the counsel (and comments by their clients if they wish). Less "pure", the JDR justice will sit down with the parties after the opinion in a facilitative and/or evaluative mediation process to help achieve a settlement. Additionally, it is, in its "pure" state almost identical to an oral trial decision, although not binding - and therefore, almost exclusively rights based. In the less pure variety, interest considerations can be added in.

Having just mentioned mediation rooms, I note that Adams & Bussin lamented²⁹¹ that: "[a]t present, court houses only provide court-rooms and judges to try cases. No one is provided to help settle cases." That is no longer the case in Alberta, where in Calgary and Edmonton, each week four JDR justices are present to help parties settle cases in JDR facilities. In the new (August 2007) Calgary Courts Centre our Court alone has eleven JDR suites, including eleven

²⁸⁹ Tettensor, *supra* note 116 at 3.

²⁹⁰ Adams & Bussin, *supra* note 3 at 137-8.

²⁹¹ *Ibid*, at 146.

“mediation” rooms of various sizes and a minimum of two "break-out" rooms for each one.

What is the service that mini-trials are supposed to deliver? Brazil (using the term “non-binding arbitration”, but to the same purpose) advised that what are roughly equivalent to mini-trials in the JDR Program:

... can be the most attractive and suitable form of ADR for individual parties who have an emotional or philosophic need for something like a day in court, who need to tell their story to a neutral who will .. [provide a non-binding opinion], or who need to be able to see the two competing stories (and the evidence supporting them) laid out side-by-side in a controlled setting -- a setting that permits a fair comparison and provides a reasonable basis for advisory ... [opinion] by an experienced and impartial neutral.²⁹²

For a made-in-Alberta description of the mini-trial, see the article by the Court’s former Chief Justice²⁹³, which sets out the service the Court commenced in 1991-2, which led to the fuller JDR Program in 1996, with some hybrids in the intervening years. While it is not the purpose of this Evaluation Report to summarize that article, a few matters are of relevance to the history of the current JDR Program: the exact process employed in a given mini-trial depends on and is flexible to the circumstance of a given case as developed with the counsel and the justice and may also resemble a mediation or a blend of negotiation, mini-trial and mediation (at 196 and 199); the early guidelines for mini-trials were very similar to those Guidelines later published for the JDR Program (at 199-200²⁹⁴); no evidence was to be presented at the mini-trial²⁹⁵, but

²⁹² Brazil, “25 Years After”, *supra* note 14 at 117.

²⁹³ Moore, “Mini-Trials” *supra* note 288.

²⁹⁴ For a copy of these early mini-trial guidelines, see, *inter alia*, Tettensor, *supra* note 116 at “Schedule ‘A’”.

²⁹⁵ The Edmonton “Protocol” (Agrios, *supra* note 12 at 68, item 5) says “[v]iva voce evidence has no place in a JDR” - I agree.

only “facts that are agreed upon or facts substantially agreed upon” (at 200); further evolution and refinement was expected (at 200) - it continues, and this Evaluation Report is part of that; the general start to finish procedure for the mini-trial is set out (at 200-1); successful settlements were perceived to be high and there were other related accomplishments were achieved - including “business relationships of the parties being maintained or restored (at 202); mini-trials do not lend themselves to conflicting evidence or credibility issues, and neither mini-trials nor mediations lend themselves to constitutional questions or where there are conflicting lines of authorities or the law is not settled or clear (at 203); and the timing for a mini-trial is when the “facts and issues ... [are] sufficiently developed to permit a meaningful analysis” and there has been a full and complete disclosure of information (at 205).

5. MEDIATION/ADJUDICATION

While I will focus on the judicial conduct and jurisdictional aspects of the Binding JDR process *infra*, I will discuss here the definition of and merits of mediation/arbitration (med/arb) or mediation/adjudication (med/adj)²⁹⁶ - what has become known as Binding JDR.

The history and theory behind med-arb should be examined. Lawyer and arbitrator, Sam Kagel, pioneered it in a nurses strike dispute in San Francisco in the 1970s²⁹⁷. In the result, the “med-arb method is a ‘technique that fuses the

²⁹⁶ As noted *supra*, while, where there is jurisdiction, what the JDR Program calls Binding JDR, the service is called med/arb, the Court has no jurisdiction to do arbitration, and accordingly the general description applicable to the Court is med/adj. This should be kept in mind when this section is read.

²⁹⁷ Landry, *supra* note 167 at 263, referencing:
 - Karen L. Henry, “Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes” (1988) 3 Ohio. Sr. J. On Disp. Resol. 385, at 390, citing in turn:
 - Sam Kagel, “Combining Mediation and Arbitration” (1973) 96 Monthly Lab. Rev. 62; and

'consensuality' of mediation with the 'finality' of adjudication", the features of which are always an attempt by the mediator to assist the parties in negotiating a voluntary agreement and, if unsuccessful on any or all issues, an imposed decision by the mediator, turned arbitrator (the "med-arbitrar"), on those issues. "The basic premise being that under the threat of [binding] arbitration, the participants will try harder to reach a voluntary agreement"²⁹⁸ - at least narrowing the issues during the mediation phase²⁹⁹. Landry further suggests that the process is better than straight adjudication or arbitration because there may be, by agreement, remedies other than the "rigid remedies" available under either alternative, and also that there is "face saving" in the result.

Goss identifies some of the benefits and disadvantages of med/arb. Most impressive, in my view, she identified the higher user satisfaction and acceptance of the result of med/arb results.³⁰⁰ The Survey data (lawyer qualitative comments specifically) shows unmet demand for more.

The "major criticism of the med-arb method is that if an impasse occurs and a binding decision must be made, the med-arbiter will have compromised

- Barry C. Bartel, "Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential" (1991) 27 Willamette L. Rev. 661, at 663.

Also see Landry, *supra* note 167, for a good description as to the differences between mediation and arbitration, at 263-4, referencing, *inter alia*, John W. Cooley, "Arbitration vs. Mediation - Explaining the Differences", [1993] *Alternatives to Litigation* 106.

²⁹⁸ Goss, "An Introduction", *supra* note 29 at 16-7, expressed it this way: "This dual process provides the parties with one last opportunity to negotiate, yet it does not delay a final resolution of the dispute. ... If mediation is unsuccessful, no time or money is lost because the dispute is *immediately* resolved through the decision of the arbitrator." [Emphasis added.]

²⁹⁹ Landry, *supra* note 167 at 264-5, referencing Christine B Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (Westport: Greenwood Press, 1985), at 126.

³⁰⁰ Goss, "An Introduction", *supra* note 29 at 17-19, referencing J. Kagel, "Comment" in H. Anderson, ed., *New Techniques in Labor Dispute Resolution* (Washington, DC: Bureau of National Affairs, 1976) 185, at 185.

the integrity of the adjudicative role”.³⁰¹ The argument against this criticism is a comparison to that of the role of a trial judge disregarding inadmissible evidence:

But why can't med-arbiters successfully divorce the “good” information from the “bad” learned in the mediation process so that they are able to render an untainted decision? The answer should be that they can. The med-arbiters task is akin to that of a judge in a bench trial. Inevitably in a bench trial, judges will hear inadmissible evidence, yet they routinely disregard it and render sound decisions. By initially focusing on the mediation process, the med-arbiters is likely to hear more “inadmissible” evidence than a judge might in a bench trial, but this possibility would only make the med-arbiters task more difficult, not theoretically impossible, as med-arb critics suggest.³⁰²

A different argument, showing the two sides of this coin is articulated by Goss:

The results reached through the med/arb process may be better than would be achieved through arbitration alone. The parties have indicated through mediation what their needs are and this may enable the arbitrator to come up with a more reasoned and predictable result that more creatively meets the parties' needs. This is, however, also identified as a criticism of med/arb.³⁰³

Of course, the criticism referenced is to the effect that the arbitrator should decide the case solely on rights and must (but find it hard to) ignore the interests.³⁰⁴ I must say, from my own experience, both of the views have validity -

³⁰¹ Landry, *supra* note 167 at 265, referencing, *inter alia*, Lon Fuller, “Collective Bargaining and the Arbitrator”, [1962] Nat'l. Acad. Arb. 8, reprinted in (1985) 12 Dispute Resolution 246.

³⁰² Landry, *supra* note 167 at 265.

³⁰³ Goss, “An Introduction”, *supra* note 29 at 17, referencing J. Kagel, “Comment” in H. Anderson, ed., *New Techniques in Labor Dispute Resolution* (A Report of the 23rd Conference of the Association of Labour Mediation Agencies (July - August 1974) and 2nd Conference of the Society of Professionals in Dispute Resolution (November 1974))(Washington: Bureau of National Affairs, 1976) 185, at 186.

³⁰⁴ Goss, “An Introduction”, *supra* note 29 at 18, referencing:
- L.L. Fuller, “Collective Bargaining and the Arbitrator” in Mark Kahn, ed., *Collective Bargaining and the Arbitrator's Role: Proceedings of the 15th Annual Meeting, National Academy of Arbitrators* (Washington D.C.: BNA Incorporate,

in the (in my case) adjudication side (binding decision, or non-binding opinion that the parties can accept by agreement - see discussion, *infra*) of a Binding JDR, I must focus on the rights, but can render a decision or opinion that not only meets the rights of the parties, but at the same time accomplishes some interests identified in the mediation side of the Binding JDR coin.

Another criticism is that, whereas mediation is supposed to develop trust between the parties and the mediator with the hope that the parties will disclose to the mediator otherwise private information that may reveal interests leading to settlement, the parties are less likely to do so if the med-arbiter might use this against them in the arbitration phase. The response is that this tension will, again, cause the parties to put more emphasis on settlement.³⁰⁵ The debate though, in my view, requires (although does not solve the dilemma), at the minimum, that the med-arbiter (med-adjudicator) give the parties an early warning to be careful in disclosing information that might be negative to them in case the arbitration/adjudication phase must be invoked.

In response to these and other criticisms, Landry identifies a number of med-arb models.³⁰⁶ In "Med-Arb Same", the same person is the med-arbiter, the purpose of which is to promote efficiency, expediency and low cost, at the risk of

1962) 29 (also cited elsewhere as: Lon Fuller, "Collective Bargaining and the Arbitrator", [1962] Nat'l. Acad. Arb. 8, reprinted in (1985) 12 Dispute Resolution 246); and

- N.B. McGillicuddy, G.V. Welton & D.G. Pruitt, "Third Party Intervention: A Field Experiment Comparing Three Different Models" (1987) 53 Journal of Personality & Social Psychology 104, at 111.

³⁰⁵ Landry, *supra* note 167 at 265-6, referencing Wayne D. Brazil, *Effective Approaches to Settlement: A Handbook for Lawyers and Judges* (Clifton: Prentice Hall, 1988), at 77-8.

³⁰⁶ See discussion by Landry, *supra* note 167 at 266-8. Landry also suggests (at 268-9) that med-arb works best when there is a relatively even power balance in bargaining.

its “coercive nature”.³⁰⁷ “Med-Arb Diff”, as the name explains, involves two different persons for the two different roles. However, this method leaves less incentive by the parties, and less incentive to the mediator to create an atmosphere, for settlement, by avoiding the positive side of the “tension” referenced *supra*. Moreover, in my view, this has little to no advantage - certainly little to no cost saving - over the regular mediation to success, and separate adjudication to the extent that there isn’t success, because the second person - the arbitrator - must hear the case all over again. The only advantage is the possible narrowing of issues in dispute in the mediation phase. The “Med-Arb Diff-Recommendation” model, has the mediator provide a non-binding recommendation to the incoming arbitrator, but again there is no real cost saving because the arbitrator has to hear the nature of the dispute again. In the “Non-binding Med-Arb”, the mediator merely makes a recommended or advisory opinion, which the parties can accept to make it binding (the result for the Binding JDR part of the JDR Program in Alberta, as seen in *Lastiwka v. TD Waterhouse Investor Services (Canada) Inc.* 2006 ABQB 567, [2007] A.W.L.D. 5), or, if they don’t agree, the parties need to find a new decision maker - arbitration or adjudication - thus, in this last sense, no different than an evaluative judicial mediation. The “Med-Arb-Show Cause” model is the same as the Med-Arb Same, but the decision at the end is tentative pending arguments as to why it should not become final. While this may seem to create a new conflict to replace the old, it is usually the way that I, and, I am led to understand, most Binding JDR justices proceed - when the mediation fails, further “submissions” can be made as to the opinion. The final model is “Medaloo” (Mediation and Last Offer Arbitration), where, after an unsuccessful mediation, the med-arbiter picks

³⁰⁷ Yarn, *supra* note 17, coercion as “an attempt by one party to influence the behavior of another party in desired directions by making him fear the consequences of not acting in the way demanded”. In this Evaluation Report, it is used in the sense of the propensity of a neutral - in this case a JDR justice - to potentially use the power of his/her office to an attempt to convince a party and/or their counsel to settle litigation in a certain way.

only one of the parties “final offers” - which encourages good-faith and adoption of fair and reasonable final positions, but the arbitrator’s options are limited - s/he cannot impose his/her own idea of an appropriate solution, but can only pick the best one of those presented by the parties.

There are a number of issues dealt with in the Alberta cases on Binding JDRs, but the main issues are jurisdiction to do them at all, and the judicial conduct in relation to doing them. I will discuss both issues in more detail *infra*, but will touch briefly on jurisdiction here. As to the issue of whether there is jurisdictional for JDR justices to provide a Binding JDR service, with the express consent of the litigants, as the Guidelines permit, *Abernethy*³⁰⁸ is patently clear authority that there were no jurisdictional issues, leaving aside lack of actual informed consent or other abuses that may take away initial jurisdiction. However, regrettably in my view, that result has been put into serious doubt by the case in *L.N.*³⁰⁹. Both of these cases will be examined in detail, *infra*. Let’s now briefly examine the other Alberta decisions that deal with the ability to, and method of, JDR justices providing the Binding JDR service.

I should make clear again (see definition of terms *supra*) that a so called Binding JDR is generally and simply a non-binding JDR opinion, which becomes binding only because the parties so agree, as a matter of contract (thus a Binding JDR opinion), as opposed to a Binding JDR decision, which, where available (see *infra*), the Court renders as a matter of authority. It is crucially important to understand that the practical distinction between these two is the consequences of a breach of any such agreement - under the former, the party wanting to enforce the agreement must sue on the agreement as a matter of

³⁰⁸ *Abernethy* (C.A.), *supra* note 197.

³⁰⁹ *L.N.*, *supra* note 19.

contract (thereby creating a new dispute³¹⁰), whereas in the latter, the party wanting to avoid the agreement, must challenge the decision by appeal in the same dispute.

Thus, the actual reason each becomes “binding” is that the parties expressly authorize it. While, with the benefit of careful review over time, I believe the language used is not as clear as I now propose to distinguish between a Binding JDR opinion and a Binding JDR decision, Burrows J. properly articulated the substance of the distinction between the two in *Lastiwka v. Bray*³¹¹, when he said at para. 15:

The [*Abernethy*] decision³¹² does however clearly establish the status of a binding JDR decision. It is in law the judge's opinion which the parties have agreed beforehand to accept as determinative of their dispute. It is not a judgment of the court. It is imposed on the parties as a matter of contract, not as a matter of judicial authority. If one party is dissatisfied with the result and reneges on the contract to resolve the dispute as decided by the judge, the other party has a cause of action for breach of contract. He does not have a right to enter a judgment in the action reflecting the judge's JDR decision.³¹³

What I call a Binding JDR decision is where the parties expressly authorize the JDR justice to render a decision or judgment that is binding on them and enforceable as a judgment, without more. In this latter case if a party is

³¹⁰ See, for example: *Petryga v. Petryga* 2005 ABQB 467, [2005] A.J. No. 769 (Veit J.); *Varga v. Sihvon* 2001 ABQB 276 (2001), 288 A.R. 1, (Burrows J.); and *Varga v. Varga* 1998 ABQB 492, [1998] A.J. No. 646, 1998 CarswellAlta 1566 (Hembroff J.)

³¹¹ 2006 ABQB 935, [2007] A.W.L.D. 1057, 405 A.R. 392.
See also, to the same effect, para. 5 of the decision of Watson J. in *Lastiwka v. TD Waterhouse Investor Services (Canada) Inc.* 2006 ABQB 567, [2007] A.W.L.D. 5.

³¹² *Abernethy (C.A.)*, *supra* note 197.

³¹³ Although, apparently, there the parties expressly agreed (thereby making it contractual as opposed to “a matter of judicial authority”) that it could have been a judgment of the Court, in which case it would have been what I call a Binding JDR decision.

“dissatisfied with the result” there is no opportunity to “renege”; rather, the only remedy is an appeal, if permissible. I say “if permissible” because such express agreements allowing for a Binding JDR decision often also contain provisions that expressly deal with whether there is a right of appeal or it has been waived - it was expressly waived in *Lastiwka v. Bray*. Again, the point (often missed) as to why the parties want a Binding JDR decision, and not a Binding JDR opinion, is that they expressly do not want to allow the other side to renege on the result, with even more costly consequences. *L.N.*³¹⁴ appears to take away the result of this express consent of the parties.

Before leaving *Lastiwka v. Bray*, what else should we learn directly or indirectly from it?

First, it is to be noted that this was a case where the issue before Burrows J. was whether third parties, not involved in the action that was the subject of a Binding JDR, for which Watson J. (as he then was) delivered what he called “Reasons for Opinion” but directed that they remain confidential to the parties to the Binding JDR agreement except by leave of the court, were entitled, in a related action involving the third parties, to have access to the opinion.

Second, notwithstanding that the parties expressly authorized Watson J. to issue what I have called a Binding JDR decision, he chose only to issue what I have called a Binding JDR opinion (on a later consent motion by the parties to the agreement, he converted it into a judgment³¹⁵).

Third, on the real issue before the court - confidentiality, I believe, notwithstanding some initial concerns by Burrows J. (at para. 18), that Watson J.

³¹⁴ *L.N.*, *supra* note 19.

³¹⁵ *Lastiwka v. TD Waterhouse Investor Services (Canada) Inc.* 2006 ABQB 567, [2007] A.W.L.D. 5.

was quite correct not to just issue the Binding JDR opinion without conditions, because (to answer Burrows J. in para. 18) he was doing so in the context of a confidential JDR process pursuant to the policy Guidelines of the JDR Program established by the Court, and to do otherwise do, unless and until accepted by the parties as an opinion binding on them, would infringe paragraph 8 of the Court's Guidelines to keep all such matters confidential (as recognized by Burrows J. in para. 19). The clear purpose of this was so that the opinion could not be available to a subsequent trial judge on the same issues, if, for any reason, the parties failed to accept the Binding JDR opinion and a separate adjudication was required. However, once the Binding JDR opinion was accepted as actually binding on them and converted into a judgment of the court (as Watson J. did on the parties consent motion) there was no reason for it to be confidential. Indeed, the confidentiality would have been lost once accepted, even if not so converted. Equally so, to which Burrows J. alluded in paras. 19 - 21³¹⁶, had Watson J. issued a Binding JDR decision, on the basis that nothing more was required, I believe it would not have needed to be confidential. Thus, the result would be like any other without prejudice settlement discussions which are confidential and privileged unless and until accepted as a binding agreement.³¹⁷ Accordingly, the most important point for this Evaluation Report that comes, indirectly, from *Lastiwka v. Bray*, is that in a Binding JDR, where a Binding JDR opinion is required to be rendered (whether in writing or orally and recorded) after the unsuccessful mediation part of the JDR is over, it should be (as it would be if issued orally off the record in a JDR mediation room at the end

³¹⁶ In my view, the issue of publication bans, raised by Burrows J. in paras. 18 and 19 do not arise, at least without some express challenge, having regard to the established JDR Program policy that they usually will be held in private.

³¹⁷ I exclude from this debate the possible term of a settlement (as opposed to the lead up to the settlement) that the result remain confidential between the parties (e.g. for some commercial purpose), because such a term would not be involved in this scenario. That is because, if the JDR justice is required to give a binding opinion, he will be doing so on rights alone, not interests, and a settlement, the terms of which are confidential, would not apply.

of the JDR) expressly confidential and privileged (except for matters of alleged misconduct which I will address, *infra*) unless and until the parties have, in fact, accepted it as binding on them. This acceptance could happen by way of a confirming judgment or a mere declaration of the parties. Alternatively, if a Binding JDR decision is issued (in the few, if any, cases, that remains available, as we shall see *infra*), it need not be confidential.

Goss concludes her discussion on med/arb, long before the aforementioned cases, with these remarks:

Clearly the med/arb process works well, and safeguards may simply be needed to avoid the disadvantages of med/arb. Of paramount importance in considering the med/arb alternative is the med/arbitrator who was selected. ... The individual selected must be skilled in both the process of mediation and arbitration and must understand the risks inherent in the med/arb process.³¹⁸

In the result, especially following *L.N.*³¹⁹, her concluding statement about the “risks inherent” is very much of an understatement.

6. EARLY NEUTRAL EVALUATION

Some terms dealing with evaluation have several similar names. Morris³²⁰ references “neutral case evaluation” which she says relates to experts who are asked to provide a (non-binding) evaluation to assist the parties in resolving a dispute.³²¹ U.S. District Court Judge Enslin described it thus:

Here a court appoints an expert lawyer immediately upon the filing of a suit. He ... or she acts as an evaluator for both sides as to the

³¹⁸ Goss, “An Introduction”, *supra* note 29 at 19. In the context of a Binding JDR before the Court the same situation would apply if the term med/adj were used.

³¹⁹ *L.N.*, *supra* note 19.

³²⁰ Morris, *supra* note 17 at 6.

³²¹ See, *inter alia*: Brazil, “Now”, *supra* note 11 at 500, and at 85 respectively.

probabilities of what will happen should this case continue in litigation. The neutral advisor or evaluator is also an expert in the field ... But he comes as a sort of a friend of the court, works with both sides and says over a period of time here is what I think is going to happen, here is how much I think you're going to spend on discovery and lawyers, here is what I think the probable result will be, here is what I think the settlement range is, here are your options, settle now, go longer, settle latter, go all the way through, or whatever. In some cases the need for evaluator is paid by both sides, in some cases he or she serves pro bono.³²²

For a complete Handbook on ENE, applicable to Northern California, but I believe also descriptive of the general nature of ENE, see the excellent manual put together by Brazil³²³.

I believe that terms with some combination of “neutral” and “evaluation” have, however, become generic and thus may reference a number of judicial or other processes (within or outside the court) that are also sometimes called “early neutral evaluation” or “neutral case evaluation”.³²⁴ Within a court context, it

³²² Richard A. Enslin, in “Alternative Dispute Resolution”, in the Pitblado Lectures, *supra* note 10 at 9.
See also: Brazil, “Now”, *supra* note 11 at 501 and 86 respectively, regarding *pro bono* ENE services by lawyers, and at 506/91 for the statement of purpose that “one of ENE’s purposes is to bring more economic discipline and common sense to the pretrial process”.

³²³ Brazil, “Handbook, 2008”, *supra* note 60, referencing:
- at 87, W.D. Brazil, “Thoughts about Impasse for Mediators in Court Programs” (*sic*) (2009) 15 Dispute Resolution Magazine 11 [Brazil, “Thoughts”];
- at 87, W.D. Brazil, “Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value” (2007) 14 Dispute Resolution Magazine 10;
- at 6 and 87, Joshua D. Rosenberg, H.J. Folberg, “Alternative Dispute Resolution: An Empirical Assessment” (1994) 46 Stanford Law Review 1487;
- W.D. Brazil, “A Close Look at Three Court-Sponsored ADR Programs: Why They Exit, How They Operate, What They Deliver, and Whether They Threaten Important Values” [1990] University of Chicago Legal Forum 303;
- at 5 and 87, David I. Levine, “Early Neutral Evaluation: The Second Phase” (1989) 1 Journal of Dispute Resolution 1; and
- at 87, W. D. Brazil, M. A. Kahn, J.P. Newman and J.Z. Gold, “Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution” (1986) 69 Judicature 279.

³²⁴ See also Danielson, *supra* note 4 at 40, relying on M. Jerry McHale, Q.C., “Mediation in British Columbia”, in *Negotiating the Future - A National Conference*

is sometimes called “early court intervention”. While it need not necessarily be early in the litigation process (it usually is), I shall use the term “early neutral evaluation” (ENE) to describe all of these processes, whether judicial or not. I use “early neutral evaluation” to bring some distance from “neutral evaluation” alone, which Danielson says can be confusing with “evaluative mediation”, because the “distinction ... is not always readily discernible”.³²⁵ In my view, the distinction is that ENE is focused more on providing an evaluation and aspects of case management³²⁶, and not as much on providing assistance in negotiation or settlement (of secondary importance³²⁷), whereas in neutral evaluation the focus is on assistance in negotiation and settlement, where an evaluation may be provided directly or indirectly, but there is usually no reference to any case management type assistance. However used, a common feature is for the evaluator (judge or other “expert”) to give advice on how to process the dispute, including how and when to approach settlement - often, initially, at the ENE process itself, to try to obtain an early discounted settlement resolution for avoidance of costs consideration. It is “explicitly” a rights based evaluative process, not interest based, and caucusing is not countenanced before the

on Court-Annexed Mediation, November 14-16, 2001, Calgary, AB, Appendix 3, at 12-3.

See also Adams & Bussin *supra* note 3 at 138.

³²⁵ Danielson, *supra* note 4 at 40, who adds comments on “evaluative mediation”, referencing:
 - Joseph B. Stulberg, “Facilitative versus Evaluative Mediation Orientations” *Piercing the ‘Grid’ Lock* (1996-7) 24 Fla.St.U.L.Rev. 985, at 991, referencing in turn Leonard Riskin, “Mediator Orientations, Strategies and Techniques” (1994) 12 *Alternatives to High Cost Litigation* 111, at 111; and
 - Cinnie Noble, L. Leslie Dizgun and D. Paul Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery Publications, 1998), at 6-9.

³²⁶ For example, in Brazil, “Handbook, 2008”, *supra* note 60, note the references to “case development planning”(at 17 (item 11), 19 (item 5), 26, and 65-6) and “case-planning suggestions” (at Appendix 2, section 5-1 of the Handbook), which I interpret to be a form of proposals for management of the case (thus, “case management”, in a broad sense), although it seems clear that these considerations are in addition to more formalized and, perhaps, regular judicial case management that may exist before an assigned justice (see at 11).

³²⁷ Brazil, “Handbook, 2008”, *supra* note 60 at 18.

evaluation is provided³²⁸ - thus, except for the “early” and case-management aspects it has similarities to the Alberta mini-trial.

Brazil³²⁹ discusses the advantages and disadvantages (and features) of both - the key is what each party’s needs are at a particular point in time. He suggests that the prime focus, using a subject matter expert as the neutral, is to determine the early strength and position of each party (usually in group. Usually this is done in a “face-to-face” joint session, not in caucus, the latter often being specifically forbidden by agreement of the parties, to allow for both frank evaluation and assessment of the other side (personally and substantively), although, of course, caucus is available by agreement. Clients are encouraged to have their “day in court” - both as presenters and listeners. The primary purpose is to provide a mutual evaluation of the case (often in a fairly formal oral opinion), a focus on the “centre” of the case (the key real issues - substantively and procedurally/evidentially - while cataloging them in priority)³³⁰, and a development plan for the case (including future settlement procedures), before significant litigation costs are incurred (and to save future costs that might be otherwise spent on periphery of the issues). There is opportunity for settlement - usually after evaluation, but, as noted, it is a secondary factor. An expert is key because of his or her knowledge and will be more suited to the task from two perspectives

³²⁸ *Ibid.*, at 18-9.

³²⁹ Wayne D. Brazil, “Early neutral evaluation or mediation? When might ENE deliver more value?” (2007) 14 Dispute Resolution Magazine 10.

³³⁰ Brazil, “25 Years After”, *supra* note 14 at 127-8, addressed it this way:
... court ADR is not intended to serve as a barrier or hurdle to trial. Rather, litigants can and should use ADR processes to make access to trial more efficient by more reliably identifying the *center* of the case and then focusing their discovery and motion work more productively to that *center*. ADR processes can also be used to make the trial process itself fairer by increasing the likelihood that all the really pertinent evidence will be presented and that the parties and the court will understand accurately all of the applicable legal principles. [Emphasis added.]

- better at evaluating (thus adding more credibility to the evaluation), and less focused on process and settlement. Brazil also effectively summarizes the key features and benefits and sets out, in great detail (in his usual highly effective, methodical way), the steps to be taken.

7. OTHER TERMS AND CONCLUSION

There are other dispute resolution mechanisms available. Many of them relate to processes that are not relevant to this Evaluation Report. Most are: clearly understood, but not jurisdictionally available to the Court, such as arbitration; not relevant to the Court (e.g., summary jury trials, because of the low incidence of civil juries in Alberta); or relevant only outside a court context (e.g., ombudsman).

With some clear views of what is included within the JDR Program, and what is not, and what terms are appropriate to describe aspects of the Program, we can now look at the Survey results.

II. SURVEY - SUMMARY OF QUANTITATIVE/QUALITATIVE REPORTING

A. INTRODUCTION

Reporting in late 1999, after the JDR Program had been in operation for almost three years, Provincial Court Judge Heather Lamoureux, in her Pepperdine School of Law dispute resolution LL. M. dissertation, reported on her direct, and informed, observations of the Court's JDR Program:

The writer has personally observed numerous JDR's conducted by a variety of judges. Without exception, all have been skillfully handled and resolution rates have been high (well over 75%). Litigant satisfaction has been well expressed, especially with respect to issues of litigants expressing that they have been heard; that they have been understood; that they had been allowed an opportunity to participate in the process. This expression of satisfaction is especially true in cases of motor vehicle litigation and family law.³³¹

While such qualitative evaluation from an external informed observer is anecdotally relevant and welcome, it is no substitute for empirical research of what users think about the JDR Program, which is what the Survey herein does.

The purpose of this section is to introduce the Summary (Appendices 3-5) of the Survey results obtained from, and to provide some observations, analysis and recommendations, leading to the further and interactive analysis *infra* and more recommendations, all relating to the Survey/Questionnaire (Survey) handed out to almost every client and lawyer participating in the Court's JDR Program in Alberta in the period from July 1, 2007 to June 30, 2008. The purpose of the Survey, in turn, was to be a prime part of the evaluation of the Court's JDR Program, and this Evaluation Report in which it is reported.

³³¹ Heather A. Lamoureux, *Template for Court Annexed ADR Program* (LL. M. Dissertation, Pepperdine School of Law, 1999) [unpublished, archived at Straus Institute, Pepperdine School of Law for Masters Dissertations].

The section will start with a brief history of the JDR Program and motivation for its evaluation, the research behind the Survey, its design and necessary ethics approvals, the method of distribution and collection.

A simple quantitative summary of the Survey returns Alberta wide is provided in Appendix 3, along with a detailed summary of the quantitative and qualitative responses from lawyers and clients in Appendices 4 and 5 respectively.

The history of the initiative to evaluate the Court's JDR Program is, effectively, set out in the letter of introduction³³² to the survey from the Chief Justice of the Court handed out along with the Survey Questionnaires. The Survey packages (similar, but not identical, as between lawyers and clients) were handed out to the lawyers (Appendix 1) and clients (Appendix 2) in 606 of the 631 JDRs carried out in the 1 year period commencing July 1, 2007 in Calgary and Edmonton, and the 10 month period commencing September 1, 2007 in the remaining Judicial Centres in Alberta.

The return of the Surveys was significant³³³ - 374 lawyers and 193 clients responded, most answering both the "Basic" (4 pages) and "Additional" (6 pages) questionnaires, and 178 lawyers and 85 clients, in separate documents,

³³² The letter of introduction (see both the Preface and Appendices 1 and 2 herein) is recognized by authorities as a "crucial" part of a research project of this type - Kritzer, *supra* note 15 at 13.

³³³ I say significant, because this was in a 1 year period for 606 JDRs. I note that in Northern California, for a 10 year period the ENE evaluations (the number of ENEs in this period was not specified), there were 1,000 responses from lawyers and 520 from clients: Brazil, "Handbook, 2008", *supra* note 60 at 12-3. See too the comments of Epp as to a response rate of 20% being satisfactory: John Arnold Epp, "The Role of the Judiciary in the Settlement of Civil Actions: A Survey of Vancouver Lawyers" (1996) 15 Windsor Y.B. Access to Justice 82 [Epp], at 86.

identified themselves and agreed to participate in an interview or further questioning if required (which I have decided not to pursue).

B. SURVEY QUESTIONS - EVALUATION PROCESS DESIGN, TIMING AND PROCEDURES

After an ADR system reaches a certain level of maturity of operation, it is necessary to contemplate its evaluation for, *inter alia*, internal organizational assessment, program development and assessment of personnel and services³³⁴.

After reference to former U.S. Chief Justice Burger's comments in 1992 as to the role of the courts in dispute resolution (repeated *infra*), Hollett *et al* commented that "[t]he growing popularity of mediation means that evaluation and assessment methods need to be developed and tested to determine if mediation is meeting the obligation suggested by Burger."³³⁵

³³⁴ Bussin, *supra* note 5 at 460, referencing:
 - J. Tomain and J. Lutz, "A Model for Court-Annexed Mediation" (1990) 5 Ohio St. J. On Disp. Resol. 1, at 3; and
 - E. Rolph and E. Moller, *Evaluating Agency Alternative Resolution Programs: A User's Guide to Data Collection and Use* (Santa Monica, CA: Rand Institute for Civil Justice, 1994), at 1.

Bussin analyzed ADR evaluations performed by ADR experts in three programs (two in Ontario - the superior trial court and an administrative agency in Ontario, and the small claims court in Maine) the contents of which are not specifically relevant to this Evaluation Report, except as to methodology. At footnote 7, at 462, she referenced about an additional ten other evaluation reports.

³³⁵ Nancy L. Hollett, Margaret S. Herrman, Dawn Goettler Eaker and Jerry Gale, "The Assessment of Mediation Outcome: The Development and Validation of an Effective Technique" (2002) 23 Justice System Journal 345 [Hollett *et al*]. The authors assert that ADR goals are quantitative focused - cost savings, efficiency, and court case throughput, and qualitative focused - client satisfaction and relationship improvement, and provide a more formulaic method of evaluation, focusing on measuring the difference between mediation processes and mediation outcomes, using a "new, multidimensional instrument, the Assessment of Mediation Process and Successful Outcome (MPSO)". They also reference other evaluative literature.

For the evaluation of the Court's JDR Program, the general purposes were similar to those identified by Hollett et al³³⁶, with some exceptions and limitations. First, there was no real intent to "develop" the program (to the extent that means expansion - indeed, perhaps, the opposite). Second, while the assessment of the personnel and services were general purposes, to be clear, no individual or personal, but only institutional collective assessment of personnel, was undertaken. The result is that the evaluation was to assess the success of the Program in terms of the Program's goals, to measure any "value added" benefits achieved, to identify and assess any challenges, and to determine any identified areas for improvement the Program.

In evaluating a dispute resolution program, Bussin, at the beginning, pointed out that, while her article is not a "how-to" manual for evaluating ADR systems, the two fundamental questions about program effectiveness that an evaluation must address are "whether the program is accomplishing the goals that have been set for it"³³⁷ and "how the program's performance can be improved".³³⁸ She identified 6 sub-issues contained within these 2 "fundamental questions".

The first Bussin question is "what are the goals of the program"³³⁹? In the Court's JDR Program, where "goals ... have been set years ago" (12+), to my

³³⁶ *Ibid.*

³³⁷ Sander, "Future", *supra* note 25 at 4, after observing, in the 1975-82 era, that "experiments ... often involving a failure to articulate goals clearly", discussed the need for "the clear initial articulation of goals" for ADR programs.

³³⁸ Bussin, *supra* note 5 at 461 and 460 respectively. As to the former, she said that there is a "myriad of design possibilities" for a dispute resolution system depending on its purpose, and that there is "no such thing as a generic ADR evaluation", relying on C. McEwan, "Evaluating ADR Programs", in F.E.A. Sander, ed. *Emerging ADR Issues in State and Federal Courts* (Chicago: Litigation Section of the American Bar Association, 1991), at 207.

³³⁹ Bussin, *supra* note 5 at 476, relying on P. Rossi and H. Freeman, *Evaluation: A Systematic Approach* (Newbury Park, CA: Sage, 1993), at 106.

knowledge, no specific goals were formally articulated³⁴⁰, but rather they were merely understood - some better than others. However, my recollection and belief is that the primary goal was to decrease the backlog in the trial queue and thus the unacceptable wait time for trials - that is, in more modern terminology, improving timely “access to justice”. No Survey or formal evaluation is necessary to determine the answer to that. The wait times for civil trials in Calgary, Edmonton and Lethbridge (where data was available) in June 1996, April 2002 and April 2008, and for JDRs in June 1997 (1 year after the JDR Program formally started) and April 2009 are set out in Appendix 6, Table 6.1 - Wait Times. As can be seen, the trial wait times have shrunk considerably in Edmonton but less in Calgary, although the data is not completely homogeneous or complete. While the capacity has increased for JDRs the wait times are approximately the same.

A secondary goal, not inconsistent with - indeed, complementary to - the primary goal, was to provide a mechanism within the Court to allow for the settlement of civil actions using a more focused judicial involvement than that available at pre-trial conferences (a separate process, primarily focused on trial readiness, whose settlement focus is generally to ask if steps have been taken to consider settlement, all as explained *supra*). This was not just to shorten the trial

³⁴⁰ It is suggested that the goals of - and standards for - ADR programs should be expressly articulated “into clear, consistent, operational statements or objectives” and the author gives tips on how to do so: Bussin, *supra* note 5at, *inter alia*, 475-6, referencing:

- National Institute for Dispute Resolution, *Conflict Resolution Institute for Courts* (Washington, D.C., 1995), at 70;
- George W. Adams, Q.C., *Ontario Insurance Commission Dispute Resolution Group Evaluation Report*, June 1998, at 68-9;
- D. Hensler, “Researching Civil Justice: Problems and Pitfalls” (1988) 51 *Law & Contemp. Probs.* 55, at 60; and
- W. D. Brazil, “Institutionalizing ADR Programs in Courts”, at 52-92, in F.E.A. Sander, ed., *Emerging Issues in State and Federal Courts* (Chicago: ABA Litigation Section, 1991).

This may be an appropriate consideration as a prerequisite to the next formal evaluation of the Program as contained in the Recommendations make in this Evaluation Report.

list (thereby reducing the queue) but to provide a value added service to the parties - one that decreased the cost, stress and risk of trial to the parties. Thus, the secondary goal was, as a part of the settlement mandate of the pre-trial conference process, to provide for a cost-efficient process that improved “access to justice”.³⁴¹

Beyond these, I don’t believe that there were any specific goals, other than to create the opportunities and the benefits, while trying to avoid any negatives, that relevant dispute resolution processes - mini-trials, mediation and other processes promised in the literature - could provide, including the opportunity to have related interests considered along with rights, and to improve the value added “intangible goals ... such as furthering relationships”³⁴² between the parties after litigation, where relevant.

The second question Bussin asked was “who is the evaluation for and for what purpose will it be used”?³⁴³ I have - indeed, the letter of introduction (Appendices 1 and 2) has - addressed the purpose *supra*. The “who” is also simple - what was called (*supra*) “internal organizational assessment”.

As to the purpose, initially, the evaluation and the recommendations in this Evaluation Report are expected to be assessed by the new (formed April 14, 2009, relevant to this Evaluation) Judicial Dispute Resolution Committee (JDRC) of the Court’s internal committee structure. From the JDRC, recommendations for improvement will be made to the Judicial Advisory Group (JAG)(a form of advisory committee), to the Chief Justices of the Court, and to the Council of the

³⁴¹ This is similar to the goals and objectives seen in the Ontario equivalent of our Court in the Macfarlane evaluation of their program - see Bussin, *supra* note 5 at 466.

³⁴² *Ibid*, at 481.

³⁴³ *Ibid*, at 460.

Court³⁴⁴, for acceptance and implementation, or modification (or rejection), as appropriate. The leadership in the next phase of the process - the approval and implementation of prudent recommendations - is crucial. As Bussin says in her paper:

An evaluator wants his evaluation to be useful and to be actually used. Stakeholders need the skills to review the evaluation and implement any changes that the evaluator believes are necessary. Stakeholders also need the incentive to do so....

...

... organizational leaders must define the original and continuing objectives of the system in order to determine whether these objectives are being met by the system and provide a direction for change...

... key stakeholders should be shown the draft evaluation and their feedback should be requested...³⁴⁵

Thereafter any internal procedures will be revised accordingly and, to the extent that they directly affect the Bar, they will be brought forward by Notices to the Profession (NP), Practice Notes (PN), or recommendations to the Alberta Rules of Court Committee (RCC) for changes to the Alberta Rules of Court, Alta. Reg. 390/68, as amended.

The third question that Bussin posed is “what are the goals of the evaluation”?³⁴⁶ The only real goal is to do a proper evaluation for the aforementioned purposes - there is no “agenda”. Having said that, a review of the Survey Questionnaires themselves will determine the goals. It will be obvious

³⁴⁴ As provided for by s. 24 of the *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31.

³⁴⁵ Bussin, *supra* note 5 at 470-2. This has been done with the Survey data, with no real feedback, with a couple of significant exceptions. Further feedback will undoubtedly commence, for those who wish, or, in the case of the JDRC, those who are mandated, to provide feedback.

³⁴⁶ *Ibid*, at 460.

that what we are trying to measure includes: the number of cases being JDRed; the type of substantive file being JDRed; the success rate; the point in the litigation process that JDR is being used; the process used - mini-trial, facilitative mediation, evaluative mediation, Binding JDR, or a combination; the procedures followed - booking, Pre-JDR, information letters, caucusing, etc.; and the role of the justice in the process and his/her qualities to do the job. The answers to these quantitative questions and, perhaps, the users' comments to the qualitative questions, will expand on this and try to get at the harder questions - non-quantitative valued added features, user satisfaction, areas for improvement, etc. The integrated analysis ("drilling down" to compare some inter-related quantitative answers in a matrix) *infra* will also provide some interesting insights leading to relevant conclusions. The Survey is culminated in this Evaluation Report to get an overall assessment of the value of the JDR Program, where improvements can be made, what pit-falls to avoid or remedy, so as to provide further guidance to the judiciary and participants in maintaining the excellence of the Program that was sought, together with, again, value added features. Each of these matters will be examined in detail as this Evaluation Report progresses.

Fourth, Bussin asked, "how is a quality ADR system defined?"³⁴⁷ While she says that there is a "lack of consensus" about what ADR programs should have as their goals, Bussin suggests that it is "achieved when the process furthers the goals of the system" and that "[r]educing [party] costs and delay, increasing user satisfaction and improving access to justice are all general goals of an ADR system". Other potential "legitimate and important" goals include cost

³⁴⁷*Ibid.*

reductions to the institution, settlement of cases³⁴⁸, and improved relationships.³⁴⁹

I believe that “quality” is achieved by the JDR Program when it achieves these goals, with minimum negative aspects, and adds value beyond the goals originally sought. It appears that there is agreement with this result: “[i]n one definition, ‘quality’ means that a certain dispute resolution process operates in practice in a way that fulfils the unique and inherent capacities of that particular process” .³⁵⁰

The fifth and sixth questions need to go together. The fifth was “how will the evaluation be designed”? and the sixth is “what data is necessary to measure

³⁴⁸ Bussin, *supra* note 5 at 460, quotes from J. Tomain and J. Lutz, “A Model for Court-Annexed Mediation” (1990) 5 Ohio St. J. On Disp. Resol. 1, at 6, regarding achieving settlements as a goal: “mediation is effective where ‘effective’ is defined as achieving settlement in a high proportion of cases, without compromising the quality of justice”.

³⁴⁹ *Ibid*, at 472-3, referencing T. Tyler, “The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities” (1989) 66 Denver U. L. Rev. 419, at 423, and, at 461, referencing J. Tomain and J. Lutz, *ibid*, at 5-6.

³⁵⁰ *Ibid*, at 473-4, referencing R. Baruch Bush, “Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments” (1989) 66 Denver U. L. Rev. 335, at 336, and later referencing quality in both the operation (process) and result/outcome to indicate the achievement of the end goal sought - “goal furtherance”.
See also Carrie Menkel-Meadow, “Maintaining ADR Integrity” (2009) 27 Alternatives to the High Cost of Litigation 6, at 7, where she says the “[q]uality dispute resolution has always referred to a few key concepts and concerns”. She identified several:
- “a notion of *voluntariness*”, noting that this had “morphed in more recent times to such oxymorons as ‘mandatory mediation’ - ... and court-annexed mediation, with automatic assignment of cases “(see also: Lucy V. Katz, “Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?”, [1993] J. Disp. Resol.1 - to the same Evaluation Report);
- neutrals “were to behave with the highest standards of professional performance and character” (a series of traits identified);
- *process pluralism* - “different kinds of parties and particular kinds of disputes might best be handled in different ways... ‘one size will not fit all’. ADR has always been about ‘tailoring’ ... ‘fit the forum to the fuss’” ... and “particular outcomes and solutions to the parties’ particular needs and interests”;
- “a sort of Pareto optimality ... ‘do no harm’; and
- integrity and flexibility.
Later, she added an overarching consideration - “dispute processes that were efficient, fair, wise, and good solutions for the parties”.

the criteria that have been identified”³⁵¹ The first answer to these questions is that this evaluation is not futuristic, although, perhaps, a more in-depth literature and robust evaluation needs to be contemplated for future evaluations (as recommended *infra*) on an ongoing basis, and at milestone dates - say every five to ten years from now - reflecting on the benefits and challenges that come to light in the context of this Evaluation Report. Thus, the design criteria is past, but will be a future consideration for the next evaluation. Let me advise of some of the considerations that were taken (or weren't taken) in the design.

Even before turning to the considerations, I need to discuss why I am addressing the process. Experts in the field have made it clear “[d]etailed descriptions of how a project evolved” are important, especially a description of “where the project started and how the project ended up with [a] particular focus”³⁵².

First, I should say that had I had the time to do a more perfect theoretical design of the evaluation, I would have needed to start in the spring of 2006, not 2007, and after a more exhaustive search of evaluation design literature. However, making this a three year project instead of a two year project may have led to my abandonment of the idea before it was commenced, and, in that case, no evaluation would have been done because there were no funds for an independent evaluation, and no one else was coming forward to volunteer to do an evaluation that was urged on our Chief Justices. The result is that the with the evaluation completed, with the benefit of its intuitive or researched (or lucky) virtues, and limited by its missing parts or elements, as a friend of mine frequently says - “it is what it is”. However, let me articulate further some of the considerations.

³⁵¹ *Ibid*, at 460.

³⁵² Kritzer, *supra* note 15 at 15.

The next issue is the “ripeness” of the Program for evaluation. When is it appropriate to conduct an evaluation of a program of this type – early³⁵³ when the program has, perhaps, not adequately “matured”, or later (perhaps too late?) in the process. MacCoun, Lind and Tyler had this to say about the timing:

... the common practice of evaluating an ADR program during its first few years of operation, while administratively sensible, can be misleading. It may take several years for the court’s staff to work out and routinize the details of program implementation and for the local legal culture to adjust and adapt to a new procedural innovation. Thus, the effects of a program are likely to evolve over time, and the evaluation itself is likely to influence this evolutionary process.³⁵⁴

Coincidentally, they also noted that “[t]here is little research on litigants’ reactions to settlement conferences”.

I believe that the evaluation at this time, some 11+ years after implementation is an appropriate time, now that the Program has become fully operational and both bar and bench have experienced its benefits and pitfalls, and recognized areas that need attention. Additionally, the Survey herein, I believe, provides a robust review of “litigants reactions” to the Court’s JDR Program.

Once a decision was made to do an evaluation survey, the design of the Survey questionnaires and the timing were inter-related. Bussin says that the “general criteria” that should be used for evaluation include “settlements, efficiency, user satisfaction, fairness and justice, neutral performance, examination of case type, compliance, and contribution to academic ADR

³⁵³ While I in no way say it was premature, I note that the Edmonton Provincial Court pilot JDR program in family law was evaluated during and at the end of the first year: Goss, “Judicial”, *supra* note 68 at 511.

³⁵⁴ MacCoun, Lind and Tyler, *supra* note 49 at 103 and 108.

research”.³⁵⁵ Compliance in this sense refers to compliance with or enforceability of mediated agreements, which the literature suggest is higher with ADR gained settlements.³⁵⁶

Bussin put this all together into three steps of analyzing what she called the “ends/means framework” - “define quality by identifying the system’s goals and standards”, “define objectives for the evaluation” relative to the “reasons for system review” and “select evaluation criteria that will measure quality”³⁵⁷.

There was some risk of putting the “cart before horse” in creating an evaluation system. Normally, as I understand it, survey questionnaires relative to quantitative and qualitative empirical research result from an in-depth analysis of the literature pertaining to evaluation and survey methodology, and other literature relevant to the specific subject matter and issues to be considered in the questioning. Then the questionnaires are drafted, vetted by experts, delivered, returned and analyzed.

All of this cannot be accomplished in an eight month Masters study period. Rather, I wished to use the Masters study period (September 1, 2008 to April 30, 2009) to analyze the views of JDR participants from the Survey results, study the substantive relevant literature on JDRs, and combine both in a Evaluation Report, and, ultimately, a Thesis, not spend it conducting the Surveys, or waiting for the returns, because it is clear that “[r]esearch projects, particularly projects involving the collection of original data, do not fit nicely into the semester ... framework”.³⁵⁸ Thus, I decided on a three step process. The first

³⁵⁵ Bussin, *supra* note 5 at 461. I should make clear that “neutral performance” is, in the Court’s JDR Program, the performance of the JDR justice.

³⁵⁶ *Ibid*, at 494.

³⁵⁷ *Ibid*, at 462.

³⁵⁸ Kritzer, *supra* note 15 at 14.

was to quickly and simply, with a minimum of research, develop the survey methodology and questions³⁵⁹ and conduct the Survey in the year before the Masters study period (July 1, 2007 to June 30, 2008). The second, in the summer between the data collection and the commencement of the Masters study period, was to create a data base for, and then summarize, the quantitative and qualitative data that was obtained. The third, during the Masters study period was to analyze the data, both from my own experience and aided by a substantial review of relevant literature pertaining to the evaluation of the JDR Program, and report it all in my Evaluation Report. Indeed, even with this schedule, the last of the Survey returns did not arrive until early November 2008 - such are the “joys and complexities of original data collection”.³⁶⁰

The risk in this approach is that one might not, *inter alia*, do sufficient evaluation and survey methodological research to start the process properly or conduct it appropriately. Indeed, there is a risk that one might not ask all the right questions (a risk which materialized to some limited extent) - indeed, one might ask the wrong questions.³⁶¹ The resulting risk is that the Survey might not provide reliable data, and/or the data obtained might be flawed by statistical or ethical/conduct issues (as to the latter, confidentiality and the like). Having done the Survey, it is, again, “what it is” and I will leave it to others who review and assess this Evaluation Report to determine its worth.

³⁵⁹ Indeed, my early ignorance was bliss, as I have learned that one can write whole papers - indeed, books - on problems such as “figuring out the right question to be asking and how that relates to designing research”: Kritzer, *ibid* at 1.

³⁶⁰ Kritzer, *supra* note 15 at 1.

³⁶¹ Indeed, Kritzer, *ibid* at 2, in referencing Jerome Kirk and Marc Miller, *Reliability and Validity in Qualitative Research* (Beverly Hills, CA: Sage Publications, 1986), at 29-30, notes that, in addition to the Type I error of quantitative and qualitative research - “‘thinking you see something [in the data] that is in fact not there’ (a false positive)”, and the Type II error (“‘failing to see something [in the data] that is in fact there’ (a false negative)”, there may also be a Type III error - “asking the wrong question”.

One back stop to the inadequacies in data collection was to do some minimal research on methodology and substance, as well as to use my experience as to the issues that arise in JDRs. In that regard, I relied heavily on the work of Wayne D. Brazil, United States Magistrate Judge, United States District Court, Northern District of California, some of which was provided to me by him after we and others attended the Symposium for Judges at Royal Roads in early 2003³⁶² - see Bibliography and other references to the extensive work that this learned jurist has done and continues to do in the field of ADR and JDR. I also reviewed the dispute resolution survey of Vancouver lawyers and accompanying article of Epp.³⁶³ Having used those sources and considered

³⁶² Whose Court is it Anyway? Judicial Dispute Resolution in Canadian Courts - A Symposium for Judges, Royal Roads University, Victoria, 2003. Specifically I had regard to:
 - Wayne D. Brazil, "Kinds of Contributions a Neutral Can Make to a Settlement Dynamic" (Paper presented at Whose Court is it Anyway? Judicial Dispute Resolution in Canadian Courts - A Symposium For Judges, Royal Roads University, Victoria, 2003) [unpublished];
 - Brazil, "25 Years After", *supra* note 14;
 - Wayne D. Brazil, *Early Neutral Evaluation in the Northern District of California: Handbook for Evaluators* (San Francisco: United States District Court, Northern District of California, Revised September 2001)[Brazil, "Handbook, 2001"](- with emphasis on evaluation questionnaires for both attorneys and parties - Appendix 8). I have more recently had access to the November 2008 revision of same: Brazil, "Handbook, 2008", *supra* note 60 - however, as noted in the bibliography *infra*, for the purposes of this Evaluation Report, there are not many substantive differences - I shall usually reference the most recent.;
 - United States District Court. *ADR: Dispute Resolution Procedures in the Northern District of California*, online: United States District Court, Northern District of California (Revised July 2000) <<http://www.adr.cand.uscourts.gov/adr/adrdocs.nsf/0456e64e13c35663882564e600676f23/e4a1d742f8be60bd882572d400699cc7?OpenDocument>> (referenced in Brazil, "Handbook, 2008", *supra* note 60 at 24); and
 - Brazil, "What Lawyers Want" *supra* note 238.

³⁶³ Epp, *supra* note 333, referencing, *inter alia*:
 - (at footnote 12), Wayne D. Brazil, *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges* (Chicago: American Bar Association, 1985); and
 - (at footnote 17) his own article "Saskatchewan Pre-Trials: An Empirical Record and Proposed Amendments" (1991) 55 Sask. L.R. 43.
 See specifically the survey questionnaire at Appendix A to the article, at 114-6, which was created on an adaption of Brazil's 1982 survey of 1,900 US lawyers (see Epp's footnote 14, at 86).
 While a detailed analysis of the Epp survey is beyond the scope of this Evaluation

questions from my ADR education (probably about 350 hours of formal training to date, plus reading) and my own experience (over 100 mini-trials and JDRs since 1991 and 1995 respectively, in my now 18+ year judicial career), I also consulted (but in a fairly shallow way) a broad section of the judiciary, the bar and academics. The result is what, notwithstanding the limitations of its development, I hope will prove to be a useful set of questions for the Survey and its evaluation of the JDR Program. Indeed, some believe that the “skills used by the evaluator of an ADR system are the skills used by an ADR practitioner”.³⁶⁴

Some have asserted that “[t]he ADR principle most relevant to systems evaluation is the use of interest-based techniques”.³⁶⁵ That may be the case for some dispute resolution (and some ADR) systems, but it was not for this JDR system. While identification of interests, is, in the literature and in practice, an important part of the settlement of what is otherwise rights based litigation, and while the JDR Program in general, and some JDR justices more than others, focus on interest based ways to achieve settlement, another role (perhaps the

Report, and the results can be reviewed separately, in simple terms, on matter not already covered by rules included in the Alberta JDR Guidelines, the conclusions reached included, *inter alia*, that:

- lawyers want judges, especially upon invitation, to be actively involved (not merely facilitative) in settlement before trial, and that such direct and indirect involvements significantly improved the prospects of success - including maintaining fairness and increasing the likelihood of a fair settlement;
- there was substantial support for mandatory settlement conferences;
- judges who were well-prepared, persistent, polite, analytical, logical and low key were the most sought after;
- lawyers did wish an opportunity to pick the settlement judge, if possible, but did not want this option if it led to deadlock delaying getting into the program;
- judicial specific input into settlements and opinions were valued;
- judges should not make value judgments on settlements; and
- there was support for early case management, but settlement was not likely to be successful until after discovery.

³⁶⁴ Bussin, *supra* note 5 at 470.

³⁶⁵ *Ibid*, at 470-1, referencing:
 - C. Costantino, “Using Interest-Based Techniques to Design Conflict Management Systems”, [1996] Neg. J. 207; and
 - W. Ury, J. Brett and S. Goldberg, “Designing an Effective Dispute Resolution System”, [1988] Neg. J. 413.

primary role) sought by the parties and their counsel is an evaluation of/risk analysis for/opinion about the parties rights. While the processes of facilitation (which are more focused on interests) and evaluation (greater focus on rights) are measured somewhat in the Survey, it was not a specific goal or purpose of either the Program or the evaluation, to evaluate the “use of interest-based techniques”, nor was that specifically done - indeed, it was one of the “questions not asked”, *infra*. Rather, the primary purpose of the evaluation was to measure whether the primary goals of the Court and the parties were achieved - the most relevant one of which was, with consequential benefits, whether the subject case was settled, regardless of the substantive basis for the settlement.

Another back stop to the evaluation was to seek (separate from the Survey returns³⁶⁶) the identity of Survey participants who were prepared not only to answer the 10 page Survey questionnaire³⁶⁷, but also to participate further potential interviews or e-mail questionnaires which might be conducted. However, that back stop presented conduct (and what some might, incorrectly, call ethical) questions³⁶⁸ relevant to tainting the data, which the separate envelope returns tried to ameliorate.

The whole issue of conduct (ethics?) in the survey methodology was substantially ameliorated through the University of Alberta Arts, Sciences and Law Research Ethics Board, and stringent procedures in distributing the blank,

³⁶⁶ Achieved by asking participants to keep the Survey return confidential and send it in a separate pre-stamped envelope from a similar envelope for the identity of the respondent for further interviews or questions (each provided as part of the Survey package) , as noted in Appendices 1 and 2.

³⁶⁷ Most did, notwithstanding its length, although some questions were unanswered or not completely answered - see comments of Epp on this issue: Epp, *supra* note 333, at 86.

³⁶⁸ On the issue of the difference between ethics and conduct, in the context of performing JDRs, see *infra*.

and recovering the completed, Surveys and separate future question/interview forms.

As to the conduct/ethics issues pertaining to doing research questionnaires, a number of steps were taken with the Survey. First, the Survey form packages emphasized that the process, and all participation was completely voluntary and confidential. Specifically, regarding confidentiality, it was made clear that no information about the specific JDR was to be identified in the response (not the action number, nor the participant, nor the JDR justice, nor anything related to the merits of the action being JDRed), and that the information would be aggregated on an anonymous basis, with original returns remaining confidential, and that I would not participate in any proceeding where I accidentally learned any information. See Appendices 1 and 2 for the detailed advice and instructions.

Second, as intimated *supra*, the Survey and Consent to Interview forms, once completed, were directed to be separated by using separate self-addressed stamped envelopes (addressed to myself), so that the identity of the participants in the latter would not contaminate the former. As can be seen from Appendices 1 and 2, the instructions were explicit on this point. Compliance was remarkably high and any lapses were effectively cured by my assistant (Darlene Walker, to whom I owe a debt of gratitude) opening my mail and separating any returns that came together, before presentation to me.

Third, with minor exceptions, the Survey returns were not handled by anyone between the user and me. They were mailed back directly to myself, although a few came through the JDR Coordinators, but these were quickly forward to me (with them being cautioned to send them directly to me without reviewing them).

As to handing out the Survey packages and obtaining the returns, a detailed procedure was followed. However, simply put, the process included the following steps. First, after detailed design, drafting and re-drafting of the questionnaires (with judicial input sought and some obtained), there was the physical preparation of the Survey packages for lawyers and clients (as noted, samples of the actual packages are contained in Appendices 1 and 2 respectively).

Second, there was a need to ensure adequate copies of the Survey forms and appropriately marked envelopes (pre-addressed and postage pre-paid) all of which were made available to/through the JDR Coordinators in each judicial centre (sponsored by Alberta Justice, on the approval of Associate Chief Justice Wittmann). I should say that the JDR Coordinators, especially the three handling the most volume, Pat Gordon in Calgary, Brent Rosin in Edmonton, and Lisa Brown in Lethbridge, made the delivery of the Survey happen, and happily followed up on my many requests and questions during and since the survey period.

Third, picking up on the last point, I requested the JDR Coordinators, for each JDR to code the forms to identify the season (Summer - for Calgary and Edmonton only, Fall or Winter - these distinctions were subsequently determined to be of little, if any, relevant use), add the designator number for the judicial centre (each judicial centre has such a designated number as a matter of the administration of justice in Alberta), and add a random number (from a random number generated sheet) to the forms to identify the individual JDR and for tracking purposes (the idea was that, perhaps, data pertaining to one JDR, from the perspective of different participants in that JDR, might be compared to check for correlation - although time has not permitted this to be examined and utilized in any detailed way in the analysis done for this Evaluation Report). Thereafter,

they were asked to hand the packages to the presiding JDR justice and ask him/her to hand them out to the participants, or, if for any reason they weren't handed out, for the JDR Coordinator to mail them out to the participants.

The fourth step related to communication with the Court's justices, explaining the exercise and seeking their cooperation, when performing the duty of a JDR justice, to hand out the Survey forms and to request the participants to consider completing and returning them. With only a few exceptions, the JDR justices were extremely helpful in this regard - those doing so showing their dedication to the JDR Program, and its evaluation.

Fifth, on their return, the Surveys came directly to my attention, and care was taken to make sure that any completed Surveys and Consent to Interview forms that had not been separated, were separated (by my assistant), and the "raw data", consisting of the completed forms were put into binders. That raw data has been retained for quality control purposes should it be required.

Sixth, a data base, using Microsoft's "Access" (TM) software, was created (by my spouse, a computer programmer), and was used by a summer student, Jena Will, who entered the raw data from the Survey returns, keeping lawyers and clients separate, and giving each a sequential control number to identify the specific Survey return document.

Seventh, the Consent to Interview forms were placed in separate binders, and retained, although not yet classified in any way, except to separate clients from lawyers.³⁶⁹

³⁶⁹ With thanks to those 178 lawyers and 85 clients who took the time to complete not only the long questionnaire, but also, the Consent to Interview form, I must apologize that I have not used the resource available in the latter material. After reflection on the high quality of the data obtained, and considering the time element, I made the decision, again with thanks to those who volunteered, not to

Eighth, the data was analyzed to provide the summaries that are attached - Appendix 3, the Survey Report Summary (detailing the number of JDRs, the Survey forms handed out, and the returned Surveys); Appendix 4, the Lawyers Survey Results; and Appendix 5, the Clients' Survey Results.

Ninth, the individual sets of data, using the wonders of the Microsoft "Access" (TM) data base technology, were cross-analyzed in an integrated way to "drill down" beneath the bare data as provided - e.g., success by type of case, etc., as discussed *infra*.³⁷⁰

Tenth, after an extensive review of the literally thousands of pieces of relevant, or potentially relevant, literature, the Survey data, together with my further analysis and opinion, comes together in this Evaluation Report, "Improving Excellence...".

So, with this background, what are the summarized results and the preliminary³⁷¹ analysis from the Survey data?

contact them for further information. There were three aspects to the time element: sometimes the time between the individual JDR and any subsequent interview or supplementary questionnaire, and its potential impact on memories; the time to send and get a return of any supplementary questionnaire, or conduct a subsequent interview; and the time necessary - but not available - for the analysis of such supplementary information and incorporation into this Evaluation Report.

³⁷⁰ I should note that the process of setting up the data base in step 6 (by my spouse), and my work in tabulating the summaries (and removing any identification of participants that inadvertently crept into the answers to the questionnaires) and doing the integrated analysis in steps 8 and 9, alone took several hundred hours, not specifically recorded.

³⁷¹ The word "preliminary" is used in at least two senses. First, the data as now analyzed is simply added up and percentages applied where appropriate as to the quantitative data and the qualitative data is repeated verbatim, subject to editing to protect the confidentiality of the participants. However, a more complex interactive database analysis has been conducted on some interrelationships *infra* (e.g. how many JDRs used mini-trial methodology in Edmonton, as opposed to Calgary, and what was the ratio of success; and the frequency of the justice meeting the parties afterward to help them in their negotiations, and how many

C. RESULTS AND PRELIMINARY ANALYSIS

1. APPENDIX 3 - GENERAL AS TO ALL JDRS

Appendix 3, the Survey Report Summary, as noted *supra*, discloses: the number of JDRs held in each judicial centre; which of those was surveyed; how many Survey packages were handed out to each lawyer and client; how many Surveys were returned; and the % of the returns. As to the number of Survey packages handed out, it is to be noted that there are typically 2 lawyers and 2 clients in each JDR, but there may be less if a party is a self-represented litigant (SRL), or more if there are multiple parties, or parties with multiple capacities (as to the latter, where a person is a plaintiff and a defendant by counterclaim, perhaps with a different lawyer for each position) - the average system wide was 2.5 clients and 2.4 lawyers per JDR.

While much of it will be self-explanatory, a review of Appendix 3 reveals a number of considerations.

Of the 631 JDRs held throughout Alberta in the year ending June 30, 2008, all except 25, namely 606 (96%) had Survey packages handed out.

Of the total of 578 JDRs surveyed in Edmonton and Calgary, Edmonton had 248 (44%) and Calgary had 330 (57%). Internal data reflects, however, that the total civil cases in the two cities for which JDRs were a potential were roughly equal in size. Thus, on the face of it, one might conclude that Calgary is more inclined than Edmonton to use JDRs, having regard to the relative equal number of civil claims³⁷² on the Court's files in the two cities.³⁷³ This relative similarity in

justices caucused in these instances; is there a correlation between the JDR methodology used and success rate; etc.). Second, I only intend to comment on some major issues here, and not all the data, much of which will be self-explanatory.

³⁷²

For this purpose, all litigation is "civil", except cases bearing a court file designator

the number of JDRable cases in Edmonton and Calgary is notwithstanding different size areas for the whole judicial district within the judicial centre is located³⁷⁴, not just the judicial centre itself.

Regrettably, for reasons not explained, Red Deer, Alberta's third largest City (population 86,000), refused to participate in the Survey process, whereas a slightly smaller city, Lethbridge (population 82,000), had a slightly higher number of JDRs. Medicine Hat (population 60,000) had a relative large number of JDRs per capita - perhaps this says something about the litigation culture of the bar or bench in those cities. Grande Prairie, a medium size city (population 50,000) had relatively few JDRs - again, I suspect the litigation culture. Smaller centres had few to no JDRs.

indicating a criminal, bankruptcy/commercial (e.g. Companies Creditors Arrangement Act claims, etc.) , and surrogate cases. Bankruptcy and surrogate cases are seldom litigious in the traditional sense, and, if the latter are litigious, the litigation often comes forward in a separate civil action. While bankruptcy and commercial cases seldom go to "trial" in the traditional sense, they often have lengthy hearings, most frequently without *viva voce* evidence. Notwithstanding these file designator classifications, the JDR Program is technically open to any case that would result in a trial if it fails to settle, except criminal cases.

373

I should add that, for some of these, judicial dispute resolution is potentially available now, and potentially for others in the future. While there is no current JDRing of criminal cases, it is an area where other jurisdictions are experimenting, and research in the area would be welcome for future consideration. Sentencing circles for aboriginal cases, for example, are a form of JDR - with a "recommended" adjudication. A form of JDR may seem appropriate for consideration in other alleged criminal offences - with possibly more likelihood in property related offences. However, without further analysis, beyond the scope of this Evaluation Report, I do not recommend it at this time. In all the other areas mentioned, there is no reason, why in the right case, JDR would not now be available.

374

For those not familiar, a judicial district is an area with Alberta (11 in total), of which there are a corresponding 11 judicial centres where the Court presides (and a sub-judicial centre of Edmonton in Hinton). See *Alberta Rules of Court*, at 5.1.1 and <<http://www.albertacourts.ab.ca/CourtofQueensBench/tabid/69/Default.aspx>>.

It is necessary to understand that, except for Edmonton and Calgary, there is currently little choice in the JDR justice in other judicial centres - you get who is scheduled, and due to last minute schedule changes lawyers/clients often get who “walks through the door” with little to no specific communication with the justice before - this needs evaluation and communication (through the Trial Coordinators in locations outside Edmonton and Calgary to make sure that the participants know who the JDR justice will be in advance and have an opportunity to speak with him/her).

The percentage return was 26% for lawyers (quite respectable, as I understand it, in face of “survey fatigue”³⁷⁵, especially from a questionnaire as long as the one I used in the Survey) and 13% for the clients (valid, but not high). The return ratios are understandable, because lawyers, as “officers of the court”, may be (likely are?) involved in a number of pieces of litigation and have a vested interest in litigation processes including JDRs, whereas clients often only have one such experience in their lives³⁷⁶ and therefore no vested interest. The exception to the latter, as we will see in Appendix 5, the Client Survey Results, will be insurance adjusters who are frequent users of the JDR system - representing 92 of the 193 clients who responded (48%) and 76% of all

³⁷⁵ Kritzer, *supra* note 15 at 10-11, referencing contributor “Hazel Genn” (specific article reference not yet provided), noting that 25% is a “reasonable response rate”.

However, note that Brazil, in Brazil, “25 Years After”, *supra* note 14 stated at 147, footnote 135, that a survey of parties (clients) at 25% was “quite low”

³⁷⁶ Macfarlane refers to the one-time or one-off personal litigant as the “one-shotter” or “‘one-shot’ clients” - see, *inter alia*, Macfarlane, *supra* note 25 at 15, 60 (relying on, in each case, M. Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 Law and Society Review 95), 119, 127, and 175 (and elsewhere) (relying on Leonard L. Riskin and Nancy A. Welsh, “Is That all There is? ‘The Problem’ in Court-Oriented Mediation” (2007-8) Geo. Mason L. Rev. 863, at 864). The latter state “[f]or one-shot players, involvement in litigation is far from ordinary. Indeed, many have resorted to the courts only because they have been caught up in once-in-a-lifetime, unique, or catastrophic events”.

defendants who responded³⁷⁷ and thus have a some continuing professional “vested interest”.

What preliminary recommendations appear, at first blush, on the face of these data? It is not too clear, but, perhaps more information about JDRs being available to the bar in the circuit points outside Calgary and Edmonton, including better ability of counsel to know the JDR style of justices (see recommendation for a JDR Justice Profile as more fully discussed and recommended *infra*, a sample of which is provided in Appendix 8) and a better ability to communicate with the JDR justice who will be presiding before the JDR takes place - recommendations supported by qualitative comments of lawyers. Related would be better methods of selecting JDR justices in those circuit points - there is currently no choice in a given period of time, only the ability to know who the presiding justice will be, which is usually not disclosed in advance of the sitting, so as to avoid “judge shopping” in non-JDR proceedings - a different judicial identity disclosure regime exists for contested motions and trials (disclosure discouraged), as compared to JDRs (disclosure encouraged). The JDR Committee (JDRC) of the Court needs to consider this situation.

Other recommendations may arise as the Survey results are reviewed.

³⁷⁷

Clients’ Survey, Sections D1 and D2 (Appendix 5). I note the comments in Julie Macfarlane and John Manwaring, “Reconciling Professional Legal Education with the Evolving (Trial-less) Reality of Legal Practice” (2006) J. Disp. Resol. 253 [Macfarlane & Manwaring] at 254, that “repeat users of the civil justice system are no longer satisfied with a slow and ponderous progress towards trial and are starting to expect early efforts to explore settlement, using mediation or other consensual processes whenever possible”.

2. APPENDICES 4 AND 5 - LAWYERS' AND CLIENTS' SURVEY RESULTS

The Lawyers' Survey Results are contained in Appendix 4 and the Clients' Survey Results in Appendix 5. However, for this purpose, I will do a preliminary analysis of the data therein together - pointing out differences between them as appropriate, and making recommendations as I go.

Before starting the analysis, it is important to recognize that the data comes from only 19% of the participants, 26% of the lawyers and 13% of the clients, and no correlation has been done (although the data is available for that purpose) as to what percentage came from the same JDRs, as opposed to different JDRs. Thus, we do not have a complete picture of the averages of all 606 JDRs conducted in Alberta in the 2007 - 2008 Court year, only the results signified by these samples. Accordingly, one cannot say that, for example, "of the JDRs carried out in Calgary, X is the statistic", but rather one can only say that "of the JDRs carried out in Calgary, *according to this sample*, X is the statistic" - that should be understood throughout, although I will not repeat this reality as we go forward.

I will do the preliminary analysis by question area and number.

A. AREA³⁷⁸

A1. Judicial Centre

These data are effectively summarized in Appendix 3.

³⁷⁸ These underlined and lettered headings (e.g. "A. Area") refer to the named sections of the Survey. The lettered and numbered, but non-underlined, headings (e.g., "A1 Judicial Centre") refer to the sub-sections in the Survey.

B. REPRESENTATION

B1. & B2 (Clients only) Representation

In between 93% (from the Clients' Surveys) and 97% (from the Lawyers' Surveys) of JDRs, the clients are represented by lawyers. The Lawyers' Survey indicated that there were 8 self-represented litigants (SRL) on the other side of their cases (2%). The Clients' Survey was completed by 3 SRL (2%) and there were 6 SRL identified by clients as being on the other side.

While really a part of the integrated analysis applicable to the next section of this Evaluation Report, I will comment here on the 3 SRL respondents. A drilling down of the data shows that 2 were "one-shotters" - a plaintiff and a third party - respectively in motor vehicle collisions, one from Calgary and the other from Edmonton. Both settled the litigation at the JDR, and the answers provided indicated a fairly pleasant experience for each. The third was a one-shot family law plaintiff in Calgary who was successful on about 50% of the issues, and also appeared to be pleased with the Program, although recommended that once a settlement is reached it should be documented at the JDR.

Danielson³⁷⁹ had some interesting comments on SRL:

Self-represented litigants are a contentious issue that can be dealt with at the pre-JDR screening. Survey responses would indicate that many justices do not want to do JDR with self-represented litigants. Other justices want to be sure the 'self-rep' is prepared and ready. It is the writer's opinion that JDR is not a process ideal for self-reps.... If the self-represented litigant is not fully prepared, they may be completely overwhelmed during the process. The writer feels that it's not the job of [the JDR] Justice to "protect" the self-rep in this type of proceeding. A self-represented litigant must be able to act and advocate for themselves.

³⁷⁹

Danielson, *supra* note 4 at 74.

The Alberta Law Reform Institute studied SRL in the context of research for the New Rules³⁸⁰.

As one alternative for SRL, with the advent of the Law Society of Alberta examining the “unbundling” of legal services, such that lawyers may represent clients for only some services, and considering the importance of JDRs in resolving cases, it may be appropriate for some SRL to consider retaining a lawyer for the JDR alone, and assigned JDR justices might so recommend to SRL.

A survey in Calgary in April 2009 showed that at least 16 justices would do JDRs with SRL, and seven will do Binding JDRs with SRL. The numbers for Edmonton are 4 and 14 “depending on the circumstances”, although in Edmonton the practice is that SRL need the leave of the Chief Justice or his designate.³⁸¹

C. TYPE OF CASE AND JDR TIMING

C1. Type of Case

JDR is available for almost all types of civil cases. Indeed, I believe that the default should be that all types of cases may be JDRed unless considerations arise that remove them from that alternative. As JDR is completely voluntary, the issue does not often arise because any party thinking that JDR is not appropriate will simply not agree to a JDR. It could only arise if a proposed JDR justice thought it was not an appropriate type of case for JDR - I know of no situation where this has happened by reason of “type” of case.

³⁸⁰ Alberta Law Reform Institute, Rules of Court Project, “Self-Represented Litigants”, Consultation Memorandum No. 12.18 (Edmonton: Alberta Law Reform Institute, 2005).

³⁸¹ Communication with the Calgary and Edmonton JDR Coordinators (memos on my file).

However, all that will change when some form of dispute resolution is required under the New Rules and one or both parties may wish to have the requirement waived by a justice (for JDR or any other type of dispute resolution), although if a dispute resolution session goes ahead the parties still have a choice (by agreement) as to JDR, private mediation or court-annexed procedure.

The majority of cases (65 - 69%) are personal injury, of which 83-86% of those are motor vehicle collisions. Family litigation represents 12% (C³⁸²) - 20% (L) of JDRs - probably closer to 20% in my view, as it may be that family law clients did not have as vested an interest as the lawyers in this area to participate in the Survey; only 2 of the 22 family law clients who responded to the survey had participated in a JDR previously. Other areas specifically enumerated (employment, insurance coverage and contract disputes) are relatively consistent between (C) and (L) at 3 - 5% of cases.

The integrated analysis, *infra* in Tables 3 - 5 identifies the type of JDR mechanism that was used to pursue settlement of the case types identified in section C.

In my view, it is necessary before the JDR briefs are filed that the JDR justice know what issues are going to be involved in the JDR so s/he can determine whether to hold a Pre-JDR, or to request certain information in the briefs in the JDR Instruction Letter going out to counsel (as recommended herein). Often the issues for a JDR are not apparent from the pleadings, which are usually very broad, and some aspects thereof may have been abandoned or settled before the JDR. Therefore, there is a need to find a way to provide this information. I believe that, in addition to other reasons for such a recommendation, the JDR Booking Confirmation Form recommended herein

³⁸²

In this Evaluation Report, "(C)" and "(L)" references clients and lawyers respectively.

should be used to identify the type of case to be JDRed, and what is involved - liability and/or damages, debt, family law - support, parenting, matrimonial property, etc.

As to personal injury, the majority of such claims, from experience, are insured claims, and those represent issues as to level of authority of adjusters³⁸³, for which there should be clear instructions to the lawyer/parties requesting a JDR - Instructions Letters (IL), as discussed *infra*, must demonstrate precisely what is required.

As to family law, cases may involve any combination of one or more of child related issues, spousal support and/or matrimonial property. JDR Booking Confirmation Forms and JDR Instruction Letters should identify, respectively, which is to be discussed at the JDR and what type of information is to be provided to the JDR justice.

C2. Length of Litigation Pre-JDR

Note that the total time in litigation in C2 is closely related to the stage (stages between commencement and trial) at which the litigation is sitting (section J) when the JDR takes place.

³⁸³

For an excellent and concise explanation as to the detailed reasons why the right representative and one with sufficient authority to settle for any amount that a proper representative might be convinced to accept/offer as a result of the mediation must be present in person (not by telephone) at a mediation, see: Robert Lewis, "Sanctions for Lack of Good Faith Participation in ADR Process" (2002) 55 Labour Law Journal 148, at 151-2, referencing *Nick v. Morgan's Foods of Missouri, Inc.*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000), at 1062-3, affirmed: 270 F. 3d 590 (8th Cir. 2001). This article, which dealt with failure to file ADR brief and insufficient authority of representative present, indicated that such conduct is more likely to be a problem when the attendance is compelled, not voluntary by consent.

Danielson addressed JDR timing in her Evaluation Report. While noting and commenting on the fact that “[t]iming for litigants is generally a matter of emotional ... , financial ... and informational preparedness”, she asserted that JDR justices and her survey supported that:

A legalistic analysis notes matters as ripe for mediation when the plaintiff and defendant counsel have a full appreciation of the factual and legal issues involved and have discussed the costs and risks of litigation with their respective clients.³⁸⁴

However, at the end of her analysis³⁸⁵, she concluded that timing was not simply a matter of information and the lawyer’s readiness, but much could be achieved if the clients were keen:

The writer now views the issue of timing as more complex than just unresolved emotion or insufficient information. It now appears to be in a more contextual consideration, and the objective that needs to be better articulated is how to seize the opportunity to capture the disputant’s motives to settlement at the earliest time. If this can be achieved, the saving in human and financial resources will be very significant.

I believe, however, that unless there is enough information one should not try a JDR based on motivation to settle only, but rather make the decision on a balancing of all the considerations (information v. anxiousness to settle). In my view, if there is very little information, such as the matter is not ready to go to trial, this can only usually only be determined by information provided at the time of booking (JDR Booking Confirmation Form) or following a Pre-JDR - that is, if the information appears scant, that may be a reason for a Pre-JDR.

³⁸⁴ Danielson, *supra* note 4 at 52, referencing Assata N. Peterson, “Arbitration, Mediation and Procrastination - Avoid the Pitfalls and Effectively Plan for your Next ADR”, *American Bar Association Young Lawyers Division, 2004 Fall Conference* - Austin, Texas, October 7-10, 2004, 1, at 4.

³⁸⁵ Danielson, *supra* note 4 at 54.

It is tremendously significant, in my view, that many cases that were JDRed had already been in the system for more than 2 years. Specifically, cases that were JDRed in the Survey period included cases that were in the litigation system for: 2 - 4 years = 30% (L) to 34% (C); 4 - 6 years = 25% (C) to 27% (L); and 6 or more years = 19% (L) to 33% (C). Aggregated, cases that were in the system for 2 plus years (all 3 groups) = 80% (L) to 88% (C); and for 4 plus years (last 2 groups) = 46% (L) to 58% (C).

While there is no information as to the number or duration of inactive lags between activities within the litigation plan, I note that the “drop dead” rule of striking an action automatically for lack of prosecution, now set at 5 years, will, under the New Rules move to 2 years. It seems to me that all the discussion in the literature about delay in litigation as being a reason for ADR methods, has much fodder here. I believe that the Court needs to pursue this issue, and start measuring and recording time to disposition statistics (time from commencement of a case until it is disposed of by abandonment, settlement or trial). A discontinuance of action is often used to signify disposition for the first two and a judgment is sometimes used to record a settlement, and almost always used to record a trial judgment.

Returning more specifically to the statistics, on their face the time to JDR is, in my view, much too long. The Court needs to try to analyze the nature (if there is a specific nature) of the cases that are more than, say, 5 years old - these cases should not, in my view, be in the system this late - they should be settled, abandoned or litigated within 5 years, unless there are exceptional circumstances. At least, in my view, any case that is in the system for more than 5 years (perhaps this threshold should be lowered over time) should be systematically examined for active case management to bring to a more timely

conclusion. I note that there is support in some of the client qualitative comments for such an approach - some blaming the lawyers for dragging out their case.

There is significant integrated analysis of the data by type of case, type of process, success rates, and the like in the section III of this Evaluation Report.

D. YOUR ROLE

D1. & D2. - Role

The numbers of plaintiff and defendant lawyers are very even - 49% to 48% respectively - a well balanced representation of litigation.

As to the clients' role, the Lawyers' Survey reported the following breakdown: personal = 59%; corporate = 6%; and adjuster = 32%. By contrast, the Clients Survey reported the following breakdown: personal = 38%; corporate = 7%; and adjuster = 48%. There is no real difference in the corporate client numbers, but the other two are significant.

These data tell an interesting but predictable story. Focusing on the client role, combining all the data, lawyers for plaintiffs and defendants (relatively equal in number) demonstrated that the ratio of personal clients to adjusters was almost 2 to 1. However, the clients responding to the Survey represented a ratio of personal clients in the opposite direction - 1 to 1.25 approximately. As noted *supra*, this indicates that there was a significant - indeed, a disproportionately high - percentage of adjuster representation in the client data, which is understandable, as they are professionals in the field, rather than "one-shotter" personal clients who may have little vested interest in the Survey. Frequent institutional users (i.e. adjusters) have a vested interest and a higher percentage of them responded to the Survey than fits their % role in the system.

Some simple analysis showed that 180 lawyers represented defendants and 120 of their instructing clients were adjusters. That means (assuming adjusters most frequently appear as defendants - subrogated cases may be an exception), 2/3 of the clients of defense lawyers were adjusters. On the client side 92 indicated that they were adjusters. While the base is not necessarily the same (i.e., the adjusters in the Clients' Survey may not have been the same adjusters as in the Lawyers' Survey), if the 92 adjusters in the Clients' Survey were also the 92 of the 120 identified in the Lawyers' Survey, that would indicate that about 75% of client adjusters from the Lawyers' Survey were sufficiently interested in JDRs to complete the Survey - to the extent that this is an accurate surmise, it shows that segment of parties in litigation have a significant interest in the JDR Program.

D3. Previous JDRs

It is interesting to note that 96% of lawyers had done 1 or more JDRs previously, and over 81% of lawyers had done more than 5 JDRs - demonstrating a high % of repeat users. On the other hand, only 52% of clients had participated in JDRs previously, but, of those, over 80% had done 5 or more - my suspicion was that these "frequent fliers" were primarily adjusters, but a further analysis would be necessary to examine that.

The further analysis confirmed exactly that. Of those 92 adjusters in the Clients' Survey, when they were asked if they had participated in a JDR before³⁸⁶, only 6 (7%) had not, 14 (16%) had participated in less than 5, 21 (23%) had participated in 5 - 10, and 49 (54%) had participated in 10 or more - the remainder were no answers. This compares to only 1 of 70 personal clients who

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It should be noted that a minor flaw is contained in the classification which permitted some overlapping of information - rather than 1, less than 5, 5-10, and 10 or more, it should have been 1, 2-5, 2-10, and 11 or more.

had 1 previous JDR experience. The adjuster percentages compare with the lawyer participation percentages of 4%, 18%, 23% and 58%. Both comparisons indicate that adjusters are very knowledgeable about the JDR process, similar percentage wise to lawyers.

To the extent that users have previous JDR experience, it *may* be that there is less need than there was in the earlier days of the JDR Program for information prior to the JDR and/or as extensive a JDR justice's Opening Statement (query whether short cuts can or should be taken on basic commonly known JDR information - or both, so as not to bore the participants). Of the processes prior to the JDR we are talking about information received from the parties prior to any Pre-JDR, the Pre-JDR if conducted, and the JDR Instruction Letters from the JDR justice to the lawyers. This therefore may raise relevant considerations pertaining to: JDR booking conformation (I recommend a JDR Booking Confirmation Form - a sample of which is in Appendix 8); need for Pre-JDRs (I recommend only if necessary, and not as a substitute for JDR Instruction Letters); and useful JDR Instruction Letters, in any event of a Pre-JDR (see sample in Appendix 8).

As to the Opening remarks of the JDR justice or counsel at the JDR, this *might* permit a more "instant start" at the JDR sessions themselves where *all* the participants have JDR experience. The need to consider this is reflected in qualitative comments *infra* where participants indicate (positively) that the justice got "right to it" in terms of the process, without much of a "warm up". However, it might be that the "warm up" is necessary to get everyone in a positive negotiation mood, even if the participants are experienced. Nevertheless, the big factor against this is that personal participants (one-shotters) tip the balance. That is because the JDR process is client centred (especially for personal clients) and in my view, the Opening Statements (JDR justice and

parties/lawyers) must focus on the lowest common denominator - the least experienced participant. These are matters that the JDRC may wish to give a best practice recommendation, although if there is doubt I believe an Opening Statement by the JDR justice is needed to at least some extent to refresh memories on the JDR session “rules” and to engender a settlement mood, as mentioned. Lawyers Opening Statements should be focused to what is important to move in a timely and strategic way to settlement.

There is one further consideration and that relates to basic information for the inexperienced, usually personal, client. Qualitative comments from some clients indicate lack of clarity as to JDR procedures in general. I will recommend that an appropriate JDR Program Pamphlet be prepared for such users.

E. TYPE OF JDR & PRE-JDR INFORMATION

E1. Type of JDR

The differences in the responses are not marked as between lawyers and clients. While this was a question where more than one choice could be made, resulting in some combinations of more than one type of JDR being used, the combined numbers are a good indication of the importance to the parties of each type of JDR. Evaluative mediation is the predominant type (a mean of 65% for both clients and lawyers), with negotiation or mediation (combined, what I call “facilitative mediation”) following (a mean of 30%), followed in third by mini-trials (a mean of 24%), and, finally, with Binding JDRs a distant 4th (mean of 10%). This means to me that evaluation of rights (evaluative mediation and mini-trials - totaling 95%) is still more significant than mere facilitation (24%). A more “pure” measure of each JDR service is provided in the integrated analysis, *infra*.

However, it is interesting to note that there were many that used more than one type - hybrids (more than 1 answer being permitted, the total %s are 117% for clients and 142% for lawyers). This suggests some further analysis. For example one of the questions and many of the qualitative responses suggest that some mini-trials are very “pure” (not much judicial participation afterward - indeed, there were a number of user complaints about this), whereas other mini-trials were followed by some form of judicial mediation. This has been examined in the integrated Mini-Trial Analysis in Table 6.6 of Appendix 6 *infra*, which combines analysis on a number of matters, including: number of mini-trials in each of Edmonton, Calgary, and Lethbridge; augmented by any differences with those for which there was caucusing after the opinion; ratios of success; and analysis by case type. In this analysis we will see the extent to which there are “pure” mini-trials and those where judicial mediation follow. And, to put proof to the rumours, we will see the extent to which there are fewer “pure” mini-trials in Calgary and more in Edmonton.

See a similar integrated Mediation/Evaluation Analysis in Table 6.7 of Appendix 6 and Binding JDR Analysis in Table 6.8 of Appendix 6.

Are there other types of JDRs that could and/or should be considered as a potentially offered service? There are examples in the U.S. Some don't appear logical - we have too few civil juries to merit a Summary Jury Trial, and the Court's justices are precluded from doing arbitrations, including Non-Binding Arbitrations. There are other reasons not to do the latter - if you are going to have a rather full hearing with *viva voce* evidence, you might as well have a binding adjudication - a trial. To the extent that a more formal non-binding opinion is appropriate, the judicial mini-trial accomplishes much of this need.

One service for possible review is Early Neutral Evaluation (ENE), which I will examine in detail *infra*. Some “one-off” ENEs have been done and there is some pilot work being done on them in family law in Edmonton. Moreover, as we will see, Agrios recommends them. A literature review will be helpful in this analysis. However, to telegraph my recommendation, I have concerns about how this service accords with the mandate of the Court (e.g. is the Court’s “business” to help settle cases that will likely, statistically, settle themselves, or only those that are ready and surely otherwise will go to trial?).

A form of dual consideration - a hidden phenomenon arises with Binding JDRs - let me explain. I, and many judicial mediators I know, while treating Binding JDRs as a different type of JDR (because of both the process leading up to settlement or impasse, including sensitivities in caucusing and confidentiality, and the final consequences), use many of the skills associated with the other types of JDR before coming to any final opinion. In other words, within the JDR session itself (as opposed to the final opinion), we treat them as all of the above - negotiation, mediation, evaluation, in such combination as is necessary, without putting the activities into express pigeon holes. Thus, they are a bit of a hybrid for many of us - negotiate and mediate (facilitative or evaluative) to attempt to get a settlement, and, if that is not possible, provide a form of mini-trial non-binding opinion or adjudicative decision (see discussion on *L.N.*³⁸⁷, *infra* as to the distinction) - in either case for acceptance by the parties according to their agreement, and thus making them a Binding JDR.

Comments by participants make it clear that they wish to know what type of services they can expect from the JDR justice, and whether there are any limitations to the services that an individual JDR justice will provide (e.g.

³⁸⁷ *L.N.*, *supra* note 19.

caucusing). I believe that this requires good communication as to what the parties and their lawyers expect, and what the JDR justice will deliver.

As to the latter, coming chronologically first, the users need to know JDR judicial style proclivities. In an adjudication mode, this is learned over time but is not required knowledge, because there is not judicial choice and the styles are all the same to the extent that trial judges hear evidence and argument and make decisions. However, in a JDR there is, with some limits, choice of JDR justice and the role and options are both much different and have different components. The JDR Coordinators in Edmonton and Calgary (but not other Trial Coordinators in circuit points) keep a list of these style proclivities but I see no reason why it could not be more clear and provided to counsel *throughout the Province* - thus I will recommend a sample JDR Justice Profile form in Appendix 8.

As to what the users want, that is often not too clear, and I can attest that I have done JDRs where that was not clear until I arrived at the JDR, with the resulting process less perfect than it might have been. JDR justices need to know this in advance, and users need to know that the JDR justice is clear what is expected of him/her, with, of course, his/her concurrence. For this reason and to provide clarity for other information that is required, I will recommend *infra* that users complete an JDR Booking Confirmation Form on (or shortly after) booking a JDR - see *infra*, Appendix 8. Furthermore, I will recommend the mandatory (subject only to exceptions for good reason or defensible exercise of judicial independence) use of an Information Letter where the JDR justice, in addition to providing/requesting information can confirm the format of the JDR being provided, as requested by counsel, subject to his/her concurrence.

E2. Who Recommended JDR

This may be a less valuable statistic in the future, because, whereas the JDR Program is now completely voluntary, after the New Rules come in effect in January 2010, some form of dispute resolution process will be necessary, and the only issue will be whether it will be (the parties choice of) private mediation, court-annexed mediation³⁸⁸, or JDR. This coincidentally identifies one question that I failed to ask in this Survey, namely why was a JDR recommended, as compared to one of the other two choices.

It is apparent from the statistics that the judiciary itself is not big in encouraging JDR 3 - 4% only - and, as noted above this will no longer be necessary, as some form of dispute resolution before trial will, be mandatory under the New Rules, unless waived. However, it may be that there is a future judicial role in encouraging other adr methods and with non-judicial providers, as well as JDR justices. Early Neutral Evaluation is one that comes to mind, as we shall see *infra*.

³⁸⁸ While, technically, court-annexed or court-connected dispute resolution processes “includes all methods that are initiated by or through the court system, whether or not they are operated by the court” (Alberta Law Reform Institute), *Dispute Resolution: A Directory of Methods, Projects and Resources*, Research Paper No. 19, July 1990), I shall use those terms in this Evaluation Report as meaning those performed under the auspices of Alberta Justice, or the Court, but not involving judicial (or judicial officer) participants - i.e., not JDRs, involving JDR justices. However, see also Yarn, *supra* note 17, which defines “court-annexed” mediation as a:

Type of court-connected alternative dispute resolution process or program controlled and administered directly by the court or courts from which the disputes are referred, in contrast to a court-referred program managed by an entity mostly independent of the courts but to which the court may send cases. Also commonly used to describe any ADR process or program used by the courts to resolve disputes brought before it without recourse to further litigation. In this broad sense, the term has the same meaning as court-connected, court-referred, and court-related. The narrower meaning is recommended.

As to the difference between lawyers and clients recommendations of JDR, the lawyers would have one believe that they or their opposite counsel (or both) make about 96% of the recommendations for JDR (7% by clients), whereas clients suggest that the lawyer role was less (83%) and the clients role was much higher (34%). These answers total over 100% because more than one answer was possible - meaning that, in some cases both lawyers and clients both agreed or recommended. It may simply be that clients thought they had a bigger role in the recommendation than the lawyers perception. However, it may be, I suspected, that institutional clients (i.e. adjusters) might be playing a larger role than the lawyers acknowledge.

A rough analysis of the recommendation to JDR as between the 88 adjusters (all except 4 of the 92 total adjusters) who answered the question supports my suspicion. It suggests that in 40 (45%) of the cases it was the sole recommendation of the lawyers, in 29 (33%) cases the joint recommendation or agreement of both adjuster and client, and in 19 (22%) of the cases the sole recommendation of the adjuster. Thus, adjusters had the sole or joint recommendation a significant amount of the time (combined = 55%).

As to recommendations, having regard to the long life of litigation files (*supra*), it may be that the judiciary should have a larger role in recommending a form of dispute resolution to users earlier in the process - ENE or private mediation, and JDR - to the extent that JDR is an appropriate process for the 95% that may settle without JDR. An ENE recommendation may be appropriate - highly contested family and other highly contested files are especially ripe for such a recommendation. Moreover, there may be (as noted *supra*) a need for the judiciary (or case management officers) to "flag" cases that have been in the system for more than a threshold period of time - say 5 years - without resolution

for a form of JDR or trial. Qualitative comments of clients support such a recommendation.

Picking up on the latter recommendation, Danielson noted that the 1994 Epp study of Vancouver lawyers “found significant support for ‘early judicial involvement to assist in either guiding the case to trial or the identification of common grounds’”. She noted as well that British Columbia has implemented a “mandatory early case conference in family matters”.³⁸⁹ This comes close to caseflow management, a concept rejected by ALRI in the New Rules Project, but only “close” in that caseflow management is a cradle to grave (commencement to disposition) individual case assignment system (in an Alberta context, except for trial) whereas what I would recommend would rather be a form of targeted case management initiated by a justice or judicial officer.

As will be seen *infra*, without rejecting some form of ENE for family matters in an appropriate way (perhaps in a court-annexed program, not involving judges), my recommendation is that the JDR Program not be used for ENE except for the unusual case as approved by the Chief Justice or his/her designate.

E3. Motivation for JDR

As between the lawyers and clients, there is not a huge difference in percentages as to the degree of motivation (note that more than one answer is welcome). The general percentages and rankings are set out in Appendix 6, Table 6.2 Motivation.

³⁸⁹ Danielson, *supra* note 4 at 51-2, quoting from Epp, *supra* note 333 at 109. Note too that in 1999 a broad base mandatory dispute resolution was contemplated in BC: Joan I. McEwen, “ADR: Moving From Adversarial Litigation to Collaborative Dispute Resolution Models” (1999) 57 *The Advocate* 699, at 703.

The rankings in the table show the order of importance. Note that the rankings for the 2nd to 5th categories (in pairs of two - speed and judicial opinion, and risk and stress) are reversed as between lawyers and clients - in other words, a judicial opinion is more important than speed to clients, and stress is more important than risk to clients - the reverse to lawyers.

The percentage of importance shown in the table demonstrates the relative “weight” of the importance of each category to the participants. In each case (except relationships - not unexpected) the %s showed that lawyers considered the options more important than clients. As to weight of importance, relationship maintenance (being case type dependent - some further analysis could be possible in the future) seems to figure quite low, and options for settlement do not figure high. Perhaps unexpected, lawyers are significantly more concerned about risk of success than are clients.

Danielson noted that when “[j]ustices were asked whether they believed that participants (lawyers or disputants) that choose the JDR process want a judicial opinion”, an “overwhelming majority” answered in the affirmative - more than 75% felt that such an opinion was “important to the success of the program”.³⁹⁰ While the percentages of what the participants actually wanted (not just judicial surmise) were slightly smaller for lawyers (68%) and clients (63%) in the Survey, overall it was very high (third and second respectively) in their ranking of importance.

By way of recommendation, as speed (JDRs quicker than trial) is a significant motivator, along with cost (top 2 for lawyers and 1 and 3 for clients), and the two are inter-related (generally the longer in the system, the more cost) this may be another reason for more active judicial monitoring of matters that

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Danielson, *supra* note 4 at 15.

are in the system for long periods. In other words, the Survey demonstrates that the participants believe that the need for early resolution is important (lawyers second most important and clients third most important), thus supporting a focus on earlier disposition by the Court - as a matter separate to the goals of JDR. To explain the latter, I do not recommend doing more JDRs in the 95% of the cases which general litigation statistics say will settle without trial (the remaining 5% being the focus of the JDR Program), but rather that these data support a separate Court initiative to reduce time to disposition.

E4 - 5. Pre-JDR (Lawyers Only Question)

Pre-JDR Meetings and/or Instructional Letters should identify/clarify *inter alia*: areas and issues of dispute in the litigation (rights issues); areas (if any) of agreement; interests and/or hidden issues; processes and expectations³⁹¹; materials to be provided (a relatively short brief, and highlighted cases and appendices), by and to whom, and when; permissibility of adversarial stances; need for counsel and client preparation; and any other matter that may be helpful to know in advance to promote the chances of a settlement.

Lawyers reported that for almost 60% of the cases they participated in a Pre-JDR was held, 93% of those being instigated by JDR justices, and only 5% by instigated by lawyers. The integrated analysis in Table 6.12 in Appendix 6, *infra*, discloses that there were Pre-JDRs in a staggering 93% of the cases in Edmonton (where the local “culture” of the Court is to have a mandatory Pre-JDR), but only 32% in Calgary (no mandatory Pre-JDR). This begs the question

³⁹¹ Brazil, “Handbook, 2008”, *supra* note 60 at 24, made it clear it is important that there be clarity of expectations between the JDR judge and the users - “[w]e want to be sure that the parties get what they choose and that the judges get what they [direct]”. In the U.S. the parties are directed to mediation, whereas here it would be what the parties agreed to. The Survey results make it very clear that this is not always happening.

to what cost/benefit is this difference given that the success rate was similar? The Survey does not answer the question, but there is clearly a larger cost to the client of a Pre-JDR.

A further analysis shows that of 150 Edmonton cases that indicated they had a Pre-JDR, 7 (5%) were instigated by the parties, and 143 (95%) instigated by the JDR justice. In Calgary, of the 54 cases that had a Pre-JDR, 5 (7%) were instigated by the parties, and 49 (91%) (1 no designation) instigated by the JDR justice.

There is an interesting dynamic here. It appears that “the jury is still out” on the usefulness of Pre-JDRs. The quantitative data and qualitative comments indicate that most lawyers were lukewarm about their usefulness, but most who attended one (Edmonton lawyers) don’t believe the same results could be achieved by a JDR Instruction Letter alone. While no identified comments were made by the Calgary lawyers (therefore no complaints), it is implicit that the JDR Instruction Letter alone was sufficient. Qualitative remarks suggest some believe they are gold, and others believe they are dirt - perhaps more analysis is needed on the factors that make them one or the other from a lawyer’s perspective.

Let’s examine the qualitative comments on this point. Some qualitative answers suggest that Pre-JDR meetings are time-consuming and costly causer and that the same benefits may be obtained by a conference call without an in-person meeting. Other key qualitative comments (often contradictory) included: meeting was not necessary; meeting was absolutely essential; much of the information from the meeting could be put in a letter (JDR Instruction Letter, as recommended); a justice’s personal style and format (JDR Justice Profile, as recommended), and the roles of each participant, need to be set out in a letter (Instructional Letter, as recommended) or at a meeting (Pre-JDR); telephone

conference would be less costly³⁹²; some narrowing of issues is possible at a Pre-JDR; meeting useful for justice to learn of parties' backgrounds and/or idiosyncracies/dynamics (some of which perhaps should not be "on the record") and counsel/justice to discuss the best approach to settlement; a meeting could deal with unusual or unforeseen procedural or factual circumstances (I wonder if that could that be dealt with another way); and a Pre-JDR meeting may give counsel a chance to meet to negotiate and to focus - I note that there is some anecdotal evidence that, occasionally, settlement results from the Pre-JDR, because the lawyers have, surprisingly, only then discussed settlement for the first time. There are a number of "access to justice" issues in this discussion - proper exchange of information v. cost in time and money.

Some justices believe that a Pre-JDR is useful to "screen out" cases that they believe should not be in JDR. Cases thus far have not been automatically refused by type - nor do I believe they should be. Thus, I believe that the default should be that any type of civil case should be *prima facie* available for JDR, and, subject to any pre-set conditions or prerequisites, if counsel wish to schedule a JDR they should be *prima facie* relied upon and presumed to know that the case is appropriate for resolution by JDR. There may, however, be reasons for a JDR justice to refuse to JDR a case. Those reasons would include: too early in the life of the litigation (the focus of the JDR Program is to deal with the 5% that traditionally don't settle, not the 95% that will settle by negotiation); related to the last, lack of any indication of trying to seriously negotiate; lack of willingness to negotiate in good faith; or one of many reasons (mostly lack of material and necessary information, or expert opinion) why a case may not be "ripe" for settlement; or there are undoubtedly others. Nevertheless, I believe that "screening out" should be used sparingly - certainly not because the parties are

392

However, one judicial interviewee suggested that telephone is not very effective and "must be in person - 'eyeball to eyeball'": Danielson, *supra* note 4 Appendix F, at 7.

too far apart - the case is “hopeless”, as Agrios suggests.³⁹³ My experience is that vast differences in position can often be successfully covered in a JDR.

Danielson³⁹⁴ talked about screening out certain cases - one judicial interviewee suggested screening out: lottery cases (cases with a small chance to win, but a big recovery if won); hard line cases (parties who come to a JDR with a “bottom line” and are not prepared to let any persuasion to change their mind, even if logical); and matters requiring a precedent. I agree with the last example, with a caveat, find the middle example very difficult but not impossible, and, having regard to the risks, think the first example is still worth a chance at a JDR.

I say “with a caveat” as to “matters requiring a precedent”, because, as pointed out by Sanchez³⁹⁵, to the extent that “due to the burgeoning caseload” courts have developed what in the United States is called the “unpublished opinion practice” (perhaps similar to the Court of Appeal’s, and occasionally our Court’s, “Memorandum of Decision” or “Memorandum of Judgment” practice, or oral decisions) to “reduce their judicial ‘decision writing’ workload”:

This practice effectively strips this strata of judicial opinions of their precedential function, placing them on the same footing as settlement outcomes - that is, both judicially approved settlement agreements and unpublished opinions are written outcomes of the judicial dispute resolution process that produce no precedential effect. Thus, the limited law creation function of courts may arguably be no more undermined by the advent of “settlement outcomes” than it is by the advent of the “unpublished opinion practice.”

³⁹³ Agrios, *supra* note 12 at 18.

See also other examples in Bussin, *supra* note 5 at 485-9.

³⁹⁴ Danielson, *supra* note 4 at 55-7 and Appendix F, at 5-6.

³⁹⁵ Sanchez, *supra* note 36 at 765.

Moreover, surely precedential value is a more important issue at the appellate level, but JDR still is prevalent at that level in Alberta as well.³⁹⁶

Danielson, at the end of her thesis, advocated “an in-service seminar for all Justices on the effective use of the Pre-JDR meeting” and that a “province-wide discussion on JDR process would inevitably lead to a more consistent *procedural format* for all Justices in the province to follow” (emphasis added), but that a uniform style and approach for JDR justices “is neither practical nor in the best interest of the public”.³⁹⁷ In reviewing an Ontario administrative agency’s program, Adams also recommended the “need to review the conduct of the prehearing process” and the “scheduling timelines for prehearings”.³⁹⁸ Again, some “best practices” might be recommended here from which a JDR justice could select, depending on their judicial independent views and the circumstances of each case - my recommendations include JDR Justice Profile, JDR Booking Confirmation and best practice JDR Instruction Letters.

As to information necessary for a JDR, I note that Adams³⁹⁹, in evaluating an Ontario administrative agency’s program, recommended the need to “clarify and enforce the [program’s] intake requirements” - this seems to me to be the case for both: what cases are presumed to be allowed into the JDR system; and as to the Instructional Letter seeking information to be provided. As to the

³⁹⁶ Justice Marina Paperny. “Too Little Too Late or Better Late Than Never: Appellate JDR” (Paper presented at Whose Court is it Anyway? Judicial Dispute Resolution in Canadian Courts - A Symposium for Judges, Royal Roads University, Victoria, 2003) [unpublished][Paperny].
Otis & Reiter, *supra* note 7.
See also: Mori Irvine, “The Lady or the Tiger. Dispute Resolution in the Federal Courts” (1995-6) 27 U. Tol. L. Rev. 795, particularly at 801-3.

³⁹⁷ Danielson, *supra* note 4 at 73.

³⁹⁸ Bussin, *supra* note 5 at 465.

³⁹⁹ Bussin, *supra* note 5 at 465.

former, as alluded to *supra*, I believe the default should be that, *prima facie*, all cases are eligible for JDR, subject to individual circumstances, but if there is reason to change the default to exclude some types of cases (say, “high potential for violence” cases), the default should be the subject to variation in the right case (say, if adequate safeguards can be put in place). It may be that, recognizing individual judicial independence, “best practice” recommendations might be helpful to bring some general consistency in both cases - especially, if, for some reason, a new JDR justice has to take over from an assigned JDR justice. While some of the “rules” for JDRs are set out in the “Guidelines” (to be incorporated into NR 4.17 - 4.21 of the New Rules) other information and practices are useful.

Table 6.12 in Appendix 6 analyzes the numbers and inter-relationships between Pre-JDRs and Information Letters. Additionally the qualitative responses in the Surveys in Appendix 4 and 5, along with some analysis thereof *infra* will be instructive.

As to JDR Instruction Letters from JDR justices⁴⁰⁰, the data as summarized in Appendix 4 is plagued by “no answers” or apparent misunderstanding of the question. However, on the face of it, all the 151 respondents who did *not* have a Pre-JDR said they received an Instructional Letter, yet 57 said they did neither had a Pre-JDR, nor received an Instructional Letter. The data is not clear. Integrated analysis was done (Table 6.12) to try to measure this better, with inconsistent success. It appears from the integrated analysis data that 143 did *not* have a Pre-JDR, and 85 said they received an Instructional Letter, but 15 said they did not; it appears the remaining 43 did not

⁴⁰⁰

Note that now the JDR Coordinators normally send out letters (and a copy of the Guidelines) to counsel, asking them to confirm the JDR. As the Guidelines (Guidelines, *supra* note 190) are now published in the Consolidated Notices to the Profession, published in the Alberta Rules of Court binder, and the substance of the Guidelines will be part of the New Rules in 2010, I believe that a copy is no longer necessary to be provided, but the JDR Booking Confirmation Form could confirm that counsel has had regard to them and provided them to their clients.

answer. The result is that at least 15 had neither a Pre-JDR nor Instructional Letter - they received no information prior to the JDR.

As to those who had Pre-JDRs (210), 60 received an Instructional Letter, but 36 did not and the rest (114) did not answer. Would the 36 that had a JDR but did not receive an instructional letter, have benefitted from same, in addition to the Pre-JDR? Could such an Instructional Letter have avoided or reduced the need for a Pre-JDR meeting?

What was the quality of the Instructional Letters that were sent out? Of the 151 who did not have Pre-JDRs, but received Instructional Letters, Appendix 4 shows that 130 rated the quality of the Instructional Letter, and of those most were generally happy with the information (90 (60%) ranking 4 or 5⁴⁰¹ v. 40 (26%) ranking 1 - 3), and 21 (14%) did not answer).

It seems to me that the practice regarding Instructional Letters and Pre-JDR is very inconsistent between judicial centres and JDR justices. The bar is entitled to have at least some level of standard practice.

To regularize the practice, and without any more "bureaucracy" than is often the case now⁴⁰² - indeed, less, but more valuable, information, I

⁴⁰¹ I made a clerical error in describing a number 5 ranking as "highly *inadequate*", when it should have said "highly *adequate*" - I believe that the answers treated it as it should have been and I have so interpreted it.

⁴⁰² Generally now, when a JDR is booked, only basic information is obtained by the JDR Coordinator (action number, style of cause, counsel names and contact information, proposed duration of JDR, whether it is a Binding JDR and whether a trial date has been booked). The JDR Coordinator then writes a letter to counsel asking them to confirm the JDR, which counsel then does. The JDR Coordinator then usually confirms the JDR date (only) back to counsel. To this point, however, very little, if any, useful information is provided - which, as useless as it is, is then passed on to the assigned JDR justice. To elaborate, no really useful information is obtained as to what, for example, is in issue (e.g., for a family law case is it child or spousal support, attribution of income, custody of children, matrimonial property or some combination; in a automobile collision, is it liability and/or

recommend a number of simple, but consistent, steps be taken following the initial booking of the JDR. First, within a set time (say 10 days) after a JDR is booked (electronically) with the JDR Coordinator, and to maintain that booking, counsel (jointly to confirm agreement) must provide certain information (including whether they wish a Pre-JDR meeting, and other relevant information to tell the Court the nature of the dispute, the proposed method of resolving it, interests, and other relevant information) to the JDR Coordinator (which I have been calling/will call a JDR Booking Confirmation Form - see Form 8.1 in Appendix 8), which (now for the first time, really useful) information the JDR Coordinator will pass on to the proposed JDR justice. Second, the JDR justice will determine (from this now useful information) whether a Pre-JDR is requested, or should be directed, and proceed to have it scheduled and conducted, *if it is required*. Third, at the later of the preliminary decision⁴⁰³ not to have a Pre-JDR or after a Pre-JDR takes place⁴⁰⁴, the JDR justice should provide an Instructional Letter (Form 8.2., Appendix 8) to counsel, confirming the JDR and documenting all the requirements prior to and for the JDR.

F1. SUCCESS

The literature says that:

Settling cases early reduces court congestion and decreases costs. Therefore, settling cases is almost always one of the objectives of an ADR process. Whether or not agreement has

damages; etc.), when the pleadings may put all of those things in issue, but some pleaded issues may have been abandoned or resolved.

⁴⁰³ I say "preliminary decision", because the JDR Booking Confirmation form should indicate whether counsel wish a Pre-JDR and the JDR Instruction Letter should invite counsel to request one, if they have not already done so in the JDR Booking Confirmation Form, if necessary as a result of the JDR Instruction Letter (or for any other reason).

⁴⁰⁴ If a Pre-JDR meeting takes place after the Instructional Letter, it is possible, but not too likely, that a supplementary JDR Instruction Letter may be required or prudent.

been achieved is the most obvious measure of success in a *dispute resolution* process. Indeed, reaching settlement is often seen as a positive goal in itself. Consequently, measuring the settlement rate of an ADR process generally figures prominently in its evaluation. A certain level of settlement may be necessary to achieve in order for a program to justify its existence.⁴⁰⁵

Indeed, Bussin identifies 15 “reasons why settlements are thought to be good”.⁴⁰⁶ However, beware of a neutral (private mediator or JDR justice) with an unusually high success rate, as this may signal coercion⁴⁰⁷, or fragile “settlements that do not last- thus, the importance of the “*quality* of settlements in addition to the *quantity* of settlements”.⁴⁰⁸

⁴⁰⁵ Note the definition of “coercion” in this context in List of Symbols, Nomenclature or Abbreviations.
Bussin, *supra* note 5 at 482 (emphasis in the original), referencing, *inter alia*:
- M. Galanter, “The Quality of Settlements”, [1988] *Journal of Dispute Resolution* 55, at 56;
- K. Kovach and L. Love, “Evaluative Mediation is an Oxymoron” (1996) 14 *Alternatives to High Cost Litigation* 31, at 31, as to clearing dockets; and
- T. Tyler, “The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities” (1989) 66 *Denver U. L. Rev.* 419, at 424.

⁴⁰⁶ Bussin, *supra* note 5 at 482-3, referencing:
- M. Galanter, “The Quality of Settlements”, [1988] *Journal of Dispute Resolution* 55, at 62-3; and
- Marc Galanter & Mia Cahill, “Most Cases Settle’: Judicial Promotion and Regulation of Settlements” (1994) 46 *San. L. Rev.* 1339, at 1350-51.

⁴⁰⁷ Sander, “Ohio Symposium”, *supra* note 38 at 705, said:
The challenge is not only to produce change in the ADR climate, but to do so without damage to the fundamental values that ADR serves. It is a sad fact that quantitative enhancement often brings with it qualitative deterioration. As ADR expands and grows we must be especially alert to this concern.,
referencing Nancy A. Welsh, “The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?” (2001) 6 *Harvard Negotiation Law Review* 1, which, Sander says, discusses “the risk that aggressive pursuit of ADR can lead to coercion”.

⁴⁰⁸ Bussin, *supra* note 5 at 483-4 (emphasis in the original), referencing numerous sources, including, *inter alia*:
- C. McEwan, “Evaluating ADR Programs”, in F.E.A. Sander, ed. *Emerging ADR Issues in State and Federal Courts* (Chicago: Litigation Section of the American Bar Association, 1991), at 213;
- C. Honeyman, “On Evaluating Mediators” (1990) 6 *Neg. J.* 23, at 25; and
- K. Kovach and L. Love, “Evaluative Mediation is an Oxymoron” (1996) 14

Analysis of “what is success” may be needed, but here, we are primarily using “success” to mean whether the matter in litigation was settled⁴⁰⁹, in whole or in part, and whether that success took place at or after the JDR, and, with more integrated analysis, where in the litigation process, and at what rate with different types of JDR process. Another potential goal to measure for success is the timing of settlement, presumably settlement closer to the commencement of litigation than the trial being the most prized, but not necessarily part of the JDR Program mandate which, as I have said throughout this Evaluation Report, I believe should concentrate only on the 5% statistically likely to go to trial. The matter of time to disposition (discussed *supra*) was not an initial goal of the Program, but the data is available from the Survey to see if it should be a future goal - if not of the JDR Program, separately of the Court.⁴¹⁰

Brazil addresses these and other related issues regarding “pressure to ‘get the cases settled’”. He argues that settlement coercion and other ethically wrong or resented behaviors can “undermine the public respect for the judiciary” - leading to inferences such as that the program is just to “advance the court’s institutionally selfish interest in reducing its workload” - a matter relevant to individual case assignments as in many jurisdictions in the U.S., not a master calendar system as in the Court, as mentioned *supra*. Moreover, emphasizing settlement rates can “discourage appreciation of the many other values ... that a good ADR program can promote” (eight of which he identifies) .⁴¹¹

Alternatives to High Cost Litigation 31, at 30.

⁴⁰⁹ This is a common measurement - see Bussin, *supra* note 5 at 464.

⁴¹⁰ Note, from the Macfarlane evaluation of the Ontario equivalent of our Court, that this was one of the goals of that program - Bussin, *supra* note 5 at 466.

⁴¹¹ Brazil, “Continuing”, *supra* note 14 at 26-7, and 37-8.
Brazil, “25 Years After”, *supra* note 14 at 129 expressed the same concern in this way:

... mediators in fact may elevate the importance of ends over means. Under this line of reasoning, mediators are believed to be more concerned about achieving the end of settlement than

Brazil adds to this debate by making it clear, as indicated *supra*, in the context of breaking impasse, that lack of settlement success, especially by the judiciary, is not anything other than a realization that adjudication will be necessary to resolve the dispute (often, as I have said *supra*, assessment by the parties of their BATNA leads to that conclusion):

A court mediator's overarching mandate is not to secure a settlement.... Their primary goal cannot be to "break" impasse; mediators are not supposed to be in the business of "breaking" anything. Rather, their objectives should be to help the parties explore and understand the sources and character of their apparent impasse and to help the parties determine whether they can move beyond it. *We must remind ourselves that some impasses are real and not reversible, and that there is nothing inherently bad about real impasse.* A mediation that ends because of a *real* impasse is not a failure by anyone. If we forget these truths, we will be tempted to try too hard to "break" real impasses - in so doing we risk invading party self-determination....⁴¹²

There is much written about the benefits of mediation even when "success", in the context of avoiding an adjudication, is not achieved. Otis and Reiter provide a fairly full comment:

protecting the moral and legal integrity of the negotiation process. Distressingly, it is by focusing on 'their' settlement rates that many mediators measure their success and advertise their ability.

He went on to note the obvious, namely that it is not the mediator's resolution rate and to so suggest "would violate what is supposed to be the central tenet of mediation - that it is the parties who decide whether to settle and on what terms". I would add, as we have seen in the context of parties BATNA analysis in "unsuccessful" JDRs (discussed *infra*), they may make a very decided decision not to settle, while still finding the JDR useful in the measurement of their options.

⁴¹²

Brazil, "Thoughts", *supra* note 323 at 11 (emphasis added).

... efficiency⁴¹³ gains can result even from a mediation process that does not end in settlement. By the time the parties resign themselves to abandoning mediation and returning to the adversarial system, they will have gained valuable insight into the issues and pertinent facts underpinning their dispute. They will likely have come to a realization of which issues remain intractable and which do not, and can thus agree either to a partial settlement or at least to focus litigation on the principal outstanding issues between them. Ultimately, this can only make preparation for the eventual hearing - if not the hearing itself - a less resource-intensive and more efficient exercise.⁴¹⁴

⁴¹³ Bussin, *supra* note 5 at 485-9, uses a dictionary reference to state that “[e]fficiency is defined as “the ability to accomplish or fulfil what is intended”, following which she measures speed, cost and “peak performance” - the most optimum time within litigation life (e.g. before or after discovery) of referral to JDR. Speed and cost were not specifically measured in the Survey, but “peak performance” was, as seen in Appendix 6, Table 1.6 - Peak Performance, recognizing that sometimes discovery is necessary and sometimes it is not useful in rendering a case ripe for settlement.

⁴¹⁴ Otis & Reiter, *supra* note 7 at 363 - 4. They follow-up with a detailed discussion of more “intangible needs”, in the latter respect referencing, *inter alia*:
 - Laurence Boulle & Miryana Nestic, *Mediation: Principles, Process, Practice* (London: Butterworths, 2001);
 - Leonard L. Riskin, “The Represented Client in a Settlement Conference: The Lessons of *G. Heilman Brewing Co. v. Joseph Oat Corp*” (1991) 69 Wash. U. L.Q. 1059, at 1083;
 - Julie Macfarlane, “The Mediation Alternative”, in Macfarlane, “Rethinking” *supra* note 220 at 1 and 4-8;
 - Louise Otis, “The Conciliation Service Program of the Court of Appeal of Quebec” (2000) 11 World Arb. & Mediation Rep. 80, at 81; and
 - Carrie Menkel-Meadow, “Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation” (2004) 5 Cardozo J. Conflict Resol. 97, at 100, with whom Otis & Reiter concur as to the intangible merits of the process aside from quantitative success:

“As Carrie Menkel-Meadow has written, ‘conventional forms of institutionalized searches for justice, in the form of courts and trial, are diminishing in use for a reason. They are suffering from evolutionary demise because they are failing to satisfy modern requirements for voice, justice, and conflict resolution.’ Though it cannot replace adjudication, mediation contributes towards rendering justice more human, participatory, and accessible, values that better reflect many people’s needs in dispute resolution.

Judicial mediation, which integrates mediational justice within the formal institutional structure of state justice, works towards resolving the stark dichotomy of these seemingly opposite concepts. As a result, trial justice and mediation can each in their own way participate in fulfilling the mission vested in

So with that background, what is the measure of the JDR Program's success?

There has been much anecdotal evidence of success - indeed, the JDR Coordinators try to maintain some data on the subject (where success is reported) - but there has been, until now, no statistical sample to determine such success. There were estimates of up to 90% success.⁴¹⁵ Agrios stated "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".⁴¹⁶ The Survey data shows that the success rate across the system was 89% on some issues and 81% on all issues, so the "skeptics" are proven wrong.

It was not a goal of this evaluation to try, in any fashion, to determine, in a quantum analysis, whether JDRs rendered higher or lower awards than at trial, or whether frequent users had a higher satisfaction level with a JDR than adjudication. While some evaluations have tried to do that⁴¹⁷, it is difficult, and not one of the Court's concerns - rather the Court's concern is the satisfaction of the parties with the resolution process and result in the subject case only. Similarly, while the literature (see discussion, *infra*) suggests that one benefit from a mediated settlement is more ready payment/enforcement of the result, and some evaluations have looked at surveys to measure that⁴¹⁸, it is not a specific purpose or goal of the JDR Program.

the courts and other tribunals-rendering justice."

⁴¹⁵ Moore, "Mini-Trials" *supra* note 288 at 202.

⁴¹⁶ Agrios, *supra* note 12 at 4.

⁴¹⁷ See Bussin, *supra* note 5 at 469, in relation to the evaluation of the Maine small claims ADR system.

⁴¹⁸ *Ibid*, at 469-70, referencing the Maine evaluation.

However, it is important to assure “with reasonable certainty” that the settlement was the result of - was “caused, promoted or furthered” by - the JDR, and not that it would have happened in any event - called the “impact assessment”.⁴¹⁹ The Survey provides some measure of that in Section M1 and M2, and as seen in Appendix 6, Table 6.3 - Settlement Impact Assessment.

Other measures of success - e.g. relationship building where appropriate, enforcement where discussed, and other more qualitative aspects that were identified in the qualitative comments demonstrate “valued added” successes, that were not quantified.

Non-success is also a relevant measure. The complete lack of success stats are relatively similar - 7% clients and 11 % lawyers, as are the successful stats (averaging 90%). Thus the success/failure rate is somewhat different (90%/10%) than the anecdotal stat of 95%/5% settlement not ever reaching trial versus trial rate. However, one must remember that the majority of the cases JDRed are cases that (hopefully) had negotiations without success prior to the JDR, and, in effect, represent a part of the historically referenced 5% that would otherwise go to trial, so one could expect a higher % of non-settlement of this 5% of cases JDRed.

As to partial success and timing, there are a few observations that may merit recognition, in addition to what is seen directly in Appendices 4 and 5. For those cases that were partly successful, those from the Lawyers’ Surveys were significantly higher (81%) than the Clients’ Surveys (64%) - but the ones with partial success were a very small percentage - thus, the emphasis should be on complete settlement, not partial settlement.

⁴¹⁹ *Ibid*, at 484, referencing P. Rossi and H. Freeman, *Evaluation: A Systematic Approach* (Newbury Park, CA: Sage, 1993), at 215.

Of those that were successful (averaging 90%), the success at the JDR (rather than after) was a median at 63%, with many non-answers (35%) for reasons unknown. It appears that most were successful at the JDR or not at all - few were successful in the weeks or months following the JDR. The numbers that were recorded as being settled after the JDR are small - 6%. There is, thus, some disconnect here, apparently by many of those who did not answer when, after the JDR, they (131) were successful. Thus, while these statistics do not provide a complete picture, they suggest that the emphasis should be on reaching settlement at the JDR and not leaving it for later, because it appears (but is not overly clear) few are successful later.

There were some qualitative comments indicating a success at the JDR, but execution thereof being delayed, or incapable of, being converted into a judgment. The JDR process is useless (indeed, worse than just going to trial because of the limbo status resulting - after trials you can at least force execution), if settlements are not enforceable - thus, perhaps the parties should consent to the JDR justice having jurisdiction to turn a JDR settlement into a judgment, if not done so by consent in a timely fashion after the JDR - to avoid the "limbo" caused (no settlement and no trial) or the need to start further litigation to sue on the settlement. Relevant to enforcement of settlements, note that the New Rules (NR 4.20(2)) only waive confidentiality on written settlements - thus a written settlement memorandum is essential as a basis for a suit to enforce settlement.

G. JUDICIAL PARTICIPATION

G1. Caucusing

Many questions were asked about judicial caucusing - did it happen, at whose initiative, when asked was it volunteered or refused, etc. - some

addressed in this section and some in the additional questions in section N. The data provides many answers, and the further integrated analysis *infra* in Tables 6.6 - 6.8, and 6.11 in Appendix 6 provides more. Some brief observations may be appropriate here, with more *infra*.

The mean of caucusing was about 64%. Thus, in spite of doubts by some, it is here to stay. Whether it was or might have been useful records a mean of 52% - not overwhelming. The qualitative answers as to why it was or might have been useful or not, and whether it was or might have been useful (*infra*) will provide further guidance.

It is clear that some JDR justices operate on caucusing being a very important part of the process, whereas other JDR justices refuse to caucus, and most caucus only if the parties want to do so. I believe that the parties should have clear knowledge in advance of a JDR justice's practice to caucus or not to caucus - a matter to be included in a JDR Justice Profile, discussed *supra*, a sample of which is in Appendix 8, *infra*. Moreover, I believe that the parties should have the major role in determining whether or not there will be caucusing - not the JDR justice. In any event, I will discuss *infra* details/factors as to when caucusing may or may not be useful.

H. JUDICIAL QUALITIES

There was much concentration on this in the Questionnaire - general in this section, and then, more detailed in the additional questions in section O. There is little doubt of what the parties do and don't want.

H1./H2. Judicial Overall Qualities

As to the “performance of the neutral”, “[t]his may be measured qualitatively or quantitatively, or through the combination of the two. Common wisdom holds that mediation is only as good as the mediator”. However, in our Survey we were not measuring identified individual JDR justices (at the micro level), but rather JDR justices as an aggregate (at the macro level), where “[u]ser evaluations give the parties and their lawyers an opportunity to comment on the dispute resolution process and the neutral’s performance”.⁴²⁰ Although, even there, much value is achieved because “research and evaluation through user surveys is useful for widespread quality control and can give an idea of consumer satisfaction with the program as a whole”, as well as “what types of mediator parties prefer and linking mediator characteristics to mediator effectiveness and settlement of disputes”⁴²¹.

Landerkin says there is not much literature on judicial qualities for a third party mediator:

What are the personal qualities that [a mediator] ought to possess? While the literature on conflict analysis and management is large, diverse, and multi-disciplinary, my research has found little comment, in relative terms, on this issue. It is my Evaluation Report that the human qualities or characteristics the [mediator] demonstrates is pivotal in determining the effectiveness of the conflict management or dispute resolution model employed in a given case.⁴²²

⁴²⁰ *Ibid*, at 491, referencing D. Henderson, “Mediation Success: An Empirical Analysis” (1996) 11 Ohio St. J. On Disp. Resol. 105, at 113.

⁴²¹ *Ibid*, at 492-4, referencing, *inter alia*:
 - W.L. Dobbins, “The Debate Over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?”, (1995-5) 7 U. Fla. JI & PP 95, at 107-9;
 - C. Honeyman, “On Evaluating Mediators” (1990) 6 Neg. J. 23, at 25; and
 - D. Henderson, “Mediation Success: An Empirical Analysis” (1996) 11 Ohio St. J. On Disp. Resol. 105, at 113-7.

⁴²² Landerkin, “Conflict” *supra* note 66 at 8 at 10. He uses the term “Third Party

The qualitative comments of the participants support this conclusion.

Bussin, referenced studies that looked at “informality, expertise, fairness, and party satisfaction”.⁴²³ Dispute satisfaction has often been the reason for ADR, with some parties liking the process even without settlement - although assessing the disputants themselves for this process may just be equal to whether or not there is settlement, and lawyers should also be consulted to get an accurate measure⁴²⁴. The Survey’s examination of judicial qualities seeks to measure the same and other aspects of the neutral’s (JDR justices’ collectively) qualities, not only by disputants, but by their counsel.

Similarly, “fairness and justice” is important - as to the neutral, the process or the outcome, with the impartiality of the neutral is integral to the perceived fairness of the process.⁴²⁵ The Survey, while measuring success or outcome (in terms of whether the litigation was settled), specifically measured the performance of JDR justices in the aggregate, and to the extent possible, the process through the impartiality of the JDR justice, although the evaluation in the “process” is primarily qualitative, not quantitative.

Neutral (TPN)”, but I have changed it to “mediator” to correspond with the terminology in this Evaluation Report.

⁴²³ Bussin, *supra* note 5 at 463-4. Also, in the context of the Ontario trial court study - at 466-7. Indeed, user satisfaction - clients and lawyers - is a key measure of most evaluations.

⁴²⁴ *Ibid*, at 489-90, referencing, *inter alia*:
 - T. Tyler, “The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities” (1989) 66 Denver U. L. Rev. 419, at 429;
 - J. Pearson, “An Evaluation of Alternatives to Court Adjudication” (1982) 7 Just. Sys. J. 420, at 431-3; and
 - C. McEwan, “Evaluating ADR Programs”, in F.E.A. Sander, ed. *Emerging ADR Issues in State and Federal Courts* (Chicago: Litigation Section of the American Bar Association, 1991), at 207.

⁴²⁵ Bussin, *supra* note 5 at 490.

About 86% of clients and lawyers are happy (rankings of 4 or 5) with JDR judicial qualities, with 95% indicating qualities of average or better (rankings 3 to 5).

While a number of these points go to the “craft” of JDRs, as well as attitude, the parties want JDR justices who are (in no particular order at this point)⁴²⁶: prepared and thorough - have read the briefs; knowledgeable in the area of law relevant to the JDR⁴²⁷; pro-active in judicial involvement in the settlement process; enthusiastic for the JDR process, not merely being a judicial “warm body” - thus, usually not mere facilitation; able to give the parties a reasonable opportunity to speak (restricted only by relevance and time) - thus, gentle control⁴²⁸ over the process; cognizant of the difference between interests

⁴²⁶ Compare this with a survey in the U.S. in the 1980s, where in being asked about the “most successful settlement facilitators”, lawyers responded that:
 ... judges must be perceived as impartial and open-minded, they must have taken the time to learn the facts and evidence developed in the case, they must understand the relevant law, and they must proceed analytically....
 Brazil, “What Lawyers Want” *supra* note 238 at 87.

⁴²⁷ I use this occasion to briefly discuss the role of knowledge. Private mediators (and arbitrators) may not be experts in the law, although they would be expected to know enough about legal procedure to properly conduct a mediation (or arbitration). Some may be experts in engineering, valuation, construction or any of a host of subjects. The point is that they are selected by the parties because of the importance to the parties of one or more of their knowledge of the subject matter, procedure (usually law in the latter case), and/or dispute resolution processes. JDR justices are expected by the parties not only to be knowledgeable in the law relevant to procedure and dispute resolution processes (not qualitative comments from the Survey in this later regard), but also the law relative to the substance. Some retired judges become private mediators (some times referred to as “rent-a-judge”) after their judicial career and are expected to carry on the same expertise as they had on the bench. See the brief discussion on this by Morris, *supra* note 17 at 5.

⁴²⁸ On occasion, the control needs to be more “firm” than gentle if emotions lead to inappropriate participant conduct, although selective and relevant “venting” may, in my experience, be therapeutic and helpful to the process. Landerkin dealt with the need of more firmness in describing the process of communications at a mediation:
 Exchanging information is quite different from exchanging threats. The judge controls the process and outlaws

(not affected by legal rights), and legal rights, or a combination; willing to give a real honest assessment and provide an opinion of the merits of the case - but at the optimum time, as suggested by the parties - avoid pre-mature evaluation⁴²⁹; courteous, friendly, personable and polite (but not “familiar”) and respectful/kind⁴³⁰ to all parties (this should be axiomatic), but in addition should have good “people” skills/rapport/demeanour - no different than a medical doctor, trust and comfort are essential elements; capable of demonstrating a modicum of mediation training and/or experience - a surprisingly significant area of comment in the qualitative responses (e.g. if a JDR justice doesn’t know what BATNA and WATNA are, they shouldn’t be doing JDRs); candid and frank, but couched in gentle language - the parties often need the ability to “save face” in moving to a settlement; assertive in views, but not aggressive; sensitivity and empathy where appropriate; impartial and fair⁴³¹; capable of providing leadership

inappropriate behaviors. The judge does not tolerate intimidation tactics or threats of violence. If these continue, the judge has the right to close down the mediation and the process, just as the parties have this right.

Landerkin, “Custody”, *supra* note 23 at 672.

429

Danielson, *supra* note 4 at 74 said:

... the writer agrees with the Justices who state it should be left to the parties as to whether or not they want a judicial opinion. Where opinions are given, the writer suggests that the Justice must determine the timing of a judicial opinion on a case-by-case basis, with full input from the parties.

Qualitative comments of the participants re-enforce these preferences.

430

MacCoun, Lind & Tyler advise that:

Dignitary process features involve the belief that disputants are treated with respect and politeness and that the dispute is treated as a serious matter worthy of a dignified hearing. Field studies of procedural justice judgments have shown that dignitary process features are as least as important as control issues in determining whether a procedure is seen as fair.

...

A good deal of research shows that perceived procedural fairness is one of the most important factors determining whether procedures are acceptable to citizens:

MacCoun, Lind and Tyler, *supra* note 49 at 100.

431

“... perceived fairness and litigant satisfaction are important criteria in evaluations

in keeping the parties focused on the goal(s) to be achieved; prepared to caucus if prudent; able to demonstrate a demeanour that is positive, focused, calm/relaxed, balanced, sincere and reasoned; able to allow claimants to feel that they have had their “day in court” consistent with what is relevant, and within reasonable bounds of time - to include, as noted *supra*, if productive, some “venting” or emotions - getting frustrations “off one’s chest” - to force the other side to listen⁴³² and be able to ask the justice a question or have a dialogue; in all of the above, able to be and to appear to be “judicial” - including exercising patience; willing to change views (as in a trial) as more information is understood/appreciated; able to make the inexperienced or unsophisticated litigant feel at ease - come down to their level - diffuse any power imbalances, create a “stress free zone”, but permit (and advise) that the counsel will be frank on strengths and weaknesses, without being derogatory - explaining along the way any JDR steps and processes that might not be obvious to the novice; confident enough to ask pointed/directed, but open-ended, questions when helpful, but are not too interventionist - allow the parties to negotiate; innovative

on ADR procedures”: MacCoun, Lind and Tyler, *supra* note 49 at 99. Otis & Reiter, *supra* note 7 at 359, referencing Chief Justice Beverley McLaughlin, “The Supreme Court and the Public Interest” (2001) 64 Sask. L. Rev 309, at 311, link the classical adjudicative system and fairness in this way: “The classical adjudicative system ..., with its procedural guarantees of fundamental justice and fairness, becomes a crucial arbiter of change.”

432

Listening is a very important part of the process for both parties (in addition to the neutral) that is little appreciated. Several authors signal out its importance.

Landerkin put it this way:

The mediator hears from each party, one at a time. In consequence, the other party is forced to listen to another point of view, perhaps for the first time. Through the age-old adage of walking a mile in someone else’s shoes, a person gains understanding he or she did not have because of the conflict:

Landerkin, “Custody”, *supra* note 23 at 672.

in the “craft” of achieving settlement - this requires training and experience⁴³³; and many more traits.

On the converse side, the parties do not want JDR justices who are (many merely the opposite or “flip side” of the above): a mere messenger of negotiated positions; prone to giving up on the process or allowing the parties to give up too easily; liable to give an opinion at an inappropriate time; merely giving an opinion without remaining after that to help negotiate a settlement; prone to merely splitting the difference between offers - principled negotiations (based on what might happen at trial) may justify an opinion at something closer to one extreme than the mean; too “chummy” with lawyers, or, especially, lawyer on one side; too “pushy” or aggressive for settlement or a certain result - there might be gentle persuasion, but not coercion⁴³⁴, remembering that it is the parties litigation and a certain result is for adjudication, unless the parties agree otherwise; biased or appear to be biased - rather, a JDR justice must demonstrate impartiality/neutrality and be slow in telling a party their position is unattainable (as is apparent from one very strong qualitative response of a client⁴³⁵), but

⁴³³ See Agrios, *supra* note 12 at 48-9 regarding some innovations he gained with experience - dealing with: conflicting experts; teleconferencing (in the future, video conferencing?) with a party who cannot attend (which I recommend only where clearly “necessary”, rather than merely inconvenient to a party - if the JDR justice must be there, and the parties get his/her JDR services for free, the least they can do is be present or forgo the opportunity); summary trial as an alternative to JDR (often very useful in my view, as an alternative to a Binding JDR, where the parties cannot or will not negotiate to a settlement, but don’t wish the expense of a full trial); and ENE.

⁴³⁴ Agrios discusses this at 26 and 31. However, the JDR justice, in my view, should never try to “sell” the settlement to the parties”, as he suggests. Moreover, the JDR justice in a JDR is not “making a decision” (maybe such inappropriate use of such terminology is what confuses some parties as to the process and the judicial role - see footnote 277, *supra*), but, helping to assess risks, or, at most, is “giving an opinion”. While it is useful for the justice to look for and “identify” possible “solutions” (see Agrios, *supra* note 12 at 22 (item 7)), he quite rightly states (see also, at 31) that, ultimately, the parties must “find their own solutions to the problem” in a JDR, and the JDR justice’s role is only to help them do so. See also, Brazil, “Thoughts”, *supra* note 323 at 11.

⁴³⁵ See Agrios, *supra* note 12 at 18, giving credence to this view.

rather relatively gently get them to that place by emphasizing the “risks” (strengths/weaknesses); inclined to ignore the case law in the briefs; clock watchers for JDR time limits (however, it is in order to use the clock as an encouragement to move on, and to ask for the sale/vote (e.g. bring the matter to a conclusion)); inclined to or perceived to drive wedges between client/lawyer on matters like legal fees - although it is in order to be frank as to the costs of trial; and many more negative characteristics.

The qualitative comments add to these lists as I will articulate *infra*.

The value added to judicial qualities is the ability to find (often hidden) and use relevant and related interests, in addition to rights (and to understand the difference), to help the parties achieve fair settlements.

By way of recommendations, it is apparent on the issue of judicial knowledge that while the whole of the submissions in JDR briefs should be expected to have been thoroughly reviewed by the JDR justice, the attachments must be appropriately highlighted to allow the JDR justice to focus on (not have to search for) the important parts - this must be clear in the JDR Instruction Letter and insisted on before the JDR starts. That having been properly required, a JDR justice must ensure that s/he has reviewed the briefs to make sure this has been done before it is too late - before the JDR.

The need to possess positive, and the need to repel negative, judicial quality traits, and the knowledge to understand each of them and their implications, require special judicial training on both the “craft” of mediation and other JDR skills, and what, in general, the parties and their counsel, expect.

The bottom line of judicial qualities is the importance of the JDR justice building and maintaining the trust of the parties and their counsel, so as to be a positive force in process and substance to allow the parties to achieve a fair settlement. Moreover, in an overarching sense, this must be done to maintain the dignity and stature of the office of the judiciary so important to maintaining the rule of law, as Smith correctly addresses (Smith, *supra* note 13) and as I address in the section on judicial conduct *infra*.

I. OTHER

I1. Overall Impression of Process and Procedures

There is a high satisfaction level with JDR processes and procedures - about 85%, but there are still about 6% who are negative and 9% who are ambivalent - the root causes need to be examined and solutions proposed and implemented.

I2. Recommend JDR in the Future

Hollett *et al* postulate that a future recommendation of JDR, or of the neutral, are clear signs of satisfaction with the process and/or outcome⁴³⁶. They set out six process dimensions and four outcome dimensions worth repeating. The process dimensions were: 1) interactional justice - the “voice” the clients had in the mediation; 2) procedural justice - fairness of the mediation process - was it explained and productive; 3) clarity - client understanding of the situation, the issues and the other party’s point of view; 4) mediator empathy - mediator’s reaction to the clients; 5) pressure to agree - measure of feelings of pressure to settle; and 6) satisfaction with the mediator - and respect, having regard to the efficiency and fairness of the process. The outcome dimensions, were: 1)

⁴³⁶ Hollett *et al*, *supra* note 335 at 348.

satisfaction with mediation - with the results and benefits substantively; 2) distributive justice - fairness of the agreement; 3) relationship change - measured in the positive or negative in the current and for prospects for the future; and 10 4) conflict resolved - whether the problems (specifically litigated or background related) that brought them to mediation were solved.⁴³⁷ The questions in the Survey attempted directly or indirectly to measure all (or most - perhaps short outcome dimensions 3 and 4) of these in some way.

Note that much of the analysis here deals with judicial qualities and organization/overall impression. This is relevant because it provides macro evaluation of mediators within the system:

... summary information from a number of cases would enable one to assess ... mediators' strengths and weaknesses. Summaries over multiple mediations would reveal to administrators what is happening, whether the mediators are reaching the process goals in sessions, and what clients think about their experiences with ... mediators. The results will help administrators mentor existing mediators and train both new and veteran mediators.⁴³⁸

Ratings as to whether the users would recommend JDR to other or use it again are pretty highly in favour - 93-4% for both lawyers and clients.

Negative comments (ratings 1-3) are consistent, including suggestions for: (again) more mediation training for justices; a desire that justices not merely give a mini-trial opinion and leave, but to stay and assist the negotiations - in caucus or shuttle diplomacy, because if it could settle without the justice, the parties would not have requested a JDR; mediation facilities that are warmer/less sterile; more time to the parties to tell their story of how the underlying cause of the dispute and the litigation about it, has affected them (this requires a lot of

⁴³⁷ *Ibid*, at 350-1.

⁴³⁸ *Ibid*, at 357.

judgment and balance between process satisfaction and information pertinent to settlement); concern about things being dragged out; and more need for knowledge about JDRs to clients - the latter resulting in my recommendation that a JDR Program Pamphlet be prepared describing the relevant parts of the JDR Program so that it can be provided to client to allow them to better understand the process.

Positive comments (ratings 4-5) include suggestions for: more caucusing and judicial involvement; caucus before opinion; more assertive judicial pushes to settlement (a delicate area I perceive); a recognition that not all cases are right for JDR and not all justices are good at it; matching judges with subject knowledge/preferences; mandatory Pre-JDR meetings (however, see discussion, *supra*); the use of shuttle diplomacy; more pro-active JDR justices; judicial toughness on unreasonable positions; more "instructions" on Binding JDRs (see reference to JDR Program Pamphlet as to JDR Program services); ability to schedule JDR sooner in the litigation process (a key issue as to the goals of the JDR Program in terms of the 95%/5% settlement trial dichotomy); more time at JDRs; (again) more judicial training in mediations; clarity as to the type of JDR being conducted - e.g one negative experience was where the JDR process changed from what it was supposed to be (binding) to something else (non-binding) - answered by the recommendations for a JDR Booking Confirmation form and an adequate JDR Instruction Letter; more consistency in Binding JDR procedures (the JDRC will need to develop some "best practices"); more judicial involvement in the negotiation process; more interaction between justices and parties directly - with lawyers present (a dangerous area, in my view, to ever meet with a client without their lawyer present); mandatory disclosure of last settlement position (see recommendation *infra*); recognition that the right to judicial selection is imperative; distinguishing between "interest based" mediation and JDRs "rights based" evaluation; and more consistent judicial approaches.

As a recommendation, it follows from the discussion that it is necessary that it be made clear among justices, and with lawyers and clients, the difference between a “pure” mini-trial only (opinion only) and a hybrid mini-trial facilitative or evaluative mediation (opinion, plus assistance in negotiation), and that everyone is on the “same page” as to which is to be conducted - it appears that some members of these three groups are not clear on the roles and expectations (relevant recommendations relate to the JDR Program Pamphlet, JDR Booking Confirmation Form, and JDR Instruction Letter).

13. General Comments - Improving JDRs

Matters arising from lawyers’ comments include: lawyers need to know which justices mediate and which just give opinions (see recommended JDR Justice Profile); an offer should be on the table from each party before the JDR so that “everyone knows what they are addressing” in JDR briefs (recommended *infra*); clients need to read the briefs from both sides in advance of the JDR; judges need not identify the issues (usually the lawyers know them), but the potential responses to the issues; JDR is not for all cases - useful to have “some better guidance to the bar as to what types of cases are” suitable⁴³⁹ (the default, in my view should be all cases, with some caveats - namely, those contained in the “not suitable” category), or “are not suitable” for JDR⁴⁴⁰; the need for

⁴³⁹ Landerkin, “Custody”, *supra* note 23 at 657, relying on and quoting a very forceful passage (“... cases are more than numbers and statistics. They represent flesh and blood controversies affecting people’s lives....”) from J.S. Kaye, “View From the Bench”, [1987] Dispute Resolution 17, at 17, makes it clear that it is an important function to make this inclusion/exclusion decision and that cases relating to relationships should be diverted to the mediation route, if possible.

⁴⁴⁰ Otis & Reiter, *supra* note 7 at 378, suggest that mediation is inappropriate for constitutional cases, cases under the *Canadian Charter of Rights and Freedoms* (*The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. pt. I), human rights legislation (but see my “opinion” to the contrary in *Chow v. Mobil*, [1999] A.J. No. 949, 1999 ABQB 1026, [1999] 12 W.W.R. 373, 72 Alta. L.R. (3d) 108, 248 A.R. 372, 17 Admin. L.R. (3d) 101, 90 A.C.W.S. (3d) 442), cases involving violence “where no realistic possibility of a balance between the parties exists”, or assault cases where there are pending charges or violence

amenities and refreshments associated with JDR facilities; keep JDR process flexible; don't allow JDR justices to "bully the sides into settlement by citing costs and uncertainty"; limit briefs; use retired judges to assist in the JDR process (likely not possible for JDRs, but there are other roles in mediation on a private basis, or, perhaps through other court-annexed mediation processes); make certain parties genuinely want to settle, rather than just going through the motions; publish JDR Justices willingness to caucus, render definitive opinions, mediate, do binding JDRs, do JDRs with SRLs, etc. (see recommended JDR Justice Profile); make sure that parties know and determine what is to follow a mini-trial opinion - judicial mediation, or leave it to the parties to negotiate? (see, again, recommended JDR Justice Profile and JDR Instruction Letter); no one should misunderstand the power of justices to make clients listen when they won't accept the same thing from their own lawyer; to improve, stagger briefs (see recommended JDR Instruction Letter) ; need a judge who will "roll up their sleeves and do a good job"; and rural centres are not too happy with judges who come there to do JDRs⁴⁴¹ - this needs some remedy in terms of knowledge of and/or choice in JDR justice (JDR Justice Profile), ability to have Pre-JDRs,

towards children. Later, at 383 (referencing Adams, at 183-4), the authors recognize that in some such cases caucusing can be used almost exclusively where "the parties are so hostile that they cannot be in the same room during negotiations".

In addition to the considerations *supra*, and without in any way trying to be exhaustive, the caveats/not suitable cases, in the context of the JDR Program, would include those cases where: there is clearly not sufficient information disclosure to achieve settlement; there is a lack of good faith willingness to negotiate to settlement; the parties have not tried to settle by negotiating on their own, unless there is some plausible explanation - the JDR Program focuses on the 5% that have tried to negotiate and failed and are otherwise surely destined to trial (JDR is not a substitute for negotiations); where there is some prospect for success, but there are violence or security risks (of perceptions of risks) that cannot be reasonably accommodated (such as caucusing only, shuttle diplomacy, security guards, video conferencing, etc.); a SRL is incapable of truly representing him/herself; the case affects unrepresented third parties (family JDR is often an exception to this, where the norms of settlement of childrens issues are relatively clear, and judicial confirmation will be required in any event of settlement); cases involving interpretation of statutes; and others.

441

One judicial interviewee told Danielson that "Rural areas do not have to take the soggy chip": Danielson, *supra* note 4 Appendix F, at 8.

proper JDR Instruction Letter, proper preparation time, and, generally, more coordination so that rural parties and counsel can expect the same, or substantially similar, service to that in Edmonton and Calgary.

Matters arising from clients' comments include: more information on the process - definitions, including those related to case management and JDR processes (see recommended JDR Program Pamphlet); importance of the "day in the court"; concern that "JDR and mediation have largely supplanted negotiation (direct), adding a larger financial cost to claims"; process was time consuming and repetitive; need an interested, proactive and positive attitude from the JDR justice; JDRs are too tough to book; "the process works because of the respect the participants have for our justices"; associated food and drink services are required in JDR facilities; recognition of the opportunities in JDRs that are not available in trial; JDR should be available for special chambers too, not just trials (special chambers applications are not part of the 5%); lawyers' posturing must stop; wish to meet judge without lawyers present (problematic - see comment *supra*); corporate representatives and adjusters must have sufficient authority to settle (any offer that are convinced during the JDR they should offer or accept); more advice that JDR is an option; and JDRs are needed sooner in the litigation process (again, the 95%/5% issue).

ADDITIONAL QUESTIONS

J. JDR TIMING & NEXT STEPS

J1. - J3. Stage of Litigation at this JDR and Optimal

According to both lawyers and clients, most JDRs did not proceed until the parties had completed examinations and hired experts and were ready for trial (about 74%), and close to 25% had at least finished discoveries.

Correspondingly, most of the lawyers and clients thought the optimal time for

JDR was after discovery and expert reports, but before trial (50 - 60%). Nevertheless, a large number (13% for lawyers and 25% for clients) thought the JDR process should have taken place in their litigation earlier than it actual did. Once again, this raises the 95%/5% issue.

Danielson noted in her Evaluation Report that 62% of the Court's judiciary who responded to her questionnaire "felt that a non-binding judicial opinion should be available earlier in the litigation process than post-discovery", although there were mixed views as to specific time within this broad time frame, but at a time selected by the parties and counsel.⁴⁴² This raises the issues within the area of ENE which I will discuss and make recommendations regarding, *infra*.

Most users agreed that if the JDR was not successful, the next step would be trial (78%) - within the next 6 months to a year.

K - P COMPARISON TO OTHER JDRS; JUDICIAL PARTICIPATION - OPINIONS; ROLE OF JDR JUSTICE IN SUCCESS OF JDR; JUDICIAL PARTICIPATION - CAUCUSING; JUDICIAL QUALITIES; AND OTHER

Many of these expanded on themes touched on in the "BASIC QUESTIONS" - comparison to other JDRs; previous JDR justice experience (i.e. - with the same justice); JDR justice opinions; choice of JDR justice: role of JDR justice in success of JDR; value of JDR justice if JDR not successful; judicial caucusing; judicial qualities - including exerting pressure; etc.

K. COMPARISON TO OTHER JDRS

K1. Comparison to Previous JDRs

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Danielson, *supra* note 4 at 15-6.

Approximately 75% of the lawyers thought the subject JDR was as good as to the procedure and process as in previous JDRs, whereas 52% of clients did not answer and only 44% thought the subject JDR was as good as the procedure and process in previous JDRs.

K2. Same JDR Justice

Approximately 45% of clients had a different JDR justice than the last time (but 53% didn't answer the question), whereas 79% of lawyers had a different JDR justice than the last time (and only 10% didn't answer the question).

L. EXTENT OF JUDICIAL PARTICIPATION

L1. JDR Justice Offering Opinions

Approximately 68% of the JDR justices gave opinions in mediations and mini-trials. Qualitative responses suggest that parties and counsel expect that the JDR justice will be in a position to give at least risk analysis, evaluation and an opinion, if requested.

L2. JDR Justice Participate after Mini-Trial Opinions

As noted *supra*, the participation of JDR justices in settlement discussions after a mini-trial opinion has been a big issue. However, there is some difference in the data as only 5% of the lawyers said the JDR justice participated after the mini-trial, but 8% of clients said that there was participation. Approximately 14% and 9% respectively say that the JDR justice did not participate after the mini-trial.

L3. Binding JDRs - opinions necessary

About ½ of the binding JDRs required a decision, although the numbers are low (15 out of 27 cases).

In addition to other factors that cause parties to seek Binding JDR (e.g. limiting cost and delay), one is the prospect for success. MacCoun, Lind and Tyler say that a recent laboratory study shows that “subjects ... were more favorable towards procedures with binding third-party decision control as their confidence in their case increased”.⁴⁴³

A review of justices that will do Binding JDRs in Calgary as of April 2009 indicates that 18 will do so with counsel, and 7 will for SRL. In Edmonton, 4 will do Binding JDR without qualification, and 14 “depending on the circumstances”.⁴⁴⁴

L4. - L5. Choice of JDR Justice (Lawyers only)

Seventy-three percent of lawyers sought a choice of JDR justice and 92% got one of their choosing. Eighty-nine percent thought choice of JDR justice was helpful. Qualitative comments suggest that counsel consider it imperative to have a choice of JDR justice.

By way of recommendation, the data demonstrates that there is a need to improve the choice of JDR justice and clarity of procedures in rural areas. Danielson addressed this, saying that the “right of choice” to a specific JDR justice “is more theoretical than practical sometimes, particularly in rural areas where only a small selection of Justices is available”.⁴⁴⁵

⁴⁴³ MacCoun, Lind and Tyler, *supra* note 49 at 103.

⁴⁴⁴ Communication with Calgary and Edmonton JDR Trial Coordinators (memoranda on my file).

⁴⁴⁵ Danielson, *supra* note 4 at 50.

M. ROLE OF JDR JUSTICE IN SUCCESS⁴⁴⁶

M1. Success Same without JDR Justice and only Negotiation

This returns to the discussion of “impact assessment” discussed *infra* and documented in Appendix 6, Table 6.3 - Settlement Impact Assessment. The judicial impact on success was quite high - 79% of the lawyers and 74% of clients were very clear that the success achieved on JDR wouldn't have been achieved by mere negotiations. As noted *infra*, counsel and clients tell why they believed that the JDR justice was so critical - had such impact on settlement.

M2. JDR Justice Improvement of the Prospects for Success

This is a different way of asking the last question.

Roughly 89% of both lawyers and clients answered that JDR justices significantly improved the prospects for success in settlement, and 70% of lawyers and 84% of clients thought they did so in a significant way. This analysis, while somewhat similar to section M1, ferreted out significant qualitative comments to be analyzed, with concentration on those JDR justices who did not assist significantly. See quality assessment *infra* for the reasons.

M3. If No JDR Success, did JDR Assist for the next Phase of Litigation

It appears that settlement is really the only success valued by users in a JDR, and they perceive little positive is achieved when there is not success - only 12 % of lawyers and 17% of clients responding thought that there was something gained from an unsuccessful JDR - apparently not giving proper consideration to the concept of their BATNA, discussed *supra*. However, even an unsuccessful

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Note that this is really related to the analysis in Appendix 6, Table 6.3 - Settlement Impact Assessment.

mediation can provide benefits, including a focus on the remaining issues and how to adjudicate them, such that it is “not time wasted”⁴⁴⁷ - again, see the BATNA principle. Obviously regard to the literature on the ways in which to achieve benefit from an unsuccessful JDR needs to be pursued - this will require more training of JDR justices, including recognition of the importance of the BATNA principle.

N. JUDICIAL PARTICIPATION - CAUCUSING

This series of questions were designed to determine which JDR justices offered caucusing, which refused, which only did so if asked, and the views on the benefits of/detriments to caucusing.⁴⁴⁸

⁴⁴⁷ Otis & Reiter, *supra* note 7 at 369.

⁴⁴⁸ One of Danielson’s judicial interviewees said (Danielson, *supra* note 4 Appendix F, at 7): “Caucus is a wonderful tool that works very well in certain situations. There is far too much time wasted debating this issue. It is a red herring”. S/he went on to suggest that it was important in 3 situations, namely where: impasse is reached; this is something that the JDR justice feels necessary to convey but does not wish to embarrass a person; and entrenched emotions are precluding a party from accepting a good offer - caucusing may find a way to “save face” and accept the offer.

Agrios, *supra* note 12 at 33 and 50 (item 5), agrees, using similar language as “Danielson’s judicial interviewee”, adding “I [would] leave it up to each Judge to decide whether or not they wish to caucus. If they are uncomfortable with it, then don’t do it” - I agree, and would add, that, in my view, in a JDR, with the express and informed consent of the parties and their counsel, caucusing is a judicial function, if properly performed in a proper judicial conduct sense. He is supported by Michael Fogel’s NJI paper which he attaches with approval as Appendix 1 (at 56-63), which he says is “[t]he best I have ever read” on the subject. I agree with this conclusion - it simply and completely addresses the following aspects of caucusing as a “strategic tool” in mediation: general goals and objectives that can be accomplished; factors to consider when caucusing; formats; guidelines; goals and objectives; and specific goals and objectives for particular circumstances. It is a must read for those who caucus, or want to understand better the positives and negatives of caucusing

B.C. Justice David Vickers agrees that “caucusing [is] an important tool in [the] arsenal of ADR techniques; it can allow the judge to get to the heart of the dispute more expeditiously and effectively”: Joan I. McEwen, “JDR - Judicial Dispute Resolution” (1999) 8:7 National 36, at 37.

Singer, *supra* note 42 at 23-4, talked about the reasons to have joint or caucus sessions. As to joint sessions, she identified these reasons, namely to: permit each of the disputants to hear directly the other’s version of the dispute; allow

I know of no JDR justice in Calgary who will not caucus with the consent of the parties (that is, some of us will only caucus with the express consent of the parties, not merely do it as a matter of style, which some do), but in Edmonton some will not caucus, leaving 5 that will caucus without restrictions and 12 who will caucus “depending on the circumstances”.⁴⁴⁹

N1. Clients/Lawyers Asking JDR Justice to Caucus

About 32 - 35% specifically asked the JDR justice to caucus, and when asked almost no JDR justice refused. There were various reasons why caucusing was not requested, as seen in the qualitative answers.

N2. JDR Justice Offering to Caucus

Lawyers and clients each reported (identically) that in 61% of cases the JDR justice offered to caucus (without being asked).

N3. Caucusing Taking Place

However it came about, JDR justices actually caucused in 55% (Clients' Surveys) and 63% (Lawyers' Surveys) of JDRs, and discussed the strengths and weaknesses of the case according to lawyers in 54% of cases and clients in 79%

people to express their anger and hurt feelings to each other in a controlled setting; identify quickly the areas of agreement and disagreement; and help disputants with continuing relationships to learn to communicate in the future. As to caucus sessions, she identified these reasons, namely to: ensure that the mediator understands the interests and concerns of all parties, who in private can be freed from the reluctance to speak in front of one another; explore settlement possibilities without the fear of divulging prematurely a party's 'bottom line' to the other parties; and enable people to continue to work toward an agreement in cases where joint hostility, intimidation by one party, or lack of assertiveness by another convinces the mediator that joint sessions are unproductive.

⁴⁴⁹

Communication with the Edmonton JDR Trial Coordinator (memorandum on my file).

of cases, but the discussions were helpful in only 47% of cases according to lawyers, although they were helpful according to 81% of clients. Nevertheless, where caucusing didn't take place only 5% of lawyers and 27% of clients wished it had taken place.

N4. Caucusing in Future JDRs

Notwithstanding all their experience, previous views and other considerations, for future JDRs, 72 - 73% (much higher than the earlier numbers) of both lawyers and clients want the option of caucusing open and only 8 - 9% were opposed to the option.

O. JUDICIAL QUALITIES

This represents a more detailed analysis of the measure of judicial qualities first raised in section H.

Danielson spoke of judicial qualities in improving chances of resolution, near the end of her Evaluation Report:

The Vancouver Study and the Brazil Study examined what judicial behaviors and statements were considered helpful in promoting settlement. The Epp Study confirmed a 'careful analytical, coolly logical approach' to be the most effective, but the approach needed to be low key. Lawyers wanted and expected the judge to come 'well-prepared, having a thorough understanding of the facts and relevant law. They want carefully considered input: both opinions and creative alternatives. They want an active, persistent judge.' Further, it was stated quite clearly that a judge who suggested to 'simply split the difference was useless'. The study also found that lawyers appreciated and found to be effective, the facilitative technique of 'highlighting evidence or law that the lawyers have misunderstood or overlooked'⁴⁵⁰.

⁴⁵⁰

Danielson, *supra* note 4 at 68, relying on Epp, *supra* note 333 at 92, 98 and 112. See also: Brazil, "What Lawyers Want" *supra* note 238 at 85 who reported that in

The areas pursued, and the ratings achieved, were measured (see also Appendix 6, Table 6.5). As to O1. - General Judicial qualities, the percentages that fit in to the top 2 rankings (4 or 5) for lawyers and clients were:

Preparation - 90% and 87% respectively;

Knowledge of the Law - 85% and 87% respectively;

Explanation of the JDR process - 90% each, of which 66% and 73 % was helpful;

Politeness and courtesy - 91% each;

Accommodating and sensitive - 85% and 81% respectively; and

Frankness but fairness - 87% and 83% respectively.

As to O2., the JDR justice's specific role in attempting to obtain settlement was measured in accordance with the following descriptors:

Assertiveness v. laid back - middle three rankings were 74% for lawyers and 68% for clients;

Innovation - top three rankings - 71% and 73%;

Worked hard to achieve a settlement - top three rankings - 58%, for which 71% exerted low pressure on respondent in the top three rankings, of which 75% thought was appropriate, and for which 48% exerted low pressure on lawyers on other side in the top three rankings, of which 60% thought was appropriate;

Worked hard to achieve a settlement - top three rankings - 73%, for which 70% exerted low pressure on respondent in the top three rankings, of which 70% thought was appropriate, and for which 48% exerted low on clients on other side in the top three rankings, of which 56% thought was appropriate;

a survey of almost 1,900 the lawyers indicated that "the most effective judicial style ... is carefully analytical and coolly logical, not emotionally high-pressured" and 50% indicated that "the hard boiled, impatient, aggressive approach ... is counterproductive".

In Brazil, "Handbook, 2008", *supra* note 60 at 22, he recommended (in an ENE context) a style that is "open-minded, calm, respectful of others, carefully reasoned, and informed by intellectual honesty".

Cool and logical v. highly emotional - top three ratings - 92% and 91% respectively;

Patience - 91% each; and

Impartial and open minded - 90% and 88%.

As to O3. - Overall Judicial effectiveness, the top three rankings were 91% each.

As to O4. - Choose JDR Justice again⁴⁵¹, the top three ranking were 87% and 89% respectively.

Regarding O5. and Ideal JDR justice - style in achieving settlement, in the following categories, the top 3 ratings were :

Aggressive - 52% and 62% respectively;

Assertiveness - 84% and 85% respectively;

Gently Persistent - 87% and 86% respectively; and

Carefree - 7% and 13% respectively.

As to O6., the Ideal JDR Justice - involvement in achieving settlement, lawyers and clients ranked the top three categories as follows:

Control of negotiations - 75% and 79% respectively;

Let the Parties control negotiations - 61% and 59% respectively;

Be Neutral - 45 % and 62% respectively.

Regarding O7. Ideal JDR Justice - formality, as between the lawyers and clients in the top three rankings, they sought:

Formal/structured - 58% and 60% respectively; and

⁴⁵¹ As to O4., while there has always been a lot of choice in selecting a JDR justice, note that, subject to the limitations of scheduling (about 4 and 2 months' respectively in advance of the September and January openings of the Court's calendar), there is not an on-line computer based way to chose your JDR justice.

Informal/easy going - 66% and 68% respectively.

O8. Ideal JDR Justice - dealt with other ideal characteristics - see qualitative analysis.

The results of the Survey, in terms of quantification of judicial qualities are summarized in Appendix 4 and 5 (in the respective sections), and (top two and bottom two rankings) in Appendix 6, Table 6.5 - Judicial Qualities.

P. OTHER COMMENTS

This gave an opportunity to make qualitative statements which will be highlighted *infra*.

D. QUESTIONS NOT ASKED

While one strives in a research project to “frontload” - “thinking very explicitly and systematically about the analysis you will do as you design the data collection” - by “ask[ing] ... how the material [one] plan[s] to collect will help answer the question[s]” to be posed⁴⁵², it is a fact of life that even experienced researchers find that “[w]ith every single survey I have ever done, there have always been questions that I wished I had asked” and, as is often the case, “you do not know what you missed until you have finished collecting the data”, because “analysis does not start until data collection is completed.”⁴⁵³

⁴⁵² Kritzer, *supra* note 15 at 5.

⁴⁵³ *Ibid* at 3, including a reference to contributor “Hazel Genn” (specific article reference not yet provided in the book to be published).

1. LAWYERS AND CLIENTS

I have had the opportunity to determine some questions (or sub-questions) which were not asked of the participants that might usefully have been asked and have started a list, which (not closed) includes:

- why did you chose JDR over private ADR?
- a series of questions to draw out rights v. interest considerations and criteria used (or that might have been used) in the JDR
- number of trial days saved by settlement (in whole or in part)
- if the case did not settle at the JDR, why not, and if it settled later, what was the role of the JDR
- qualitative, in addition to quantitative, discussion about success or lack of success in settlement - relationship maintenance or improvement, enforcement, use of BATNA, etc.
- what should be the “rules” for JDR briefs
- others (I am sure some more will come to my mind, and readers of this Evaluation Report will undoubtedly identify others)

A few of these potential question areas merit some discussion, together with why I did not do a supplementary questionnaire. Dealing with the last point first, I could have prepared another questionnaire for the 178 lawyers and 85 clients who graciously volunteered to answer further questions (or do interviews). However, having regard for the relative importance of the data (discussed somewhat *infra*), potential participant memory constraints with the delay since their JDR, and lack of available time in developing this Evaluation Report, I made the decision not to do so. However, the list (current and further) will be relevant in preparing any future (ongoing or periodic) evaluation of the JDR Program.

One area identified for questioning, as noted, relates to interest based versus rights based mediation. While I wished I had asked questions in that area, and the answers would have been interesting, from both the academic and dispute resolution “craft” points of view, and to give a better focus to future JDRs, I determined that this lack of information was not so significant as to suggest a supplementary questionnaire at this time, for several reasons. One of the reasons is because, simply put, all the cases being JDRed are primarily “rights based”, because, unless settled, a justice will be determining rights at trial. Indeed, Macfarlane acknowledges and discusses the default to rights-based dispute resolution, as discussed *supra*. Nevertheless, some questions would have been useful.

As some form of surrogate for not asking the lawyers how many days would have been actually (trial time booked) or potentially (no trial time booked) saved by JDRs that were successful in whole or in part, I looked for the informal records kept by the JDR coordinators in Edmonton and Calgary. However, I found that they did not have sufficient information to determine one or more components of: how much trial time was booked; how much trial time was estimated for cases where no trials were booked; or what cases settles at, or because of, the JDR. Thus the information was more anecdotal and not sufficient for a direct measure or extrapolation. This lack of information so as to maintain a proper tracking system is thus a matter I recommend be changed in the future, with the assistance of the proposed JDR Booking Confirmation form which will require information as to the actual trial time booked or estimated.

The Court’s CASES Coordinator came to my rescue (I thought) until I learned that her information only applied to actual booked trials that settled at or because of a JDR. Nevertheless, her excellent statistical analysis determined that the total trial days booked (therefore not including JDRs for which there were no trial dates booked - which represents, generally, 75% of JDRs) for which

there had been a JDR based settlement in the subject period was 581 days for Edmonton, 665 for Calgary, and 11 for Lethbridge, for a total of 1257 days. That is that is a saving in trial time of 250+ trial weeks⁴⁵⁴. However, again, note that is only for trials actually booked before a JDR, and we know that many (about 75%) of the cases for which JDRs are held don't have trials booked.

Danielson's research provided another source. One of the interviewees responding to Danielson's questions⁴⁵⁵, estimated that 90 to 135 trial weeks are saved in each term (2 terms each year) for each of Edmonton and Calgary, which equates to a total of 360 - 500 weeks for a year. Applying the same logic to the 631 JDRs performed in Alberta in the year ending June 30, 2008, and applying a measure of an 80% success rate (based on the Lawyer' Survey), with trial averaging 1 week (the statistical average is actually closer to 2 weeks), that equates a minimum of 500+ weeks of trial time saved in a year (631 x 80%) - obviously 1,000+ weeks if the average trial time is 2 weeks. That is roughly equal to the 500 civil trial weeks scheduled in a year (246, 246 and 27 (latter civil and criminal must be divided by two) weeks respectively in Edmonton, Calgary and Lethbridge)⁴⁵⁶. On this logic, the trial time saved is, in effect, a whole years worth of civil trials. If those trial weeks had continued, that would make the trial wait time much longer, directionally back to the problem before the JDR Program. That is the saving of work for about 12 justices for a year - of just scheduled sitting time, not to count preparation and decision rendering time.

We see the savings, but what were the costs? The answer is about 6 plus JDR justices' time in performing JDRs - preparation and hearing time. I am no

⁴⁵⁴ Communication with the Edmonton and Calgary JDR Coordinators , and CASES Coordinator (memoranda on my file).

⁴⁵⁵ Danielson, *supra* note 4 Appendix F, at 4.

⁴⁵⁶ Each of Calgary and Edmonton has 41 trial weeks for civil, each with 6 justices scheduled per week = 246 trial weeks for each city. Lethbridge has 27 weeks (combined civil and criminal) with one justice scheduled.

arithmetic expert, but it equates to me to a net saving of about 6 judge years, each year, for assignment to other matters - well worth the exercise.

What are the savings for the clients - well, 500 trial weeks (2,500 trial days) saved for an expenditure of 631 days of JDRs. While there are clearly legal costs in preparing for JDRs, they are minuscule in comparison to preparation for trial. However, even ignoring preparation time before either a JDR or a trial, and allocating a conservative allocation of 8 hour billable time per trial day, that is a saving to clients of 20,000 billable hours for each client, less the JDR time of 4,000 billable hours for each client, is a net saving of 16,000 billable hours. At a average, but conservative, rate of \$300 per hour, that equates to a saving of \$4,800,000. However, there are usually at least 2 lawyers (an average of 2.4 in fact for both sides). Thus, arguably the JDR program saved close to \$10,000,000 for Alberta clients in 1 year. One could argue that means a loss of similar revenues to lawyers, but there are more clients and disputes in the queue to replace that lost revenue.

Thus, subject to checking this rudimentary arithmetic, the JDR Program provides a significant saving in judicial resources (that are funneled to other judicial functions - a growing number of motions court applications and case management, desk applications, specialty applications, more circuit sittings, etc.) and a tremendous saving to the Alberta clients.

2. JUSTICES

The Survey canvassed the views only of lawyers and clients, excluding my judicial colleagues. The primary reason for this was that Danielson's survey provided answers to many potential questions, such that I did not initially feel that a further survey was necessary. Further, caution is required with respect to

judicial questionnaires for three reasons. First, there is no wish to interfere with legitimate exercise of judicial independence. However, secondly, balancing that, there is a need for some aspects of program consistency and standardization so that the Bar knows what to expect. Third, in assessing mediators (judicial or otherwise), there is sometimes a concern that they are, as Brazil found, more “enthusiastic” about the settlement results and statistics, than the answers from clients or lawyers justified.⁴⁵⁷

Nevertheless, in retrospect, a number of areas might usefully have been pursued with the judiciary. For example, the views of the justices could have been sought with respect to the utility of Pre-JDR meetings versus detailed JDR Instruction Letters or both.

One area about which JDR justices clearly have views⁴⁵⁸ and could provide even more useful feedback than lawyers or clients is the information provided in the JDR brief. I have heard many anecdotal comments from my colleagues that there is too much minutia in JDR briefs (unreadable doctors charts, in addition to their professional opinion; individual invoices and work orders, when there are also summaries in any event, etc.). It has been suggested that the briefs should be more concise and limited and I agree with the sentiment, but one must be careful. On the one hand, as a JDR (unless a Binding JDR) will not result in a decision on the record, there is no need to provide all the backup detail “for the record”. On the other hand, a judicial opinion is only as good as the information going into it, and thus caution is required, especially for more formalized opinions in mini-trials and in Binding JDRs.

⁴⁵⁷ Brazil, “25 Years After”, *supra* note 14 at 128-9.

⁴⁵⁸ See Agrios, *supra* note 12 at 13-4.

In addition, some of the qualitative comments from lawyers (discussed *infra*) indicate that there is a need for standards, so that lawyers know how to prepare the briefs. In my view, the “rule” should be to include in the JDR brief only information that is explicitly “relevant and material” to the settlement. Granted, this standard still leaves scope for much individual discretion on the parts of both the mediator and the lawyer, but some guidance could be provided using a relatively standardized JDR Instruction Letter. Examples of necessary information would include: a definitive list of heads of damages (properly broken down and supported - i.e. a claim for special damages should have all the details, unless agreed) in damage cases; copies of contract documents and accounting in contract and claims; supporting income statements, budgets, and lists of property and valuations for family law claims; highlighting of pertinent parts of cases and discoveries that have a relevance to settlement (to avoid the need for a search); and the extent, if any, to which negotiations took place before the JDR along with reasons if there were no such negotiations. These and other items are included in Appendix 8 - Table 8.3 - Sample JDR Instruction Letter.

Macfarlane suggests, indirectly, that such briefs should also identify known interests that may be relevant to settlement, in addition to issues of rights. In addition to discussing the psychological resistance (and the ways to cure it) from old fashioned lawyers (my term - a subject beyond the scope of this Evaluation Report) who prepare such briefs, she explained the nature of the problem - positional rights based bargaining, without interests considerations - thus:

The zero-sum assumptions of legal negotiations have many implications The acquisition and development of information is regarded as being primarily about winning rather than about understanding and elaborating the clients’ needs, developing shared facts, or understanding more about the other side and possible mutual gains. When information is only about winning, a culture of secrecy and non-disclosure develops in legal negotiations that borders on the paranoid. Disclosure of almost any

information is assumed to give an advantage to the other side. As a consequence, [litigation negotiation] is conducted on the basis of very limited information being available about the other side's motivations, goals or priorities.

...

... If both sides share information, more mutual benefit can accrue. If both sides refuse to share information, negative results ensue. If one side shares information but it is not reciprocated, it gives a real advantage to the receiving side. Assuming the worst and protecting oneself perpetuates a culture of secrecy in which even a parent innocuous information – for example, about goals and motivations - is routinely withheld.⁴⁵⁹

In my view, the JDR Instruction Letter should encourage the parties to identify the underlying interests that they believe are relevant to settlement. Perhaps, they should be required to identify all information about underlying interests that would not be prejudicial to their clients' interests to disclose, and to disclose such information to the JDR justice in the brief, at a pre-JDR conference (if held), or during the JDR.

To the extent that I have not sought judicial input by any form of questionnaire, I am sure that not all is lost, as I presume that there will be a lot of judicial feedback to the recommendations herein. It is my hope that the JDRC will use these recommendations and the subsequent feedback to develop some best practices to recommend to the Court for maintaining some minimum standards.

E. CONCLUSION

As can be seen, a lot of data exists, and the aforementioned is but a brief summary of the basic and additional quantitative and qualitative answers to the

⁴⁵⁹ Macfarlane, *supra* note 25 at 78-9.

Survey that appear in Appendices 3 to 5. Much more integrated analysis of these data, together with the benefit of an extensive review of the relevant literature, will support the more detailed recommendations that follow in this Evaluation Report.

III. DETAILED AND INTEGRATED ANALYSIS OF SURVEY RESULTS

I now move⁴⁶⁰ to the in-depth - earlier I said, “drilling down” - detailed and integrated (indeed, interactive) analysis of the data from the Survey. As I do so, I realize that I am facing the further and continuing dilemma of the “challenge of analyzing data - whether qualitative or quantitative - and the centrality of writing to the analysis process...”⁴⁶¹. “Analyzing data ... is directed towards arriving at conclusions”, where “the path from data to conclusions is often a difficult and tortuous one”, including the writing process - as this Evaluation Report demonstrates - as it often results in the “discover[y of] questions or issues that takes [one] back to the data for additional analysis”. The role of interpretation in the analysis of both quantitative and qualitative data is a “process [that] is not well understood. It draws on a combination of the data themselves, side information possessed by the analyst, and the creativity of the analyst”. In this process, the researcher seeks the data to “Speak to me!”. Moreover, “drawing conclusions often requires thinking beyond the explicit materials in hand”⁴⁶² - this, I believe is where my dispute resolution education and experience may be useful.

In addition to the not unusual realization at the end of the Survey that there were questions not asked (*supra*) and “questions that you later discover are not of much use” and “for the vast majority of cases [one] could have used a much simpler survey instrument”⁴⁶³, I found that much of the quantitative Client’s

⁴⁶⁰ As I start this section, I regret and apologize that there is, unfortunately much repetition here (mostly as to the recommendations) similar to the previous section - however, as explained in the Executive Summary, my editing time has run out, and, accordingly, it is what it is.

⁴⁶¹ Kritzer, *supra* note 15 at 1.

⁴⁶² *Ibid*, at 8-9.

⁴⁶³ *Ibid*, at 3, referencing contributor “Hazel Genn” (specific article reference not yet provided).

Survey data was, in reality, potentially/likely either or both unnecessarily repetitive of, or less accurate than, the quantitative Lawyers' Survey data⁴⁶⁴. Therefore, in my quantitative analysis, I have focused on the lawyer data and left the client data less analyzed⁴⁶⁵. Perhaps another researcher will wish to probe these quantitative data another time. Nevertheless, the qualitative client data is indispensable because it provides the measures of the real attitude of the clients, directly and in their own words. Both are available in Appendix 5 and as somewhat analyzed in the last, this and the next section of this Evaluation Report.

While it was not a purpose of the evaluation when it was undertaken, Bussin suggests that the evaluation of an ADR system can provide empirical data and theories to contribute to academic research on ADR in the broad sense or to the specific program⁴⁶⁶. A respected U.S. jurist sets four prerequisites for a new alternative, and insists that an empirical analysis of any such alternative to the traditional adjudication system is imperative:

1. *The procedure must conform to a model of rational litigant behavior....*

⁴⁶⁴ I say "potentially" or "likely" less accurate not to be negative in any way to clients and their dedication in responding to the Survey, but rather that the lawyers, knowing all aspects of the case, would seem to have (likely had) the most accurate quantitative information. As to the repetition, had more time permitted, I would have compared the two sets of data, but, on a quick review, the trends, if not the actual percentages seemed similarly to cause no real alarm as to differences, or a need for any greater analysis of the client data..

⁴⁶⁵ Note too, that, for the reasons therein articulated, Epp focused on inquires directed to the lawyers, not the litigants: Epp, *supra* note 333 at 85.

⁴⁶⁶ Bussin, *supra* note 5 at 495, referencing:
 - J. Tomain and J. Lutz, "A Model for Court-Annexed Mediation" (1990) 5 Ohio St. J. On Disp. Resol. 1, at 3;
 - National Institute for Dispute Resolution, *Conflict Resolution Institute for Courts* (Washington, D.C., 1995), at 72; and
 - L. Susskind, "Evaluating Dispute Resolution Experiments", [1986] Neg. J. 135, at 139.

2. *The success or failure of the procedure must be verifiable by accepted methods of (social) scientific hypoEvaluation Report testing.* I am unconvinced by anecdotes, glowing testimonials, confident assertions, appeals to intuition. Lawyers, including judges and law professors, have been lazy about subjecting their hunches - which in honesty we should admit are often little better than prejudices - to systematic empirical testing.....If we are to experiment with alternatives to trials, let us really experiment: let us propose testable hypotheses, and test them.
3. *Any alternatives to the trial must respect relevant legal and institutional constraints....*
4. *Any proposed reform must move the legal system in the right direction, where 'right' is defined in accordance with broad social policy rather than narrow craft standards of success....*⁴⁶⁷

And so, the Survey, with both its plain (merely reported) and more detailed integrated analysis, as reported in this Evaluation Report, provide the *empirical testing* for the JDR Program. Additionally, the data will remain available indefinitely in a format that can be analyzed on an integrated basis. It will be held by the Court for internal analysis as required, and lodged with the Canadian Forum for Civil Justice for external analysis upon consent of the Court.

A. MINI-TRIAL ANALYSIS

I did an extensive analysis of mini-trial selection from the Lawyers' Survey. The results appear in Appendix 6, Table 6.6 - Mini-Trial Analysis.

⁴⁶⁷ Richard A. Posner, "The Summary Jury Trial and Other Methods of Alternate Dispute Resolution: Some Cautionary Observations" (1986) 53 U. Chi. L. Rev. 366, at 367-8 (italicized emphasis in the original, underlined emphasis added). Judge Posner went on to analyze the Summary Jury Trial, but in doing so he said, at 366, "much of what I shall say about summary jury trial applies to other alternatives as well". He subsequently examined two other alternatives - at 389, court-annexed arbitration (non-binding "the hope is that it will encourage settlement"), for which, at 391, he says he had "reservations", and private ADR, for which, at 392, he says " I think its potential is limited" because "it is not clear whether the overall settlement rate can actually be raised".

Smith stated “the Mini Trial was an evaluative process. Current research shows that most Alberta justices still favor giving opinions which are evaluations based on the law”.⁴⁶⁸ Indeed, the mini-trial is an evaluative process, and certainly JDR justices give “opinions which are evaluations based on law”, but they do not need a mini-trial format to do that. They can do it equally in a facilitative mediation, with evaluation added, or an evaluative mediation also. Moreover, the statistics from this Survey do *not* support that “Alberta justices still favour” purer forms of evaluation - such as mini-trials, as seen in Appendix 6, Table 6.6 - Mini-Trial Analysis (although there is a predominance in Edmonton). Some also like the pure evaluative mediation model (predominantly in Calgary, but significantly in Edmonton), as seen in Appendix 6, Table 6.7 - Mediation/Evaluation Analysis. While some parties like pure evaluations (of the mini-trial opinion style), many in Edmonton who opted for the mini-trial style, wished that the JDR justice who provided the mini-trial opinion, had, in fact, remained to participate in the settlement discussions that followed⁴⁶⁹, suggesting that mediation (facilitative or evaluative) is very important.

There is a significant difference between Edmonton and Calgary in terms of their mini-trial “culture” - only 10% of the cases JDRed in Calgary were mini-trials, whereas 52% in Edmonton were mini-trials. Agrios said he had “no idea why” there was this difference.⁴⁷⁰ I attribute it merely to local bench and bar “culture” because there is no real evidence that the settlement success results are significantly different between the two large centres, but the means at

⁴⁶⁸ Smith, *supra* note 13 at 9 referencing Danielson, *supra* note 4.

⁴⁶⁹ Indeed, Landerkin makes clear that in his view the proper methodology is generally to help the parties settle through a mediation or facilitation and if that is not successful, then provide a non-binding opinion by way of mini-trial, not a mini-trial alone, although that is surely the right of the participants to decide: Landerkin, “Custody”, *supra* note 23 at 662, and 675.

⁴⁷⁰ Agrios, *supra* note 12 at 25.

arriving at them certainly are. Macfarlane discussed this under the heading of “Communities of Practice” and had this to say about the phenomenon:

The increase in specialization and the growing differences between urban and rural practices and big firms and solo practices give rise to myriad subcultures and “communities within communities”. Each of these subcultures has its own norms and values, which are sometimes described as “local legal culture”. Local legal culture is more than simply differences in formal rules or practices. It reflects a “how we do things here” perception in relation to particular rules and practices. These perceptions arise from local expectations and assumptions....⁴⁷¹

B. MEDIATION & EVALUATION ANALYSIS

Having done a comprehensive analysis of the rather distinct mini-trial method of JDR, other than the Binding JDR, to which I will come, the next type of JDR to analyze is the combination of mediation and evaluation, excluding mini-trials. I provide some statistics that separate the pure mediation from the pure evaluation, but many are a combination (hybrid) of both. Appendix 6, Table 6.7 - Mediation/Evaluation Analysis provides this analysis.

These results, as between Edmonton and Calgary, are generally consistent with Danielson’s reporting of judicial attitudes, which showed a strong correlation between Edmonton and evaluation (in addition to mini-trial, here in an evaluative mediation style) compared to Calgary and its higher preference for facilitation.⁴⁷²

⁴⁷¹ Macfarlane, *supra* note 25 at 34, relying on several authorities, and borrowing the phrase “communities of practice” from L. Mather, C. McEwen, and R. Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford: Oxford University Press, 2001), at 41-63.

⁴⁷² Danielson, *supra* note 4 at 12 and 38. On the latter occasion, she added: How this difference in practice arose is unknown. The real differences may be more perception than reality. The differences between the two Judicial Districts ... might also be a simple

In an attempt to answer the differences in approach by JDR justices in the two cities, I believe she identified something that has significant validity:

While certainly some experts in the dispute resolution field would agree that the evaluative opinion is *contra* mediation, others regard substantive input on the merits of the case as just a variation in a selection of overall mediation approaches. The giving of an opinion does not negate mediation *per se*, but the manner and timing of the opinion within the mediation process can determine whether the process is “neutral evaluation” or “evaluative mediation”.

At the risk of over generalization, and with some exceptions, the Survey results cause me to conclude that, generally, some Edmonton JDR justices are more inclined to provide the fairly formal neutral evaluation opinion (either in a mini-trial setting or early in an evaluative mediation) and leave it to the parties to negotiate thereafter.⁴⁷³ By contrast it appears that the Calgary JDR justices are more inclined to conduct a more informal process and use mediation skills to help the parties negotiate, raising the risks and “reality checks” associated with rights and positions (in the “shadow of the law” context, as discussed *supra*) as they go (thus providing “evaluative mediation”), but reserving any ultimately evaluative opinion to the end of the JDR, if the parties need or seek it.

matter of semantics, or at least a lack of clarity in terminology, rather than a substantive difference in actual style.... Perhaps the overall approach to JDR's by Justices in Edmonton and Calgary is more similar than it appears at first glance. More research on this issue is required before making firm conclusions one way or another.

She made similar comments at 69. The Survey, makes it clear that there is, indeed, reality to the difference, that it not semantics, but rather, with some individual exceptions, there is a substantive difference in actual style.

⁴⁷³ Danielson, *supra* note 4 at 38 says “if the opinion is given by the Justice too quickly, some disputants may feel that ... the Justice has rendered a “judgment” without hearing the disputant’s point of view”. This may be why a large number of Edmonton clients referred to the Justice’s “decision”, when, we know no “decisions” are made in JDRs (except Binding JDRs, not the subject matter here) - although it appears some JDR justices use that inappropriate term also - see Danielson, *supra* note 4 Appendix F, at 6.

Here we talk about the desire of the lawyers or the clients to have the JDR justice help them evaluate the merits of their case based on the case method of study. While also talking about the importance of the role of the judge in setting the standards applicable to judging, Kronman, in looking at the case method of the study of law, additionally discussed why it is so important for the parties to try to determine the ultimate decision maker's views, a matter that often leads, in a JDR, to a judicial evaluation (one judge helping to assess how other judges might assess the rights of a case):

Legal rules are often ambiguous or incomplete. As a result, their application frequently requires an interpretive judgment on someone's part regarding their purpose and scope. To know how the law will be applied in any given case, one needs to understand how judgments of this sort are made. ...

There are many people whose decisions have some bearing on how the law is applied. In principle, therefore, the lawyer's expertise relates to an enormous realm of behavior – one that includes the behavior of other private individuals who have the power to deploy the law for or against the client's benefit; of ... policeman, and prosecutors; and of judges. But within this vast domain is the behavior of the last group in which the lawyers are most interested. That is because judges occupy a position of preeminence among those who have a say in determining the application of the law. For whenever a question arises as to whether anyone else has properly applied the law, the question must, if pressed far enough, be settled by a judge. Judges are the final arbitrators of all such questions, the princes, in Ronald Dvorkin's phrase, of law's sprawling empire. ... The lawyer's expert knowledge of the law is thus above all else a knowledge of judicial behavior⁴⁷⁴, of what judges are likely to do when called upon to say how far the law should be applied. ... every lawyer, regardless of field, needs to understand the behavior of judges. A knowledge of this sort is the one kind all lawyers must possess: it is the core of their common professional expertise.

⁴⁷⁴ See Richard A. Posner, *How Judges Think* (Cambridge, MS, Harvard University Press, 2008) [Posner, "Judges"] at 3, in relation to judicial analysis and discretion, in addition to the application of legalistic precedent. Thus, as Posner says, the problem is the difficulty in determining the "consequences of judicial behavior".

... The more accurately a person can predict how ... [a] question will be answered by the judge who has the ultimate responsibility for deciding it, the more control he acquires over his environment. Skill in making such predictions is therefore ... [a] clear ... advantage.... For, other things being equal, each increases the actor's power and likelihood of success.⁴⁷⁵

Kronman goes on to discuss, at some length, the opinion of the lawyer in the context of a hypothetical "impetuous" client, pointing out the need to have a standard on which to advise the client, and to test the validity of the perhaps conflicting view of what the lawyer might advise and what the client wants to do. Again, the judicial opinion is of value (whether to a lawyer as counselor before litigation, or an advocate after litigation has commenced), but what if the judge's identity is not known?

But a lawyer's study of judicial behavior is not characterized by a ... sharp distinction between his own view of what is right and wrong and the view of the judge whose behavior he wants to predict. That is because the lawyer must often make his predictions without knowing the identity of the judge or, if he knows it, without being able to rely very heavily on what information he possesses about the judge's peculiarities. Obviously, when a lawyer puts a hypothetical question to himself – how would the judge view my client's claim ...? – he cannot answer that question by determining how judge so-and-so, a specific individual with known beliefs and a record of decisions in past cases, would view it. For the lawyer's hypothetical judge has as yet no concrete identity. The sorts of predictions that counselors must make a therefore almost always about the behavior of anonymous judges.⁴⁷⁶

Thus, the exercise becomes one of an anonymous assessment:

... Here, also, the question the lawyer must often ask is ... "What would a judge – or judges in general – say about this?" ... The point is that the conditions of advocacy commonly compel him to treat the judge as if he were an anonymity, so that in attempting to predict what the judge will do, he has no choice but to guess at the

⁴⁷⁵ Kronman - "Lost", *supra* note 10 at 124-5, referencing, Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), at 407.

⁴⁷⁶ *Ibid*, at 136.

behavior of someone about whom he knows only that he is a legal officer charged with certain responsibilities... . How, in these circumstances, is a lawyer to decide what counsel to give his client or what argument to make on his behalf?⁴⁷⁷

One answer, in a JDR context, may be to seek the assistance of a JDR justice, by mini-trial or other evaluation, to provide an non-binding opinion to attempt to assist in this prediction and to estimate the risks and possible result, on the premise of “the judicial ambition to preserve and perfect the community of law”⁴⁷⁸. That can either be done as a stand-alone exercise, a “pure” mini-trial, or in a session where either before or after the opinion, the JDR justice assists the parties in negotiation - such as facilitation, or mediation. If they are all combined into one they may be known as a judicial evaluative mediation.

The Survey results make it clear that the parties want some input on the timing of any judicial evaluation or (non-binding) opinion. In a “pure” mini-trial, it is expected that after reading the briefs, and hearing from the parties and/or their counsel, the mini-trial justice will render a formal, but oral (non-binding) opinion to all assembled. That is the end of the judicial role, unless the parties wish the justice to stay to help negotiate a settlement influenced by that opinion. In an evaluative-mediation, while such a “formal opinion” is rare, except at the end of what might be an otherwise unsuccessful JDR, the JDR justice is more likely to be less formal and give softer, more informal, observations and comments, in joint or caucusing sessions as to the risks inherent in positions. However, a JDR justice taking on too aggressive a role in expressing an opinion at all, or, at a less than optimum time⁴⁷⁹, will have a dampening effect on the negotiations. Thus a

⁴⁷⁷ *Ibid*, at 136-7.

⁴⁷⁸ *Ibid*, at 150.

⁴⁷⁹ I have participated in many JDRs where I have never been asked, nor have I given any opinion, whether formal or informal. If given, my experience is that most often the later the opinion is given, the better, but I believe the parties should determine that.

JDR justice should be careful only to give any assessment (formal or informal) if and when the parties want it so as to be most advantageous to settle the case. Indeed, I would go a step further to suggest that there should be consent on the “if and when” for any opinion delivered in a joint session, and perhaps, if there is a disagreement, only address such issues in individual caucuses. In this regard, Smith observes that:

Even ‘evaluative mediation’ connotes the withholding of judicial opinion in favor of providing legal information. Yet, only a judicial settlement conference in which the judge consciously and, if necessary, verbally guides the participants to a settlement within the bounds of the law is within the judicial function⁴⁸⁰.

While I vehemently disagree with Smith’s continued repetition of the latter, collateral, statement, as I have addressed elsewhere in this Evaluation Report, the former is relevant to this point. The timing of any opinion is of crucial importance to the parties as comments in some of the Survey reflected.

C. BINDING JDR ANALYSIS

Binding JDR is a very special form of JDR.⁴⁸¹ Appendix 6, Table 6.8 - Binding JDR Analysis provides the analyzed data pertinent to this unique, and, as we shall see, now significantly crippled, service.

It is interesting to note that the demand for this JDR service seem about equal in both the major cities (at 11 - 12%) of JDRed cases. While there were qualitative comments by some that caucusing was not appropriate for Binding JDR cases, it is to be noted that, although the absolute numbers are low, there was caucusing in 63% of the cases in Calgary, but only 16% in Edmonton. There

⁴⁸⁰ Smith, *supra* note 13 at 23-4.

⁴⁸¹ As explained within the Evaluation Report. Note too the discussion Smith, *supra* note 13 at 17.

is nothing to prove a correlation, but an exceedingly high 95% of Binding JDR cases were successful in Calgary, as compared to a still respectable 79% in Edmonton. It is clear that the type of case for which Binding JDR is in most demand was for family law (a mean of 65%), but interestingly Edmonton participants used it in a number (6) of personal injury cases, where as Calgarians only used it for 1 such case.

D. SUCCESS BY JUDICIAL DISTRICT AND CASE TYPE

Some evidence of success has been discussed *supra*, but it is also interesting to look at success by case type. Indeed, Bussin states that “[l]ooking at the rate of settlement and timelines to disposition by case type can be a useful tool for those stakeholders in charge of policy-making and design of the ADR system.”⁴⁸² The reason, if there is a substantial difference, is that the JDR process should be used more heavily for the case type to which it best lends itself. Appendix 6, Table 6.9 - Success by Judicial District and Case Type provides this analysis, but I am not sure that it renders any significant conclusions.

Where the numbers are significant enough to show a trend, then emphasis perhaps needs to be placed on the most successful type of case. However, the data in the Survey tends to show that no one type of case is more amenable to JDR than any other.

It is interesting to note, from Danielson’s thesis, the perceptions of justices as to why cases do *not* settle - a question not asked in the Survey. Noting that respondents could provide more than 1 answer, she found that the perceived

⁴⁸² Bussin, *supra* note 5 at 494. This, and time to disposition analysis implicit in the data causes me to make a recommendation, independent of evaluation of the JDR Program (although there are some inter-relationships) for the Court to be more active in monitoring older cases (with a higher time to disposition rate).

reasons included: over-confidence (76%); lack of sincerity with JDR process (merely “going through the motions” - my term - at JDRs)(56%); parties too highly positional and unwilling to compromise (56%); lack of readiness (53%); counsel too highly positional and confrontational (47%); lack of information on facts or issues (44%); insufficient common ground (26%); lack of preparedness by counsel (24%); nature of dispute not conducive to JDR (21%); lack of judicial training (9%); and not enough time at the JDR (6%).⁴⁸³ These are components of a question that I might have asked of the parties and their counsel in my Survey, but it was not asked.

E. CAUCUSING BY JUDICIAL DISTRICT AND CASE TYPE

Some evidence and opinion about caucusing is evident from the data and each has been discussed *supra*, and will be discussed further *infra*. However, it is also interesting to look at caucusing by case type, as seen in Appendix 6, Table 6.10 - Caucusing by Judicial District and Case Type. While on a total basis Calgary caucused in about 90% of the cases, Edmonton was only 48%. This trend was even higher in most cases, except for “other” personal injury and family law where the numbers are relatively equal. No reason for the former is not apparent, but there are some more reasons from my experience and the literature for the latter. Reasons may include need to separate parties due to emotions, security issues or power imbalances, etc.

Lethbridge caucusing rates were high over all categories.

Notwithstanding these numbers, the answers to N4 were significant in that 72% of respondents want caucusing in the future (only 9% don't want it). It is

⁴⁸³

Danielson, *supra* note 4 at 19-20, and 62.

interesting to see in Appendix 6, Table 6.11 - Demand for Future Caucusing, from where these respondents come.

Putting this all into perspective, it means that: whereas, from the Lawyers' Survey 90% of Calgary JDRs had caucusing in the past, 9% more (totaling 99%) want caucusing in the future; whereas from the Lawyers Survey 48% of Edmonton's JDRs had caucusing in the past, but 25% more (totaling 73%) want caucusing in the future. In Lethbridge, 85% of JDRs had caucusing in the past, and 15% more (totaling 100%) want caucusing in the future. In total, 71% of three judicial districts JDRs had caucusing in the past (average dropped significantly by Edmonton's numbers), but 18% more (89%) want caucusing in the future. This demonstrates clearly that there is significant - and growing - user demand for caucusing, with the highest percentage of that growth in demand in Edmonton, a matter to which Edmonton JDR justices may wish to have heed.

By way of interest, while twelve (92%) wanted caucusing in the future, one (8%), did not in the small number of JDRs conducted in the remaining judicial districts.

**F. PRE-JDR - JDR JUSTICE PROFILE, JDR BOOKING
CONFIRMATION FORM, PRE-JDR CONFERENCE, JDR
INSTRUCTION LETTER AND OPENING STATEMENTS**

The issues originally intended for discussion in this section relate to Pre-JDR meetings or conferences (Pre-JDRs) and Instruction Letters (IL), but, having regard to the qualitative comments in the Survey returns, I believe it is necessary to also discuss information on judicial styles, information exchanges between counsel and the Court (outside of, and potentially impacting on, Pre-JDRs), and, while not pre-JDR in a strict sense, Opening Statements at the beginning of a

JDR. In the result, I make recommendations on all of the, and propose new forms - JDR Justice Profiles and JDR Booking Confirmation - to assist. I acknowledge that I have raised these recommendations *supra*, but this rounds out and particularizes the discussion more. I will discuss them in the order in which they should arise in a JDR.

There is significant support for the recommendations that follow from the quantitative and qualitative data in the Surveys. For the former, in its simple summarized form as reported, see Appendices 4 and 5, and, as more deeply analyzed on an integrated basis, see Appendix 6, Tables 6.1 to 6.14. For the qualitative support, again see Appendices 4 and 5 for all the detail, and for the highlights of the qualitative support therein, see Appendix 6, Tables 6.15 and 6.16.

JDR Justice Profile

It appears from the Survey results that often counsel are not familiar with individual JDR justices, their styles and their proclivities (as to what type of JDR types and processes they will carry out). Thus, while there is, to a large extent, choice as to the JDR justice, often *the choice is blind* because the characteristics of the JDR justice are not known. While those matters are learned by an experienced counsel over time in a trial context, there is no choice in trial justice for a number of good reasons beyond the scope of this Evaluation Report (indeed, the choice of trial justice is one of the risks to be weighed somewhat in any settlement). However, in JDRs there is a significant amount of a choice, so as to promote the parties best views of the optimality of a case for settlement. Thus, I believe, as an exception to the normal practice, there is a good reason for the Court to encourage JDR justices to release a profile of their JDR

“characteristics”.⁴⁸⁴ Accordingly, *infra* and in Appendix 8.1., I recommended a form of JDR Justice Profile.

JDR Booking Confirmation Form

When considering the prerequisites to a JDR, and the information that the JDR Coordinator and JDR Justice should have before the JDR, key to determining whether or not a Pre-JDR is necessary or advisable, I recommend that counsel (or, the party, if SRL) prepare a joint or several JDR Booking Confirmation Form. Brazil’s Handbook, with appropriate modifications for the jurisdiction and style, is an excellent source for documentation from the first request for a JDR to bringing a matter to the JDR itself.⁴⁸⁵

Pre-JDR Conference

The Survey, the literature and the practice with which I am familiar, all indicate that there is a significant issue among the Court’s judiciary (and counsel) as to whether or not there should be a Pre-JDR Conference (Pre-JDR), who should initiate it, what should be included in the discussion if a Pre-JDR is held, and whether there should be an Instruction Letter (IL) independent of a Pre-JDR.

Pre-JDRs are an especially poignant issue with JDR justices. Some believe they should be mandatory - indeed, the Edmonton judiciary’s official

⁴⁸⁴ Note from Brazil, “Handbook, 2008”, *supra* note 60 at 37, that information about the evaluator is standard in Northern California.

⁴⁸⁵ Brazil, “Handbook, 2008”, *supra* note 60 - for example, see reference to docket sheet and other information (now apparently largely electronic) at 27 and Appendices 3 and 4.

policy is that they are mandatory⁴⁸⁶, whereas some think they are a waste of time, and others are ambivalent.

It appears from the Lawyers' Survey that most of the Pre-JDRs were initiated by the judiciary and most participants felt they were useful, although there are some exceptions. As noted *supra*, there was a significantly higher percentage of Pre-JDRs in Edmonton than Calgary (a ratio of almost 3 to 1 - 93% and 32% of cases respectively). This is in part because Edmonton justices seem to feel strongly enough to require an automatic Pre-JDR, and the data supports an interpretation that Calgary justices are, generally, more ambivalent, only having a Pre-JDR when counsel want one or for some other specific reason. My experience, supported by the data is that counsel seldom seek a Pre-JDR on their own initiative.

Many of us (some in Edmonton, and most in Calgary) believe, to use Prime Minister Mackenzie-King's famous concription terminology, "Pre-JDRs if necessary, but not necessarily Pre-JDRs" - that is, only do them if necessary or if requested by counsel, in each case for some purpose beyond what a detailed a JDR Booking Confirmation and a JDR Instruction Letter (IL) can achieve, one or both of which may make them less necessary. Moreover, in my view, Pre-JDRs

⁴⁸⁶ Agrios, *supra* note 12 at 18, 50 and Appendix 5 (item 1), at 68 - the latter including a number of recommendations unique to Edmonton, which they call a "Protocol", dated December 2004. Brazil, "Handbook, 2008", *supra* note 60 at 27 notes that a "Pre-Session Telephone Conference" with the evaluator and counsel is mandatory under their local rules (for all their local rules on, *inter alia*, non-binding arbitration (exactly like an arbitration, although shorter and not binding), ENE, mediation and settlement conferences, see Appendix 2 to the Handbook). There is a lot of useful information in the Handbook at 27-31- what value they have, when to hold them, and possible agenda items (at 28-31 and Appendix 5) that may be valuable for the JDRC to review in assessing the recommendations herein, and, to be provide sample information for use in such conferences. I note, as came out of the recommendations from some lawyers in the Survey, that telephone conferences are, obviously, deemed acceptable.

should not be a substitute for an IL, as they are with some JDR justices, nor should Instructional Letters be considered redundant if a Pre-JDR is held, as the data would tend to indicate some JDR justices believe.⁴⁸⁷

As the New Rules suggest that the parties should have a lot of say in (indeed, determine) how the JDR should be conducted, subject to the JDR justice's concurrence, the JDR Booking Confirmation would be a useful way for counsel to propose to the Court how they believe the JDR should proceed, all for the confidential information of the JDR justice. That and adequate information to allow the JDR justice to know how to plan for the JDR might avoid the time and cost of a Pre-JDR meeting - or, especially with an experienced JDR justice, might only need to be supplemented by a brief caucus between the justice and counsel at the beginning of the JDR - although there may be some issues there of sending a wrong signals to the parties. If the information in the JDR Booking Confirmation form (including the request of counsel), or the lack of information, make a Pre-JDR prudent, then conduct one, by all means.

If a Pre-JDR is, in fact, held, Agrios leads a very useful discussion on Pre-JDRs and a checklist, with comments, of the matters that could be canvassed at such a meeting.⁴⁸⁸ However, I caution a closer examination of the Agrios checklist to remove those items which could be as easily - perhaps better - covered by an appropriate JDR Booking Confirmation form or Letter of Instructions (IL). In my view, a Pre-JDR should only be used for those matters which cannot be (or are not) put in an a JDR Booking Confirmation form or an IL - put another way, to use the words of Agrios in another context (at 18) "Let us

⁴⁸⁷ Agrios, *supra* note 12 at 23, item 15. Brazil, "Handbook, 2008", *supra* note 60 at 31 (item 12) specifically mandates an IL, even if there is a pre-session telephone conference.

⁴⁸⁸ *Ibid*, at 18 - 23. See also Brazil, "Handbook, 2008", *supra* note 60 at 27-32, as discussed *supra* at note 486.

not waste lawyers' and Judge's time..." at a Pre-JDR discussing matters that could be put in such a booking form or instruction letter, unless there is an issue about (or deficiency regarding) a particular matter in the either (which, of course, counsel or the JDR justice can raise if required). Additionally, if a Pre-JDR is to be held determine if it can be as effectively held by telephone to avoid cost to the parties.

Danielson addressed⁴⁸⁹ what she called "Pre-Screening" as to what types and complexities of cases are suitable for JDR, and received many views. While some justices may not relish doing certain types of JDR, I believe that, at the present time, JDR is potentially available for almost any case, except criminal (some jurisdictions do some and that is an area for further research), although there may be fewer choices of JDR justice in some areas of the law or some types of JDRs, due to judicial choice (some might say resistance). While some justices did not like JDRs where facts were in issue, factual issues are hard to avoid - indeed, because of potential differences in fact finding in a trial, JDRs are often a good way to get a judicial assessment. Nevertheless, even when "potentially available", a JDR may be refused for any number of legitimate reasons, including, but not limited to: one or both parties have no real intent to settle, and are only going through the process ("tire kickers") for some ulterior motive or with a lack of good faith, or abuse of process⁴⁹⁰ (for example, relevant to Binding JDRs versus summary trials - if the parties want a simple, inexpensive and final process to resolve their dispute, but are not prepared to mediate in

⁴⁸⁹ Danielson, *supra* note 4 at 49, as well as 55-7. See also, Agrios, *supra* note 12 at 18 and 20.

⁴⁹⁰ Otis and Reiter, at 377, note, referencing John Lande, "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs" (2002) 50 UCLA L. Rev. 69, that "A party who cynically uses the process to gain an advantage, knowing that he or she can abandon mediation and jump back into the adjudicative queue if mediation does not work as planned, thus undermines the integrity of the process."

good faith, then a summary trial process, not a Binding JDR, is more appropriate); a case is not ready (or “ripe”) for settlement - relevant, crucially necessary, information for settlement is missing on a key issue⁴⁹¹; there are security or power imbalances that cannot be resolved; very small monetary matters may not justify a JDR; and others (the list is not closed). While Danielson argues that the “literature supports diverting away... matters as those in which the public has a real interest”⁴⁹² JDR justices seldom, if ever, in my experience, attempt to divert away any case in which the parties agree to JDR.

Danielson noted that the majority of judicial respondents believed that a Pre-JDR conference was almost always necessary to “provide for a preliminary evaluation to determine the ability of JDR to serve a self-represented litigant”, with many “very leery” of doing JDRs with SRL.⁴⁹³ I believe this to be true - indeed, as an exception to the general rule of Pre-JDR only if necessary (primarily because, unlike a lawyer, a SRL is not an “officer of the court” whose proper motivations and conduct can be taken at face value), I believe Pre-JDRs should be mandatory for SRL.

⁴⁹¹ See Danielson, *supra* note 4 at 52-4, referencing, *inter alia*:
 - Louis Kriesberg, “Timing and the Initiation of De-Escalation Moves”, in William J. Breslin and Jeffrey Z. Rubin, *Negotiation Theory and Practice* (The Program on Negotiation at Harvard Law School, Cambridge, MA, 1999), at 223-4;
 - Assata N. Peterson, “Arbitration, Mediation and Procrastination - Avoid the Pitfalls and Effectively Plan for your Next ADR”, *American Bar Association Young Lawyers Division, 2004 Fall Conference* - Austin, Texas, October 7-10, 2004, 1, at 4-5; and
 - Jeffrey Z. Rubin, “Some Wise and Mistaken Assumptions”, in William J. Breslin and Jeffrey Z. Rubin, *Negotiation Theory and Practice* (The Program on Negotiation at Harvard Law School, Cambridge, MA, 1999), at 9-10.
 She noted that “the JDR Program is not intended to be a free discovery”.

⁴⁹² Danielson, *supra* note 4 at 49, referencing:
 - Dickson, *supra* note 14 at 236; and
 - Daniel Joseph and Michelle L. Gilbert, “Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings” (1989-90) 3 *The Administrative Law Journal*, 571, at 590-91.

⁴⁹³ Danielson, *supra* note 4 at 17.

In my experience a Pre-JDR is usually necessary for a Binding JDR, to see if there is a real chance that the parties will negotiate in good faith - if not (as intimated *supra*) and one or more of the parties is using the Binding JDR as merely a way for a more simple, less costly resolution, merely set the matter as a summary trial for an adjudication, and avoid the facade of any negotiation. Before *L.N.*⁴⁹⁴, this is what Watson J. (as he then was) did in *Megyesi v. Megyesi*, 2005 ABQB 706, 57 Alta. L.R. (4th) 169, [2006] 7 W.W.R. 358, at paras. 7 - 18 (where the parties didn't seem to want the mediation part of the exercise and wanted the right to appeal the "decision") and *Nuttall v. Rea*, 2005 ABQB 151, 374 A.R. 1, 44 Alta. L.R. (4th) 42, [2005] 8 W.W.R. 244, at para. 4 (where it appeared that Binding JDR was not deemed appropriate). Indeed, a Binding JDR is best set up as a combination JDR - summary trial in any event, to provide a evidentiary bases for any adjudication (or, in effect, an adjudication in substance), although there may also be other dynamics that should be pursued.

JDR Instruction Letters

Suggestions for Instructional letters⁴⁹⁵ and brief requirements⁴⁹⁶, if not

⁴⁹⁴ *L.N.*, *supra* note 19.

⁴⁹⁵ At the risk of duplication, see comments in note 488 *supra*, related to the Agrios Pre-JDR checklist. Brazil, "Handbook, 2008", *supra* note 60 at 31 (and Appendix 5) provides sample ILs.

⁴⁹⁶ As to brief requirements, Macfarlane, *supra* note 25 at 212-3, describes the situation in "some legal cultures" as:

Some legal cultures appear to be developing their own norms of good faith bargaining behaviors before and during settlement meetings.... In mediation, these types of conventions usually include conventions for the adequate preparation for mediation (sometimes including a style of mediation brief), documentary exchange..., and sometimes a frank discussion between counsel to avoid unnecessary energy being expended by either side if one or the other believes mediation to be inappropriate or premature.

She went on to say that this is the case more in smaller legal communities, because:

included in the JDR Booking Confirmation form (as I believe most should be) include (in random order): disclosure of previous offers - indeed, I recommend that offer (separate from trial “position”) be a prerequisite before a JDR is booked and confirmed in the JDR Booking Confirmation form, and, if lapsed, be renewed or substituted by a new offer with the JDR brief); emphasize purpose is settlement; request to have parties raise interests that are present outside the pure litigated issues that might be relevant to settlement (this can sometimes merit a Pre-JDR meeting, if there are confidential matters that the JDR justice should know in advance); list of current “barriers” to settlement (the same point as to a Pre-JDR meeting); guidance on the possible specific roles of clients in different situations (e.g. how the facts arising from the issues in the litigation have affected them, what are their interests (personal) in addition to their rights (which the lawyers should articulate)); where a Pre-JDR meeting is not “prescribed”, an offer by the JDR justice to meet where helpful, and a list of situations or scenarios where it might be helpful (see examples *infra* in this paragraph); role of costs (currently only awarded if there is “abuse” or unnecessary causing of costs in the process leading up to a JDR - e.g. one party

In other legal communities – often larger, more competitive, and sometimes (by dint of numbers) anonymous environments – it is still normative and even assumed that counsel will often use mediation and other collaborative processes instrumentally and sometimes in bad faith.

Still later, at 214, she added (footnote references omitted here):

Data from clients suggest that some would like to see the mediator play a more proactive role in managing recalcitrant and obstructive behavior on the part of counsel. Some lawyers agree... ‘The mediators should be willing to get their hands dirty’ – that is, by being interventionist when counsel is being obstructive to the process.

These comments have some wider implications. However, on the level of notice to the parties and their counsel, it seems to me that what is expected should be clearly agreed to by the parties *and confirmed* by the JDR justice (at a Pre-JDR) *and in writing*, or if no Pre-JDR, as directed *in writing*, by an Instructional Letter - while good counsel practices are normally met for JDR material, merely anticipating such is too unpredictable to be relied upon.

prepares brief, and the other party withdraws consent prior to the JDR⁴⁹⁷); chronology of events or facts, or expert consultations⁴⁹⁸, etc., when and as appropriate; minimal information (e.g. for matrimonial property disputes, etc.); and any other details necessary of the JDR.⁴⁹⁹ This all suggests to me that most information can be exchanged in a JDR Booking Confirmation form or followed-up in an Instruction Letter, limiting the need for a Pre-JDR. For a sample Instruction Letter (relying on heavily on one commonly used in Edmonton), see Appendix 8, Form 8.3 - Sample JDR Instruction Letter.

As to ILs, it may be that justices who had a Pre-JDR felt that a IL in addition was not necessary, as the information could be imparted at the Pre-JDR. However, although there is a fair bit of under reporting on whether ILs were received, it appears that some JDRs had neither a Pre-JDR nor an IL, a situation

⁴⁹⁷ Note that the Edmonton "Protocol" suggests that costs can be used for such purposes - see Agrios, *supra* note 12 at 69, item 11. See also *Willeson v. Calgary (City)* 2008 ABCA 197, 167 A.C.W.S., [2008] A.J. No. 564, where it is implicit that costs are appropriate in principle for a last minute adjournment of a JDR, although not awarded in this case for failure of the initial justice to afford the adjourning party an opportunity to speak to same.

⁴⁹⁸ It is typical that all expert reports obtained by the parties are exchanged before the JDR and made available to the JDR justice in the JDR briefs (appropriately highlighted to separate the grain from the chaff in the attachments). However, one type of expert "report", the video (or other) surveillance sometimes used relative to the issue of malingering is often an issue, and this was expressed in the qualitative Survey results. While such material is usually part of the solicitor's privileged brief and thus not normally required to be produced in document disclosure, it is usually evidence admissible in a trial (I hasten to add that I am not providing a judicial opinion here, but merely noting the common practice), and at a JDR there are strategic issues with such evidence. While the parties will often keep such evidence "close to their chest", if one of the purposes of a JDR is risk assessment and settlement, this is often very useful information to disclose - often with strategic impact at either a JDR or trial. However, in the qualitative comments in the Lawyer Survey section I3, I note the respondent argued for "compulsory obligation to reveal all evidence at JDR - surveillance tapes, expert opinions, etc. - otherwise the party is not willing to put all cards on the table to settle".

⁴⁹⁹ Again, see the Agrios, *supra* note 12 at 18-23 for his Pre-JDR checklist and discussion, both summarized and discussed *infra* at footnote regarding JDR Booking Confirmation Forms.

which I believe is inappropriate. I would recommend to default to an IL in any event of a Pre-JDR - they are not much work and provide a lot of clarity that will make sure there are no unnecessary procedural impediments to have a negative effect on the settlement of a dispute.

Opening Statements

While technically not part of a Pre-JDR, except for a matter of minutes before the submissions and negotiations commence, I shall address Opening Statements, by both the JDR justice and counsel at this juncture.

Chief Justice Moore reported that feedback from counsel in the early years of mini-trials was that the “opening remarks by the judge at the outset of the process, which explained the purpose and nature of the mini-trial, as well as the costs and risks associated with a full trial, were very useful and instructive to their clients”.⁵⁰⁰

Danielson noted that, generally, over 75% of justices discuss the following issues in the justice’s opening remarks at a JDR: cost of trial (88%); uncertain outcome from adjudication (91%); payment of costs (74%); time delay of litigation (76%); high emotional cost of litigation (77%); and advantages of personal resolution over court-imposed resolutions (85%).⁵⁰¹ There appear to be many styles⁵⁰², and there is no wish to tread unnecessarily on judicial independence. However, to provide some standard of best practice and some consistency (subject to modification for judicial independence or as the

⁵⁰⁰ Moore, “Mini-Trials” *supra* note 288 at 202.

⁵⁰¹ Danielson, *supra* note 4 at 18 - see also Appendix F, at 6, for one justice’s practice in openings.

⁵⁰² Reinforced by comments of Agrios, *supra* note 12 at 16-6.

circumstances dictate), I recommend that the JDRC prepare a sample JDR Justice Opening Statement. It may be particularly useful (as I found in such circumstances) for the less experienced JDR justice.

While JDR justices and some counsel may be fully familiar with such JDR justice remarks and find them redundant and boring, it is to be remembered that, except for professional adjusters, most of the time at least one of the parties will be a personal “one stopper” who may not be familiar with all the procedures or benefits of the JDR - the Opening Statement should address the lowest common denominator. Indeed, the Client Survey shows that 48% had not participated in a JDR before and an additional 19% had not participated on more than 5 occasions. Therefore, notwithstanding some evidence of some JDR justices missing this step, or some regular users grumbling about it (e.g. in section H2 of the Lawyers’ Survey, one respondent approved of a JDR justice who didn’t make an Opening Statement and “didn’t require counsel to make their usual opening statements which wastes time, but rather zeroed in on the issues”), I believe this step should only be missed in the unusual experience where everyone has participated in a JDR before - preferably with this JDR justice.

The NJI steps for a JDR (discussed *infra*) clearly indicate the continued importance of this step. Therefore, for those JDR justices who wish to/need to use one, in wholly or in part, it is recommended that the JDRC prepare a draft, sample, opening remarks document. Agrios agrees with an opening statement and has provided samples for consideration.⁵⁰³ While I have one that I use, which I believe would be useful for this purpose, I believe there needs to be more judicial input into any sample as a form of best practice. Accordingly, I shall not

⁵⁰³ Agrios, *supra* note 12 at 23, and appendices 2 and 3 (at 64 and 65 respectively). See also Brazil, “Handbook, 2008”, *supra* note 60 at 35-65 and Appendix 5 for a detailed agenda for the session, draft opening remarks, and a checklist for each step in the process. The NJI steps also address the broader purpose and element of this step.

include it in Appendix 8, but, rather, provide it to the JDRC for their consideration and further recommendation.

As to Counsel's opening statement (alluded to *supra*), there is some debate among the JDR judiciary (and the comment, *supra*, would also indicate among counsel) as to whether, at the beginning of a JDR, counsel and or the parties should make an "opening statement". The opponents of such a practice⁵⁰⁴ argue, *inter alia*: it is a waste of time because counsel will merely repeat what is in their briefs, and will add little or nothing; and, worse, it will re-enforce positions, as opposed to interests and needs. They argue to move directly into negotiations. However, I have another view, and recommend opening statements by counsel and/or the parties, with some direction. The direction (a good place for this is in the Instruction Letter, and re-enforced in the JDR justice's opening) would include: they must not merely repeat their brief, although concentration on a large troubling issue may be all right; should bring a new offer; and should allow the client to express, in lay terms, how the litigation affects/impacts them or their principal. The latter is extremely important for at least three reasons: the "day in court" principle; while the other side will have questioned a party and received disclosure, they likely have never had that side present (briefly) the case as they would in a trial⁵⁰⁵; and it may help, where relevant, the assessment of credibility of a party.

⁵⁰⁴ Agrios, *supra* note 12 at 52.

⁵⁰⁵ Framed in the context of counsel's comments, but equally applicable to a party's comments, or both, Tettensor, *supra* note 116 noted, at 6, that this is: "an opportunity to explain directly to the parties adverse in interest your client's *position* in the litigation". I highlight "position" because, in a JDR context that is a rights based position, and proper if the matter goes to trial (therefore appropriate to the risk assessment at a JDR), but it should also be expanded to address "interests" and needs in a way that the opposite side may respond in kind. See Goss, "An Introduction", *supra* note 29 at 7, in agreement, but adding, *inter alia*, the perspective of the mediator's role in: clarifying matters, looking for common ground, isolating agreements and issues, and generating possible solutions.

G. OTHER ANALYSIS

In my view, the above more detailed and integrated analysis was quite key, providing some very interesting results that calls for recognition and recommend new or better practices. On the other hand, other more minor analysis proved of no great significance, which, in some cases, in itself made a conclusion. Let's examine a couple of these.

1. SUCCESS AS A FUNCTION OF THE DURATION OF THE LITIGATION

Appendix 6, Table 6.13 - Success/Duration Analysis, demonstrates that there is no significant advantage to waiting for litigation to “mature” with “age” before a JDR can be successful. Discounting somewhat the weight of the % of the 1 year or less cases because of their small number (and recognizing that the Survey questions were not sufficiently specific enough to avoid some overlap in the boundary years), it seems that most cases of 1 - 6 years are generally successfully JDRed about 77% of the time. Coincidentally, the table repeats the information (*supra*) as to the high % of cases that come to JDR after a long duration. The result is that there is no apparent advantage of waiting, while there is undoubtedly cost associated with doing so. Nevertheless, this involves the 95%/5% debate (both *supra* and *infra*) in the context of the real purpose and goals of the JDR Program.

2. SUCCESS AS A FUNCTION OF THE STAGE OF THE LITIGATION

Similar to the last, while my experience tells me that it is more difficult to get a more precise fix on what is the appropriate result in a rights case before all

the facts are known - perhaps some discount (or bonus) for an early, cost saving settlement. Appendix 6, Table 6.14 - Success/Litigation Stage Analysis, demonstrates that there is no significant advantage to waiting for litigation to “ripen” or “mature” with “process” before a JDR can be successful, although the more “process”, clearly the more expense. Recognizing that parties were allowed to register more than one answer, and that the last two categories may have some similarities, I have tried to separate the categories into 3 categories - the first two that are independent of the other and the latter inclusive of each. Under any scenario, however, it seems that a successful resolution can be made before the expense of all the adjudication related process is complete. However, one might expect that earlier resolution may be at somewhat of a discount/bonus for one or the other (or both parties), because of a lack of proof or a lack of certainty - offset, nevertheless, by a reduced expense.

3. REPRESENTED BY OTHER THAN LAWYERS

I have provided some more detailed analysis of this *infra*, but add some comments here. The Lawyers’ Survey disclosed that when lawyers reported all parties were represented by lawyers, except 6, of which one had a SRL, in a family context (successfully JDRed), and four had a SRL (along with others represented by lawyers) in personal injury, motor vehicle collisions (three successfully JDRed), and one in an insurance case (not successfully JDRed).

While I have not done any real, in-depth, analysis on the Clients’ Survey, this is one where I thought the analysis might be helpful, but it was not. Of the clients reporting, three were SRL (all with lawyers on the other side), two in personal injury/motor vehicle collisions and one in a civil family dispute (does not appear to be matrimonial in nature). There were none of “some of both”. Only one was successful and that was a personal injury/motor vehicle collision.

Of the Clients' Survey, there was one case where the client reported that the other side was SLR and 5 cases where the other side was some of both (three motor vehicle collisions, one slip and fall, and one not specified), of which only the slip and fall was successful.

It is noted in passing that in evaluating an Ontario administrative agency, Adams recommended a "review of the need for user advisory systems for unrepresented applicants"⁵⁰⁶. Is there a need for such a user advisory system for SRL pertain to their accessing the JDR Program - if so, is the Alberta Law Information Centre (LInC) the vehicle to accomplish this? I believe it is, but the JDRC may wish to consider the matter in conjunction with the recommendation on a JDR Program Pamphlet.

H. CONCLUSION

Having in this section "drilled down" to obtain integrated and interactive information that did not appear on the surface of the summary of the Lawyers' Survey data in Appendix 4, with some references to Clients' Survey data in Appendix 5, in a number of tables in Appendix 6, more useful and meaningful information has been obtained. I have used this analysis of the data - some exceedingly clear in its recommendations - to make my own recommendations on a number of improvements to present aspects of the JDR Program, and to add recommendation of new forms for handling information to improve the JDR Program.

In the next section I will analyze the qualitative data that supports this interactive data and the conclusions that are apparent as a basis for the recommendations in this Evaluation Report.

⁵⁰⁶ Bussin, *supra* note 5 at 465.

IV. ANALYSIS OF QUALITATIVE SURVEY RESULTS

Bussin's work makes it clear that evaluation programs that seek and analyze not only quantitative, but also qualitative, data can be very valuable to measuring success of an adr/jdr program.⁵⁰⁷

While the qualitative data from the Survey is available and reported in Appendices 4 and 5, unfortunately, time limitations do not allow for as detailed an analysis as I would have preferred. That, however, gives an opportunity for future analysis by a future researcher, because, as I have identified elsewhere herein, the data will remain on file, in the public domain, in the records of the Canadian Forum for Civil Justice (CFCJ) and be available for analysis, on consent of the Court.

Yet, all of the qualitative data, while prone to understandable repetition, is poignant and sincere, and carries a number of significant and important - often hidden - messages that the Court must understand and take into account as the JDR Program continues. It is also worthy of reading by the true scholar of dispute resolution. From either view point, the qualitative data provides many insights that the quantitative data alone cannot.

Even still, in the limited analysis provided, I confront the usual problem that the "sorting and categorizing involves lots of judgment calls because language is often very ambiguous", but the importance that must be maintained is "grasping the content of the data"⁵⁰⁸ - the real essence and significance of the often concealed, but, when extracted, clear messages from the qualitative data.

⁵⁰⁷ Bussin, *supra* note 5 at 467.

⁵⁰⁸ Kritzer, *supra* note 15 at 7-8, including footnote 19.

There are so many qualitative comments that one would be repeating the complete summary of those comments as contained in Appendices 4 and 5 to draw attention to them - yet some mention must be made of the important themes to extract the essence of the points buried there, failing which the true value of the comments will be lost.

Therefore, I will first, separately for both the Lawyers' Survey and the Clients' Survey, address the qualitative data that contain certain constant and common themes (most often with section references) much of which is relevant to the recommendations that I make in this Evaluation Report.

Second, I will (again for each Survey) touch briefly upon the conclusions that derive from the significance of important section-by-section qualitative participant comments. This will be supported by an even more in-depth analysis of the qualitative section-by-section data that results in the more significant - indeed, highlighted - comments being placed in Tables 6.15 and 6.16 respectively of Appendix 6.

Nevertheless, in all cases the data is not homogeneous, and there are many repetitive comments that fall into both categories, so, the separation is not perfect.

A. LAWYERS

Common Themes

Judges Need More Training

There were a significant number of, apparently highly perceptive, random comments that suggested JDR justices did not appear to have any or sufficient mediation training. Some examples will reinforce the point: H1. (ranking 3⁵⁰⁹) - “[justice] courteous, helpful, but did not seem to have mediation training”; H2. - “lacked a clear process and ordinary mediation skills”; and “does not understand role of a mediator”; I2. (ranking 2) - “Judges to be trained in mediation”; and I2. (ranking 5) - “ensure justices who are doing JDRs have mediation-interest based negotiation skills”; “continued exposure to JDRs and other ADR processes by judges ... will improve the program”; “judges should be trained on evaluative mediation”.

More systematically, in section I3. respondents were invited to offer specific comments/suggestions regarding the JDR Program. Numerous respondents also identified “mediation training” for justices as necessary in order to improve the program. This recurring theme can also be found in response to questions K1, L5, and O8. Section P1. invited open comment from lawyers. It is here that some chose to comment on JDR training and is reflected in the following: “the judge should have basic conflict management skills and some

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In reference “ranking”, I am referring to the choices respondents had to rank their selection between 1 and 5 on a designated scale. For the qualitative comments in Appendices 4 and 5, many have been separated by this ranking - thus, in this instance the middle ranking, 3, is what is being discussed. The purpose for mentioning these rankings is two fold - to allow a comparison of the weight or strength of the opinion, and to allow the original comment to be found in the summarized, but otherwise raw, data in Appendices 4 and 5.

understanding of the dynamics of settlement”; “... a more consistent level of judicial mediating skill amongst all justices”; “all judges should be trained if they wish to do JDRs”; and “limit justices, if possible, to those who are qualified and suited to JDRs”.

Day-In-Court

The following passages spoke of the merits of JDR providing the clients with their “day in court”: E3. - “party needed to feel ‘day in court’ and hear opinion of judge”; E3. - “opportunity of client to present her views/opinions directly to judge”; H2 - “justice put whole heart and soul into making sure the client felt s/he got a proper hearing”; I2 (ranking 5) - but need “a bit more ability for the client to tell their story”; K1 (ranking 2) - “the parties didn’t have a chance to tell their story or to listen to the other side’s story”; and K1 (ranking 4) - “... for clients, it is like their day in court”.

Selection of JDR Justice

Selection of the JDR justice (now effectively achieved in the on-line booking system) seemed a key phenomena on to many: E3. “... can select the Justice to hear the matter”; I2. (ranking 5) - “ability to choose a suitable judge”; I3. - “allow the parties to pick a judge” [a couple]; and other similar comments that suggest that many would not proceed with a JDR without some ability to select the JDR justice; K1 (ranking 4) - ability to “select a justice” positive; and K1 (ranking 5) - “its best to have choice of judges...”.

Selection of JDR justice was a specific enquiry in L5., and I add here some of the more important reasons that 89% of the Lawyers felt that selection

was important: importance of “different styles”; “mediation/interest ... skills”; and “background and expertise”. Recurring sentiment also identified the “nature of the client”, “emotionally intense clients and situations”, “the client ... more at ease”, and “style suited [the] parties” as being crucial factors in selecting a justice for a JDR. This is further borne out in the following comments: “I wouldn’t go to a JDR unless I had a choice of justice”; “because there is a significant variation of judicial style with different styles being appropriate for different cases [several]”; “choice is critical - there are some judges I could never do a JDR before [numerous]”; “if I could not choose the justice, I would do a private mediation where I can pick the mediator”; and “certain justices are much better with difficult clients”. This theme recurred in the final section, P1., where respondents described the right to choose the judge as “imperative”, “essential” and “critical to the outcome”. Further comments surrounding selection include: “I sincerely hope there is no plan to remove the right to choose the JDR Justice - this would severely affect our decision of whether or not to do JDRs - the right to choose the justice is essential”; and “the opportunity to pick a judge from a roster, ‘on line’, is a huge improvement”.

Importance of a Judicial Mediator

Several comments were made as to the importance of the judicial role as mediator: E3 - “power of a judge as mediator”; H2 - “an advantage over private mediation is a neutral evaluation by a judge whom the parties perceive as an authority”; I2 (ranking 5) - “the JDR process is the most effective QB process that there is for dispute resolution”; I3 - “any counsel who does not seriously consider JDR before putting his or her client to the expense/risk of trial is doing serious disservice to the client”; and “*JDR is a superb tool ... judges have an authority which is unimpeachable ... JDR is probably the most important tool in litigation and must be maintained and strengthened*”[emphasis added].

Unique Nature of JDR v. Trial

A number of comments talked about the unique opportunities provided by JDR that were not available at trial. One, in E3, is that there is “opportunity to say things that may not have been permitted at trial”.

Welcome Privacy of JDR

Several comments reflect a welcoming of the privacy of JDR - for example, E3, talks about “... privacy, court phobia ...”. This is relevant to the discussion, *infra*, of JDRs in public, recording of proceedings and transparency. This comment is representative of a number of comments that make clear that the parties want the same privacy in their JDR confidential settlement attempts (and, hopefully, achievements) as they get in private ADR.

Need for JDR Justice to Understand Process Wishes of Counsel

There are a number of references to the JDR justice not understanding what processes the counsel wanted, or counsel not knowing the JDR style or limitations of JDR justices. I will recommend that the former be corrected by having a JDR Booking Confirmation Form (Appendix 8, Form 8.2) provided by Counsel telling what precisely they want (subject to judicial concurrence) and ensuring JDR Instruction Letters (sample in Appendix 8, Form 8.3) be issued in all cases by the JDR justice. As to judicial style and limitations, I will recommend that each JDR justice be encouraged to publish a JDR Justice Profile (Appendix 8, Form 8.1).

To support these recommendations, it is necessary to see the problems counsel have been having - for example, : I2. (ranking 3) - “justice quickly gave

each side a conclusion of a range of damages and then left, but was “available” - was not expecting that ... I specifically wanted a JDR that would be a mediation ... either in the room or as part of shuttle diplomacy ... leaving after providing an assessment was unexpected and difficult - if the parties had been able to deal with each other ... we would not have been at a JDR”; I2. (ranking 5) - “both counsel asked for a Binding JDR - this appeared to be what we had until the commencement of the JDR when we were told it was non-binding ... perhaps the result of a communication error - if not, the presiding Justice should ensure that the participants and their counsel know at an early date that the justice realized the character of the JDR - binding or non-binding”; “more consistent judicial approach ... should know before booking”; “... if we wanted to mediate, we would have gone with [private] mediation as opposed to JDR”; and I3 - yet “keep JDR process flexible enough so justice works with particular parties and issues to reach settlement”.

As to the recommendation herein of a JDR Justice Profile, see these examples: “*publication of judges willingness or unwillingness to do certain things such as caucus, render definitive opinions, mediate - such preferences aren’t always known by counsel before selecting the judge*”[emphasis added]; “... very disappointed in judges who agree to conduct a mini-trial only to turn the process into a form of mediation - this is a waste of time and money...”; however, a contrary view - “I prefer JDRs where the justice remains involved after giving his/her opinion - ours really was a combined mini-trial and mediation”⁵¹⁰; “...it is very important that different types of JDR are available - different matters call for different approaches”; “confirmation up-front by JDR judge of their personal style”; “the JDR list should advise which judges will use which approach”; “perhaps have judge be more clear about whether his or her style/preference is

510

I believe that the opposite positions in the last two statements proves the point that what should be provided is what was requested, or, if not specifically requested, agreed to, as the JDR proceeds.

for mini-trial/mediation [several]”; from K1 - “turned out to be a different process that what I was lead to believe would occur”; from K1 (ranking 2) - “this was evaluative mediation, I prefer mini-trial”; “style of mediation and role of judge - prior one was really interest based, this one position based”; from K1 (ranking 3) - “counsel asked for and expected a Binding JDR, but received a non-binding JDR...”; from L4 - *“do not know the justices to choose one over another”*; *“choice was acceptable but unknown”*; from O8 *“it is extremely important to know the style of the judge and if their style and process will work for the client”*; [emphasis added] and from P1 - “judge explained that process was to be mediation - it was not - even if it was to be evaluative mediation, then he was far too aggressive”; “I would never go to JDR with an “unknown” judge”; *“we need a ‘menu’ of judicial types, for different types of cases...”*; and *“at the moment the only knowledge lawyers have of the JDR style of each justice is anecdotal - it would help if, when choosing the JDR Justice, the Court provided information as to style, background, years on the Bench”*.⁵¹¹

Section-By-Section Observations

There are, as one can see from examining Appendix 4, literally pages and pages of comments in response to qualitative questions asked, section-by-section. Each is valuable, but there is, understandably, much repetition. There would be no point in repeating these comments here - they are, already, in Appendix 4. However, some are more poignant and significant than others. Therefore, with added comments, I have extracted certain qualitative Lawyers’ comments, that need, in my view, more special - indeed, highlighted - notice. I have included my comments on their qualitative responses in Appendix 6, Table 6.15 - Lawyers’ Survey Qualitative Highlights.

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I believe that, without more, these last two comments (emphasis added) are the proof that JDR Justice Profiles are essential.

Nevertheless, without just leaving it to Appendix 6, Table 6.15 alone, it should be noted that the subjects addressed therein include (but are not limited to) perceptions regarding: Pre-JDRs - including the ability to participate by telephone; adequacy of Instruction Letters; observations (negative or positive) about caucusing; more details on the real essence of judicial qualities in various forms and events (in the significant majority), or the lack thereof (in the very minority); and other responses.

B. CLIENTS

The importance in the JDR Program of clients being involved in the process of settling their own cases (usually with the assistance of their lawyer), and having a direct understanding of the strengths and weaknesses of their case, rather than merely leaving the dispute to their lawyers should not be underestimated, as is recognized in the following comments:

... if you were required to bring [the] client to the pre-trial, ... the client has to understand the frailties of the system. There is no better way of doing that than actually seeing what goes on when the judge says to [the client] that he thinks you've got some problems in your case. That's wasted talk from the judge or watered-down talk by the time it goes from [the lawyer to the] client. I think it would be far more productive if [the] client] actually heard it from the judge and didn't hear it from [the lawyer].⁵¹²

This was expressed in another way in the increasing wish of corporate managers to be part of the resolution of disputes involving their corporations:

The legal process distorts reality; not only speed and economy but the real issues in dispute and the treatment of disputants by the professional dispute resolvers escape our control. Even top corporate managers feel as if their business problems take on a

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Alan MacInnes, Q.C., at the Pitblado Lectures, *supra* note 10 at 92. See also comments of Macfarlane, *supra* note 25 at 149 (quoted *infra* at note 956) regarding the importance of clients being present during negotiations.

legal life of their own once they turn them over to lawyers and courts.⁵¹³

Singer made the same point, from the mirror side, when she talked of the satisfaction of clients being involved in resolving their own disputes:

... savings in cost and time are not the sole reason for much of the rapidly increasing enthusiasm for settling disputes. The core of the excitement lies in the reaction of disputants and dispute resolvers alike: People – from squabbling neighbors to corporate managers ... – gain satisfaction from taking an active role in settling both their own and other people’s conflicts. Many disputants care about preserving relationships even where they differ. All of us care about controlling the outcome of our own disputes⁵¹⁴. Even corporate executives with high-priced lawyers are more satisfied with both the process and the results when they are actively involved in sharing outcomes than when their affairs are placed in the hands of outsiders.

...

Negotiated or mediated settlements also are far more likely to preserve any continuing relationship between the parties than is a court battle. ...

...

... there is growing evidence that people who reach agreements themselves are more likely to abide by them than are people who are told what to do, whether by a judge, a supervisor, or a therapist.⁵¹⁵

⁵¹³ Singer, *supra* note 42 at 3.

⁵¹⁴ Studies show that procedures are viewed as fairer when “process control” is vested in the disputants – “even, or perhaps particularly, in the face of unfavorable decisions”: MacCoun, Lind and Tyler, *supra* note 49 at 100 and 103. See also, to the same effect, Landerkin, “Custody”, *supra* note 23 at 653, referencing, F. Lind & T. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988).

⁵¹⁵ Singer, *supra* note 2 at 11.

In addition to the quantitative data, a review of the qualitative data in the Clients' Survey, makes it clear that clients have received much value from their involvement in the JDR process, whether "one-stopper" personal clients, sophisticated corporate representatives or professional claims adjusters.

To appreciate this one merely needs to read the lengthy and often repetitive qualitative comments in the many pages thereof in Appendix 5. In analyzing the Lawyers' Survey qualitative data, I addressed a number of "common themes" and then did a "section-by-section" examination, and placed some highlighted comments in Appendix 6 - I propose to do the same here, with some less reference back to Appendix 5.

Common Themes

While I have concentrated on common themes with the Lawyers' Survey, I have done so to a lesser extent here, and invite review of Appendix 5 itself. Nevertheless, there are some that I will touch on briefly. Some of the common themes are the same as the lawyers and some are different.

Day-in-Court

One of the most expressive comments on this point (remembering that a high percentage of respondents were not claimants who are the ones normally wanting their "day") was "some parties just want to be heard, whether it makes a difference in the solution or not - it is an informal way to 'vent'".

Importance of a Judicial Mediator

Some comments related directly to the satisfaction with the JDR justice, either him/herself, or as a representative of the Court. One of the clearest (demonstrating that the Court and its justices must be vigilant to maintain their high level of excellence, trust and judicial conduct) is reflected in this comment: “I think the process works because of the respect the participants have for our justices”.

Need for JDR Justice to Understand Process Wishes of Counsel

While this was not as common a theme as for the lawyers, one comment brings home the issue of the JDR justice not staying to mediate after rendering a mini-trial or other evaluative opinion: “[the JDR justice] should have stayed for full process, as once judge left, no one was willing to negotiate past what the judge laid out for quantum”.

Other Common Themes

Without quoting further from the comments specifically, other common themes included: a very high impression of all attributes of the presiding JDR justice - with a couple of “bad apples” thrown in; a need for more JDRs and JDR justices to get a JDR earlier and easier - however, that raises the 95%/5% argument raised throughout this Evaluation Report as to where the JDR resources should be focused; comments tending to indicate lawyers waiting for the JDR rather than negotiation (and adding cost and delay) added fuel to the 95%/5% fires - to wit: “JDR and mediation have largely supplanted negotiation (direct), adding a larger financial cost to claims”; the rather judicially “dangerous” suggestion that clients could and should caucus with the JDR justice without

their lawyer present - something, I believe, JDR justices should dissuade and avoid; some comments to suggest a need for more joint session process control by the JDR justice - to stop interruptions, cut down on long winded submissions, etc.; and a request for JDRs to be used for special chambers motions - there are clearly no current plans in this regard, and I would not recommend it for a number of reasons, including resource issues cost/benefit analysis. There are undoubtedly others that I may have missed.

For a full appreciation of all clients' comments, review Appendix 5.

SECTION-BY-SECTION OBSERVATIONS

As with Appendix 4 for lawyers, in Appendix 5 for clients, there are many pages of comments in response to qualitative questions asked, section-by-section. Equally, there is much valuable, but, expectedly, also much repetition. While all are valuable, some seemed more significant. Some of them, with a few of my added comments, have been extracted and highlighted in Appendix 6, Table 6.16 - Client' Survey Qualitative Highlights.

Nevertheless, without just leaving it to Appendix 6, Table 6.15 alone, and covering some additional areas not covered in Table 6.16, I include, in the following sections, a discussion, with some examples of the responses, section-by-section.

G1. Caucus

The number of client comments provided relative to caucusing is significant. Interestingly, many of the comments regarding caucusing expressed sentiments similar to those found in the Lawyers' Survey.

An overwhelming number of client respondents, as did the lawyers, cited “justice’s opinion” as the reason why they found this JDRs useful. While lawyers linked this to caucusing, clients did even more so, as a useful process for this purpose. Similarly, some clients identified that “reality checks” were better received in caucus and that they were able to “discuss problems more freely”. While numerous comments from the Lawyers’ Survey identified “emotions/tensions” between the parties as being a particularly motivating reason for caucusing, the Clients’ Survey did not emphasize this same view.

There is, however, another aspect to this. As to the use of “justice’s opinion”, there was a tone to it that the JDR justice was directing the procedure and caucusing without much input or consent of the parties. Two issues arise: first, under the New Rules, the parties will have more say in determining the process, subject to the JDR justice’s concurrence; and caucusing must never, in any event, be undertaken without clear and informed consent of the parties.

A few additional comments are noteworthy relative to having participated in the caucusing process. One party said “the other side used meeting as a means to intimidate”, while an opposing opinion suggested that, because of caucusing, “intimidation was eliminated”. Yet another said that caucusing was a “time saver [as it] avoided petty arguing”. These responses indicate that JDR justices must ensure procedural fairness and allow no intimidation, whether or not there is caucusing.

Some did not caucus but would have liked to have done so. For them the process would have been more useful. They stated that they “could have given [their] insight in a confidential manner” or “could have told [their] side more fully without always being interrupted by [the] other side”. Confidentiality and

interruptions were also identified, as in the Lawyers' Survey, as reasons as to why many find caucusing to be beneficial.

Responses in the Clients' Survey indicate that 38% of participants did not caucus. Relevant comments surrounding why they did not, or did not need to, or did not think it proper (or available) to do so, include: "judge was only interested in money, not issues"; "I don't think that would be fair"; and, "judge had predetermined outcome". The second of these relates to the propriety of caucusing, whereas the first and third are more of a condemnation of clearly unacceptable judicial qualities, a subject which I will address next.

H. Judicial Qualities

This question invited clients to provide their opinion regarding the "JDR Justice's overall qualities in this JDR", taking into consideration such characteristics as: preparation, knowledge, assessment of the issues, approach, style, manner, and role in success. As with all multiple choice questions, the ranking of 1 (poor) to 5 (excellent) was used. Only 3% of respondents ranked the JDR Justice as 1 or 2 and provided comments, including the following: "apparently only the other side was told to bring documents" - indicating lack of clarity of instructions from the JDR justice and supporting the recommendation for an improved JDR Instruction Letter; "too focused on numbers and positions, not issues and merits" - some suggestion akin to coercion, or at least too aggressive a focus; and "justice did not seem interested and was anxious to leave for an appointment at noon" - absolutely unacceptable.

The vast majority of comments were associated with a high approval ranking as 4 and 5 were ranked 35% and 52% respectively. An overwhelming theme is that most clients felt that the Justice was "prepared" for the JDR, having

read the supporting documentation. The Justice's were also described as being knowledgeable, well-reasoned, and informative. A few comments which are representative of the overall sentiment include: "very thorough and balanced"; "... helpful in resolving the issues"; "... good listener, identify real issues"; "explained patiently the legal process, documentation and causation"; and "justice was prepared, thorough and easy to understand in reasoning".

As to whether or not the clients would choose the same justice for a subsequent JDR, an exceedingly high 90% indicated that they would choose the same judge. The comments in this section are numerous and appear to correlate to responses made regarding the Justice's overall qualities. In other words, those that ranked the qualities highly (4 or 5), would tend to choose the same Justice if they were participating in a subsequent JDR. The comments from the 10% that would not choose the same justice appear to be made as a result of dissatisfaction with the outcome of the process, rather than with the judicial qualities. However, the overall high level of client satisfaction may lend credence to the sentiment expressed in the lawyers survey comments which spoke of the importance of being able to match clients with judicial style.

I2 - I3. What other Changes/Improvements Like to See

A full 75% of client respondents indicated that they would recommend JDR to others and would use it again themselves should the occasion arise. While the process was considered positive, there is no central theme which identifies potential improvements. Not surprisingly, the comments reflect the negative aspects of their most recent experience and include the following suggestions: "... have to wait so long to book one"; "more input from the justice"; "I had not been in one before, and I would have liked to have more knowledge of what to expect" - supporting the recommendation for a JDR Program Pamphlet; "would like them to

inform everyone in the room that they can see the judge separately without the other party in attendance or without any lawyers present”; and “... more consistency in how each justice handles JDR”.

Section 13. asks for additional client input regarding the JDR process. The comments offered here are numerous and, while some are repetitive, many are sufficiently important that they should be highlighted - as I have, in Appendix 6, Table 6.16. In general terms they include, together with my comments: more JDR information - supporting the recommendation for a JDR Pamphlet; they want JDR justices to give real opinions, not just find the “middle”; fatigue with lawyer posturing - the lawyers need clearly to read Julie Macfarlane, *supra* note 25; don't want the JDR justice to give up just because the parties start negotiation far apart - they need help, because negotiation alone has not been successful; BATNA is very much on the table - “JDR provides valuable insight to trial risk”; and frustrations with litigation of long duration.

Although the question asked respondents to comment on possible changes/improvements, several comments focused on an overall high degree of satisfaction with the program: “I think it is an excellent program - I'm thankful we have this option in Alberta”; “I have attended over 40 JDR's and have found the process very useful for both sides”; “I think the JDR process is a necessary “tool” for assistance in resolving contentious issues ...”; “this is a great tool to move a file forward”; “the efforts of the judge to reach a solution in this case were phenomenal - the judge's experience approach, feedback and suggestions really were the key to solving this case - I came away with a true admiration for the system of JDR's and judges in particular - I used to think that judges were overpaid - not anymore - this experience has made me re-evaluate my opinions and my trust in the legal system”; and “I think the JDR process is an extremely

valuable avenue to follow - I do hope however that I do not have to use this again, but if so, this would be the number one option”.

See Appendix 6, Table 6.16 for further significant - and therefore highlighted - comments.

J. JDR Timing & Next Steps

In contrast to the Lawyers' Survey that contained few comments regarding JDR timing and next steps, respondents to the client survey offered numerous comments. The majority of JDRs took place after Examinations for Discovery (74%), with a large part of that (50%) taking place after expert reports were also received. Respondents were also asked to indicate when in their particular case they thought a JDR would be most useful, and the numbers were substantially the same as what actually happened - with a small increase in wishing discovery first (84%, rather than the 74% actual). However, this particular question allowed for more than one response, in response to a direct question 25% of respondents wanted a JDR earlier in the process - again challenging the 95%/5% issue. The range of answers indicates that many thought that the JDR should have been held anywhere from 6 months to 6 or 7 years earlier, however, one respondent stated “loss was 10 years old - should be getting to JDR within 5-6 years max” - raising the time to disposition analysis I recommend.

Not surprisingly the focus in this section was timing and cost related issues. There appears to be an overwhelming sentiment that many cases drag on too long and that JDR should be a viable option that is considered earlier than it is and/or earlier than the court timetable is able to accommodate.

Further significant - and therefore highlighted - comments are seen in Appendix 6, Table 6.16.

K. Comparison to Other JDRs

Here again, clients chose to comment on the JDR just completed as compared to JDRs in which they had participated in the past. Only 4% of the respondents were significantly dissatisfied with their recent experience, citing that “the input was lacking from the justice, who just took the high and low figure and went halfway”. On the other end of the scale 31% of respondents were moderately to highly satisfied with the way in which the most recent JDR compared to other experiences. Some of the reasons include: justice was “prepared”; “justice’s effective participation”; and “I’m a believer in the JDR process and have seen many files resolved because of this process”. Speaking highly of the system, two respondents noted that they “have been pleased with all JDR’s”. The majority of client comments were more general and addressed such things as: “liked getting straight to issues”; “I think the Justice was key in getting all participants to view their risks in an objective manner and this is what, in my view, moved us toward resolution”; “they are a very effective way of getting a resolution without trial”; and “justice was not interventionist - correctly assumed all counsel involved were competent, but seasoned counsel can be more entrenched and feel reputation on the line”.

M. Role of JDR Justice in Success or Lack of Success

As with the Lawyers’ Survey, this section was divided into three parts. Here also the information sought in M1 and M2 is similar and will be dealt with as one. M3 was designed to determine whether, in the case of failed

JDRs, if additional information was brought forward/clarified that would allow the parties to go to trial.

The majority of respondents (74%) indicated that the same outcome would not have been achieved in their case without the involvement of the JDR Justice - demonstrating a high Settlement Impact Assessment, as seen in Appendix 6, Table 6.3. Similarly - when asked in a different way - an even higher full 88% of respondents felt that involvement of the JDR Justice improved the prospects for settlement. Here again, the need for an “opinion” was directly stated or alluded to on numerous occasions. Similarly, reference was made to strengths, weaknesses and risks as these areas seem to remain in the forefront.

A lone respondent observed that involvement was not helpful as “the Justice just brought back offers”.

With respect to question M3 where settlement was not achieved on all issues, 17% felt that they were better informed following the JDR and were subsequently able to move forward with the new information. Respondents identified “explaining the alternative we had - it enabled us to come to conclusions sooner”, “by giving an overall view of how the justice system will approach this dispute”, “ eliminated 5 key issues, leaves only 1-left”, and “decision making pros and cons in going to trial made decision easier to make on next step in process” being the reasons why the JDR process was still helpful, regardless of settlement - illustrating the BATNA phenomenon.

See Appendix 6, Table 6.16 for further significant, and therefore highlighted, comments.

N. Judicial Participation

The answers to this question suggest that the parties (and their counsel) are not taking a very active role in whether or not to caucus or not, and JDR justices are substantially directing this as “how they do business” (my term). It also shows that the parties and counsel need to know whether or not the JDR likes to (or will) caucus or not - thus supporting the recommendation for a JDR Justice Profile.

In this survey 32% of respondents said that they asked the JDR Justice to caucus, as opposed to 59% that did not request this direct input into the case. One reason provided for requesting caucusing was “to obtain justice’s assessment apart from other party and to reveal surveillance”. Opinion as to how caucusing occurred differs: “judge made it clear at onset of the process wanted to use and this wasn’t one of them”; “it was understood beforehand that we would caucus”; “JDR judge initiated the caucus”; “justice made it clear that s/he would be providing an opinion as to value of claim in a take-it-or-leave-it manner”; “judge dictated this occur without any discussion”; “justice suggested it at the outset”; and “justice did so on his own”.

Whether caucusing was requested or offered, the responses indicate they were helpful. Reasons why the process was useful include: “needed to hear it from a judicial level and what we may face going forward”; “gave a clear indication of the strengths and weaknesses of our case”; “another set of eyes”; “gave or showed me my options at trial”; and “gave insight as to how court might look at our position”.

The reasons for wanting to caucus but not having the opportunity to do so are varied. In some cases participants wanted feedback on the “strength”

of their case, while in other instances they wanted to “ask questions without [the] other parties present”. The sentiment was also expressed that caucusing was considered to be less stressful and private than may otherwise have been experienced.

On the question of whether clients would want the opportunity to caucus on subsequent JDRs (N4), 73% stated that caucusing would be their preference - higher than those who actually supported it on the subject JDR. The primary focus here related to reasons of “privacy”, opportunity for “frankness”, and not exposing “weaknesses” to the other side. Further reasons why clients prefer caucusing include “to benefit from the justice’s knowledge and experience”; and “to ensure all concerns are aired without feeling pressure or combativeness from the other side”. Of the 8% that prefer not to caucus, reasons cited were: “feels more impartial without caucus”; and “I like how they are done in Edmonton - give opinion and left to negotiate”.

O. Judicial Qualities

Comments were invited relative to the JDR justice’s role in how settlement was achieved and the degree of pressure exerted on the parties to settle. The client’s assessment of the role is relatively evenly distributed across the 1 to 5 ranking scale. Just as the ranking scale covers the spectrum of low to high pressure, so do the numerous comments on the appropriateness of the pressure or lack thereof.

The comments provided for this section are extensive, with many of the sentiments having been expressed in other sections of the survey.

P. Other

Section P elicited a significant number of additional comments from clients, many of which have been expressed elsewhere throughout the survey and many are of a personal nature. Some additional points made include: “there seemed to be some misunderstanding when the pre-JDR package was filed and should be clearer”; “JDR process is a valuable tool ... the court system should be promoting this avenue instead of the trial path...”; and “I think it would have helped had I been better informed as to what was the purpose of the JDR system. I was given no understanding of what was involved until we sat down” - supporting the recommendation for a JDR Program Pamphlet.

C. OTHER CONSIDERATIONS

Some of the quantitative - but more of the qualitative - comments invite a discussion and analysis on what type of personal - and personable - style a JDR justice should bring to a JDR. Simon, relying on Kronman, talks about “practical reasoning” and says that a good trait for lawyers, which I believe is generally applicable to a JDR justice, is to provide “a simultaneous commitment to both sympathy and detachment” - or, “empathy-with-detachment” - it is important to make both parties feel that you empathize with the strengths of their case, while being frank (but relatively gentle) with their weaknesses.

In essence it is trust, and it is essential to understand how important is not only to the success of an individual JDR, but also to the success of the JDR Program, and the whole role of the Court and its justices in the

administration of justice in society. Thus, it is absolutely imperative that we be vigilant to maintain it.

Nevertheless, it is imperative to make clear at all times that the JDR justice is, and at all times, must remain only a facilitative justice, not a confidante, advocate or advisor. Indeed, Simon describes it this way in a judicial context:

The judge has to identify with the parties's various conflicting positions in a series of exercises of empathy and at the same time has to pull back to see these various positions in the perspective of the applicable legal norms. For Kronman the commitment to case-by-case judgment on the one hand and empathy-with-detachment on the other, which have long been associated with the common law judge, also characterize the most fulfilling kinds of lawyering.⁵¹⁶

⁵¹⁶

Simon, *supra* note 14 at 22 referencing Kronman - "Lost", *supra* note 10.

V. SUMMARY OF CONCLUSIONS FROM SURVEY ANALYSIS

With its 12 plus year history of the JDR Program, there is a new norm of dispute resolution in the Court. The Court now provides adjudication and other dispute resolution alternative judicial services, in the form of a judicial seamless web, for civil cases. With that context in mind, and the literature that sets the appropriate standards, I have reported and analyzed the basic Lawyers' Survey and Clients' Survey quantitative and qualitative data obtained from participants' answers to a detailed questionnaire. In addition, I have drilled down into the Lawyers' Survey (and some of the Clients' Survey) quantitative data to get a better picture of the integrated and interactive data for analysis. What have we learned? What do we need to yet examine?

On a macro level, I believe that we have learned a number of significant things about the Court's JDR program (not in any order) including, but not limited to:

- there is significant demand for JDR and its various options that exceeds the supply
 - the demand is similar between Calgary (slightly higher) and Edmonton
 - it is easier and quicker to get a trial date for a 1 week civil trial in Calgary or Edmonton than to get a JDR
- most of the participants are clients represented by lawyers, roughly split between plaintiffs and defendants in the Lawyers' Survey, but with more highly defendant representation (significantly by professional adjusters) in the Clients' Survey
- as to the type of case eligible for JDR - all civil litigation is possible, and much represented, with about 70% personal injury (mostly motor

vehicle collisions), 25% family matters, and the rest split among a number of types of claims, 80% of which have been in the system for more than 2 years, and 60% more than 4 years

- this leads to a recommendation for the Court to conduct a time to disposition analysis and take appropriate action, in any event of the JDR Program
- users are experienced with JDR - there is a very high percentage of participants, including lawyers and (on the client side) primarily professional adjusters, who have participated in a number of JDRs previous to the one that elicited the Survey response
- the JDR type most used is evaluative mediation, with facilitative mediation more predominant in Calgary and mini-trials more predominant in Edmonton - a split attributed to the legal culture of the bench and the bar in the respective communities
- the frailties of the adjudicative system - cost, delay, risk, stress and formality, process options, and relationship maintenance are (in rough order of importance to users) the motivations for JDR, and, once at the JDR, the parties seek to settle, or, in the alternative, seek an evaluation on their future dispute resolution alternatives
- prior to the JDRs surveyed, there were Pre-JDR conferences in an overwhelmingly high percentage of cases in Edmonton, but not so in Calgary - yet there are mixed opinions as to its usefulness and parties and their counsel are not always clear as to the process that may (or will) be employed in the JDR - resulting in recommendations for:
 - a JDR Judicial Profile to identify the JDR services and processes that a JDR justice will, or will not, use, if requested
 - a JDR Booking Confirmation form (with relevant details from the participants) to tell the JDR justice whether a Pre-JDR

conference is requested or would be otherwise prudent and to assist in preparation

- a Pre-JDR conferences (with consideration to teleconferencing) when
 - requested
 - when otherwise prudent
 - when a self-represented party or a Binding JDR
- a comprehensive JDR Instruction Letter from the JDR justice (in any event of a Pre-JDR conference)
- there is a high rate of settlement success, for which JDR justices are an indispensable influence (high positive impact)
 - up to 80% on all issues, and higher on some issues
 - not dependent on case type, or JDR type
- use of caucusing is mixed, but significantly higher in Calgary, but there is growing demand in Edmonton
- choice of JDR justice is essential and participants have a very high regard for a wide variety of judicial qualities, with only minor exceptions
- overwhelmingly, the participants would use JDR again if the need arose and would recommend it to others
- JDR timing
 - invariably after discovery
 - most frequently after expert reports
 - generally at the stage of litigation thought appropriate for a JDR, but most wish the stages had taken place earlier
- qualitative comments suggest there is the need for more judicial training and education in dispute resolution theory and craft
- other observations and conclusions buried in the Survey data

What I haven't dealt with directly is whether the Court should be doing JDR at all. An overwhelmingly high percentage of users suggest the Court should continue the JDR program, but are the policy issues or allegations of the potential threats of judicial conduct negatives sufficient to outweigh perceived benefits? In this determination, what concerns about the judicial role in JDR have validity and which do not?

If the Court is going to continue the JDR Program, we need to examine how JDR justices continue to remain vigilant to maintain the high ethical and conduct standards that are essential for confidence in the administration of justice and, in the end result, the rule of law, and democracy itself, in the Western Tradition.

With all of this in place, I will look again at what JDR services the Court is providing, what the Court should be providing, and how the Court can provide them in a manner consistent not only with the highest standards of judicial conduct, but also consistent with policy objectives.

VI. CURRENT ROLE OF THE COURT IN JDR

From either an external or internal point of view, why should judges be involved in any method of dispute resolution other than adjudication? Why should mediation and other forms of dispute resolution not be left to private mediators? There are many reasons for - and some against - judges being involved.

As to the views of my colleagues on JDRs and the judicial role therein, the Danielson thesis is a very useful document, and many completed her survey and welcomed her resulting analysis and observations. I believe that she identified much of the essence of the JDR Program and its characteristics and judicial role, and other identifiers have now been added by this Evaluation Report. I, and, I believe, most of my colleagues generally support the conclusions in her thesis. But what do other scholars on the subject, and, perhaps, most importantly, the users, think? The users have spoken strongly in favour - there was not one who said, or even intimated that the Court should end the JDR Program - rather they overwhelmingly said they endorsed it, but asked that it be improved in some ways. So the viewpoint that remains to be examined is that of other scholars.

Some reasons positive to the judicial role relate to: access to justice issues - reducing the expense and delay in getting to trial, due to the backlog in scheduled trials - in part, the "caseload crisis"⁵¹⁷; JDRs are "free" to the participants; one gets a non-binding judicial opinion as to rights to be

⁵¹⁷ Kronman - "Lost", *supra* note 10, at 321, referencing Richard Posner, *The Federal Courts: Crisis and Reform* (Cambridge, Mass: Harvard University Press, 1985) (including, at 7 and 77-93), and arguing, based on other authorities (see footnote 6 therein, at 411), that the same phenomenon applies to other courts.

otherwise determined at trial; all the reasons identified in the Survey and discussed *supra*; and others.

Reasons negative to the judicial role and in favour of private mediators relate, primarily, to: alleged conflict with the judicial role in adjudication; private mediator expertise in the subject matter of the dispute; private mediator expertise in the “craft” of mediation; and others.

In a sense, however, it does not matter that justices have taken a role in dispute resolution, if the parties have a choice not to mediate at all, or not do a JDR, or have a choice of the type and personnel involved in the mediation. The former will change in Alberta under the New Rules if one wishes to proceed to adjudication (unless the requirement to mediate is waived), but the choice of mediation type and personnel will remain. It is now a completely voluntary process, and in the future will still be completely voluntary as to the method and personnel of dispute resolution before trial. Thus, essentially, JDR is now, and will only be, available to those who want it - there is no compulsion. However, aside from these very tangible reasons, why would the parties pick a judicial mediator over a private one?

Kronman addressed this issue in this way:

Of course not all “dispute resolution” (as it is now fashionable to call it) is done by judges or occurs in courts. Today much of this work is done by mediators... and others, and takes place outside the courthouse in less formal settings. But though these alternative forms of dispute resolution have in recent years grown in number and popularity, the judicial form continues to enjoy a decided priority over them. In part this is a cultural phenomenon that reflects the extraordinary prestige that

courts and judges have always enjoyed.... But even more obviously, the priority of the judicial form of dispute resolution is a function of the fact that it is judges who must ultimately define the authority that mediators ... exercise – not the other way around – and so long as this remains true, judges and the work they do are bound to retain the position of dominant importance they've occupied in our legal culture from the start.⁵¹⁸

He also tried to identify the proper judicial model for doing this, in the context of his discussion of the “good a managerial judge is seeking to maximize”:

... the maximand of judging is justice. Doing justice to the parties that appear before one means honoring the rights and enforcing the duties that the law assigns them; and treating justice as a maximand simply means doing as much of this as can be done with the resources at one's command. This ancient and powerful idea rests on the picture of the law as a distributive order that allots different rights and responsibilities to different individuals. The judge's job, on this view, is to ensure that the distribution scheme established by the law is properly maintained – that those subject to it receive the benefits and burdens the law distributes to them. Justice is the name we give to the condition that results when these distributional requirements are satisfied, and the goal of judging, as the managerial judge sees it, is to bring this condition about to the greatest extent that available resources permit.⁵¹⁹

⁵¹⁸ Kronman - “Lost”, *supra* note 10 at 317-8, referencing some early works on the subject:
 - Owen Fiss, *Against Settlement* (1984), 93 Yale L.J. 1073;
 - Richard Posner, “The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations” (1986) *University of Chicago Law Review* 53;
 - Carrie Menkel-Meadow, “Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR” (1991) 19 *Fl. St. U. L. Rev.* 1; and
 - Neil Vidmar and Jeffrey Rice, “Jury-Determined Settlements and Summary Jury Trials: Observations about Alternative Dispute Resolution in an Adversary Culture” (1991) 19 *Fl. St. U.L. Rev.* 89.

⁵¹⁹ Kronman - “Lost”, *supra* note 10 at 335.

Kronman also addressed the negative in the context of the “dangers that the increased involvement of judges in the pretrial management of cases poses to the integrity of the judicial process as it has traditionally been conceived”. In this regard, he points to Judith Resnick and the warning of “the dangers of what she calls ‘managerial judging’”. The first deals with compromising the judge into a partisan for one of the parties. The second is related - it deals with conducting management in private and the risk of “encouraging decisions that are more precipitous and prone to personal bias”. However, I believe that these negatives are unique to the typical U.S. “cradle to grave” individual docket judicial assignment process where the judge is appointed when the pleadings are initially filed and remains seized until the matter is settled or is determined by his/her adjudication⁵²⁰ - whereas, in Alberta, under the master calendaring system, absent the consent and specific request of the parties, the case managing justice neither becomes the JDR justice, nor the trial justice.⁵²¹ Nevertheless, this aside, let us be perfectly clear - *the credibility of the Court’s JDR program - past, present and future - is dependent, as Posner says, on the “competence and integrity of the judges who operate it”*.⁵²²

⁵²⁰ See the 1986 comments of U.S. District Court Judge Richard A. Enslin, in “Alternative Dispute Resolution”, in the Pitblado Lectures, *supra* note 10 at 4, last para.

⁵²¹ Kronman - “Lost”, *supra* note 10 at 323-4, referencing:
 - Judith Resnik, “Failing Faith: Adjudicatory Procedure in Decline” (1986) 53 University of Chicago Law Review 495; and later to the same points:
 - Owen Fiss, “The Bureaucratization of the Judiciary” (1983) 92 Yale Law Journal 1442; and
 - Joseph Vining, *The Authoritarian and the Authorative* (Chicago: University of Chicago Press, 1986), at 51-7.

⁵²² Posner, “Judges” *supra* note 474 at 3 (emphasis added).

Moreover, on judicial involvement in settlement of cases, U.S. District Court Judge Richard A. Enslin, took on the doubters - Fiss, Resnick and the like⁵²³ - as early as 1986, saying:

The debate in the United States goes on with this subject. Professor Owen Fiss and Professor Judith Resnick believe judges should not manage their own dockets⁵²⁴ because they believe that it somehow falls short of a due process kind of presentation before an impartial judge. Professors Fiss and Resnick believe that notions of impartiality are somehow shattered by the judge learning something. Some of us disagree

523

Note that these were those whom Sanchez called the "early critics", whose comments arose in 1984-5: Sanchez, *supra* note 36 at 764-6, referencing Judge Harry T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 Harv. L. Rev. 668, at 671. Of these early critics, primarily Fiss, she said:

The restraints traditionally associated with judicial method, and traditionally viewed as lacking from ADR, are at the core of many critic's concerns that justice cannot be (or should not be) negotiated through ADR. Early critics of the ADR movement were most concerned with what the system of 'traditional justice' might lose if legal disputes were resolved through ADR, rather than through precedent-accreting court judgments.

Gabriel, *supra* note 107 at 81-2, was critical of Fiss who she described as "principal among" ADR's "detractors" (a phrase also used, along with the adjective "inveterate", by Adams & Bussin, *supra* note 3 at 133). As to his concerns about coercion, imbalance of power and miscarriage of justice, Gabriel said:

What Fiss ignores, however, are the protective factors incorporated in court-annexed ADR which are designed to prevent financial imbalances of power from coercing settlements, *i.e.*, judicial participation.... Moreover, Fiss neglects to offer much empirical support for his contentions, and fails to make any distinction between the applicability of his criticisms in the ADR context as opposed to the more traditional adjudicatory process.

Sander, "Future", *supra* note 25 at 4, referred to this period - 1982-90 - as the period of "cautions and caveats", and, referencing Fiss, said that he was "very eloquent, but I think misguided, [in his] attack on settlements and mediation", and that his thesis that "settlement comes at the expense of justice" really focused not on the ordinary case but the "large-scale public litigation" that dealt with "public values" - at 5, he too separates out "articulation of public values and interpretation of statutes and the [c]onstitution".

These concerns continue today in Alberta, although from an internal perspective, through my colleague, Smith, so we should regard her as an "early, but continuing, critic" (although appointed in 1991), whose views against JDR, I believe, have been passed by time.

524

Again, note the individual docket system.

with those two individuals and believe that impartiality for a judge is a capacity of mind. It's a learned ability to recognize and to compartmentalize the relevant from the irrelevant and to detach one's emotional self from one's rational self. If that isn't true, then how could the judge listen to the first opening statement without forming some opinion, or judge favorably those lawyers whom he personally likes and not favorably those he does not.⁵²⁵

Sanchez also responded to the Fiss criticisms:

Critics of Fiss's perspective have pointed out that his assumption that court judgments are more just or innovative than outcomes reached through ADR processes is not susceptible to empirical proof. A related point is that the very conception of "justice" necessary to evaluate the "justness" of outcomes is value-laden, and thus subjective and also policy-driven. As a result, "justice" should in some measure be susceptible to negotiation, to the extent that ADR allows, leaving the parties themselves free to set their own standards of justice, if they want to, and therefore free to reach outcomes that may be uniquely "just" to them, under the circumstances.

Fiss's second major concern about ADR - that the settlement of lawsuits will undermine the precedent-creating function of the common law and the role of judicial policymaking and innovation - is also in need of contextualization.⁵²⁶

Changing perspective, from the internal point of view, Kronman described how a "managerial judge" would deploy available resources to dispute resolution:

⁵²⁵ U.S. District Court Judge Richard A. Enslin, in "Alternative Dispute Resolution", in the Pitblado Lectures, *supra* note 10 at 5, going on, at 6, to make it clear that, even then, he was not talking about "a system of settlement outside the courts, or independent of the courts", but rather a system "that's in the courts, or annexed to the court", and he went on to reference 5 programs, including mini-trials.

⁵²⁶ Sanchez, *supra* note 36 at 765, referencing Jethro K. Lieberman & James F. Henry, "Lessons from the Alternative Dispute Resolution Movement" (1986) 53 U. Chi. L. Rev. 424, at 434.

A managerial judge will therefore feel it important to deploy... resources in such a way as to produce the greatest amount of justice.

...

... [managerial judging] is essentially a program of economic reform, premised on the belief that a reallocation of judicial effort from the courtroom to the conference table can mitigate the inefficiencies of our present queue-based system of adjudication and thereby increase the amount of justice that our courts will be able to produce with the resources committed to them. It is the duty of judges, they say, to allocate their time and energy as productively as possible, and under the historically evolved conditions that exist in the... court system today, this requires, they insist, a relatively heavier concentration of effort during the pretrial phase of cases when the queue for justice can be more easily policed. This is the economizing strategy of the managerial judge.⁵²⁷

From the same internal point of view, Macfarlane looked at the predilection to the judiciary being interested in settlement roles:

When asked to identify areas of new skills and practice in which they felt the need for more skills development, 45 percent of judicial respondents stated that enhanced settlement conferencing skills was a personal priority for them. This seems to reflect a real appetite among some sectors of the bench for casting themselves as settlement specialists. Of course, it also suggests that for a significant number of judges, settlement work is not seen as being a priority and perhaps reflects some ambivalence about the appropriate judicial role in steering cases toward settlement. It seems likely that, just as we are seeing within the profession, the judiciary will divide into those who enthusiastically embrace dispute settlement as a new and exciting aspect of their role and others who feel less comfortable or even opposed to this extension of the professional function and responsibilities.⁵²⁸

⁵²⁷ Kronman - "Lost", *supra* note 10 at 335 and 337.

⁵²⁸ Macfarlane, *supra* note 25 at 234-5, referencing a survey she conducted for the National Judicial Institute in 2002: <http://www.nji.org>.

Landerkin described, better than I could, what a judge can bring to the mediation table in this way (then focusing on a child care dispute, but generally applicable):

... the judge has a great advantage in this role. First, by definition, a judge is not for or against a party; the judge is independent. Second, a judge understands the necessity of balancing between disputants. Third, a Judge is master of his or her own house and controls the court process. It is not difficult for the judge to understand the need of a mediator to control process, yet leave control of the ultimate decision-making to the participants. Fourth, a judge is not swayed easily by unilateral actions, words or deeds, and will not be taken in by the articulate style of one of the participants in the lawsuit. Fifth, a judge is used to obtaining information to make a decision. A judge has an understanding of the problems and some of the ways they can be resolved.... Sixth, a judge has the ability to assess the parties and hear what they are really saying; a judge is an effective listener. Seventh, a judge can keep everyone on task and not allow the process to take on a life of its own. Finally, a judge understands better than most the limitations on people in terms of time, money, and emotion. A judge is motivated to find wise solutions ... and if these can be reached before trial, a judge will be well satisfied.⁵²⁹

These and other references support my view that our Court's justice have a role to play in dispute resolution outside of adjudication. The participants of the Survey agree and strongly support this role. The JDR Program is the vehicle by which to continue to provide what the Survey demonstrates clients, and their counsel, want as a possible alternative (if settlement can result) to trial, while adjudication remains available to them if they are unable to settle.

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Landerkin, "Custody", *supra* note 23 at 674.

Notwithstanding that conclusion having been reached, the debate still continues, and there is still some work to be done, as Macfarlane also recognized:

Procedural changes in the courts, efforts to promote the early resolution of civil and family disputes ... are changing the relationship between the judiciary and disputing systems and, consequently, the way that judges imagine their role and the skills they require. The National Judicial Institute survey suggests that judges themselves are highly aware of these issues, and many are eager to participate in new approaches to principled settlement. Despite this openness to change, there remain many contentious issues at the heart of this debate that require further and better examination. There are signs that a discussion over the appropriate role of the judge in dispute settlement is beginning to take place.... A threshold question is whether these individuals who are appointed as decision makers in an adjudicative system can also be responsible for accommodation and settlement within the same system.... the question persists as a matter of role definition and public policy. To what extent should those appointed as authoritative decision makers within a system of justice be involved in facilitating resolution that may draw on principles chosen by the disputants themselves rather than the rules for which judges are responsible? ...

The fact that questions such as these about the judicial role in dispute resolution are being raised at all is indicative of the degree to which judicial practice has already been affected by changes in legal practice and the landscape of legal disputing. This issue will have truly “come of age” when debate begins over revisiting the qualities sought in prospective judges to reflect the nuances of a settlement as well as an adjudicative role. In other words, do we need new judges to work with new lawyers?⁵³⁰

The fact of judges being involved in mediation - or, indeed, anything but adjudication - has been an issue, whose time I believe, as I have

530

Macfarlane, *supra* note 25 at 235-6. The NJI survey she references was conducted by her in 2002: <http://www.nji.org>.

expressed *supra*, has passed. Indeed, in the Epilogue to her book, Macfarlane states:

... the landscape of legal disputing has changed dramatically and this is our present reality.... In closing, I want to suggest that the profession get ready for the pace of change to speed up. What has changed already will not change back . And there is much more change on the horizon as the basis for resistance is increasingly eroded.⁵³¹

Danielson, while noting that the “adjudicative role is a primary duty”, “argues that the traditional adjudication function of a judge has evolved into a new adaptive role”. She also noted that the Canadian Judicial Council itself acknowledges that the “administration of justice includes issues of ‘... trial and pre-trial practices and procedures, including case management; *court-managed alternative dispute resolution mechanisms and procedures...*” and that the Canadian judiciary “must prepare itself to deal with the growing demands in such areas as judicial dispute resolution...”. I could not agree with her more, when she concluded her discussion on this point by saying:

There can be no doubt, then, that ‘judicial tasks, broadly defined’ can, and do include judicial dispute resolution. The inclusion of mediation programs, within the Court context, is part of the ever-expanding new scope of judicial responsibilities. ... Although [some] Alberta Justices have disagreement as to *whether their judicial duties ought to be extended to the settlement conference or the practice of mediation*, the writer posits that *the day for that argument has passed. The better argument today is how to undertake the new judicial duties while still maintaining due regard from the public for the judicial office.*⁵³²

⁵³¹ *Ibid*, at 243.

⁵³² Danielson, *supra* note 4 at 20-2, referencing the Canadian Judicial Council, *The Way Forward: Final Report of the Special Committee on Future Directions to the Canadian Judicial Council*, adopted by the Canadian Judicial Council, September 2002, at 12 and 30. [Emphasis (italics and underlining) added throughout.]

Later, Danielson talked of the evolution of the judicial role, and the need for the judiciary to keep in step with the changes in society. It is basic change management thinking:

Notwithstanding the merits of the traditional adjudicative role, the public expects our Courts to change and adapt in accordance with social, economic and political circumstances. As society becomes more complex, so also does the role of the Court within that society. Maintaining public respect and promoting autonomy of our judicial system can be divergent goals. To align them requires receptivity of the Court to reflect changing social values. One such changing social value is the declining importance of the trial process in resolving disputes.⁵³³

Later she concluded her comments about the judicial “expanding role” by saying:

Public trust and confidence in the administration of justice is critical to the function of the Courts. The evolution of ADR within the Courts has been in response to the complaints from the public in terms of their estrangement and from the judiciary in terms of the crowded dockets and unmanageable caseloads. ‘The wheels of justice’ are slow, and individuals in disputes want to get the matter resolved and move forward with their lives. They are asking the judiciary to adapt to their needs, and the judicial system has responded.⁵³⁴

Still later she spoke of the need for court leadership:

Leadership from within the courts is therefore necessary to produce a new image that allows the public to perceive the judicial role as one which can not only adjudicate their

⁵³³ Danielson, *supra* note 4 at 25, referencing:
 - the late Justice D.C. McDonald, of our Court, in a “Comment”, Allen M. Linden, ed., *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, York University, 1976), at 155; and
 - Justice A.J. Rogers, “Judges in Search of Justice” (1987) U.N.S.W.L.J. 93, at 103.
 She says the former stated “that our adversarial system ‘is the product of evolution” and the latter said “Mediation by judges has been a natural evolution...”.

⁵³⁴ Danielson, *supra* note 4 at 26.

problems, but can also provide opportunities for creative compromise.⁵³⁵

The Minister of Justice and Attorney General of Ontario, in 1986, also talked of the need to maintain our adjudicative system and yet change to provide reforms, including radical reforms:

By assessing conventional approaches to the justice system, as well as considering alternative forms of dispute resolution, we sow the seed of productive change and reform.

... the changing role of the lawyer and judge in dispute settlement. ... those rapidly changing roles threaten the very capacity of our *traditional* dispute resolution system to perform the functions for which it was designed. ... we must make more systematic use of alternative forms of dispute resolution such as arbitration and mediation, ... [but] this step by itself may not be enough; ... a more fundamental re-examination of how our system operates and the purposes it should serve is required. That examination will, I believe, lead to radical surgery.⁵³⁶

Landerkin and Pirie conclude that “there are sound reasons for JDR, appropriately and judicially devised, to be an integral part of the functioning of the modern judge” and that “[t]he image of the judge as a mediator ... will continue in the coming years”.⁵³⁷

I believe that these observations by legal scholars and leaders in the field are in accord with what the Court’s Survey has conclusively indicated. However, two things remain essential to ensure that this is so. The first is the sense of knowledge, decorum, statesperson like qualities⁵³⁸, and fairness,

⁵³⁵ *Ibid*, at 30.

⁵³⁶ Attorney General Ian Scott, “Alternative Dispute Resolution and the Rule of Law”, in the Pitblado Lectures, *supra* note 10 at 13 (emphasis in original).

⁵³⁷ Landerkin & Pirie, *supra* note 25 at 250-1.

⁵³⁸ Borrowed from, and used in the sense of the thesis of Kronman - “Lost”, *supra* note 10.

that the Canadian judicial system, and its collective and individual judiciary, provide in the adjudication role that foretells the reason why judges, appropriately trained in the dispute resolution “craft”, are so successful at settlement - simply put, they are trusted. The second is that the judiciary must never, individually or collectively, breach this trust and high standard, because it affects the confidence of the public in the collective judicial role of all judges in both adjudication and settlement. This realization is reflected in these words:

The explanation for the remarkable support enjoyed by the legal system from large sectors of the community, including those who appear relatively disempowered or powerless to alter its form, may lie less in its substantive content and more in its symbolic significance as a source of social and moral stability. In other words, the use of law by disputants as a source of norms may represent an acceptance of its authority as much or more than actual agreement with its substantial content. This dynamic is evident when, for example, disputants seem willing to accept the authority of the law in the absence of personal knowledge (and therefore assessment) of the precise nature of these rules. ... Faith in the legal system and in its rules to create just outcomes appears to be highly normative among lay people who regard law as an impartial, objective, external norm that is separate and removed from everyday life ...

... As a result of its normative status, law influences behavior and cultural tolerances for particular dispute resolution processes and outcomes among those without legal knowledge. In so doing, law plays a crucial role in dispute resolution beyond its use by lawyers to predict outcomes in a lawsuit.

...

Law is one source of such norms, and it is a very important one, especially in legal disputing. An appeal to law, even in the absence of legal expertise, often has important persuasive force because of the “reified” status of formal law.⁵³⁹

⁵³⁹ Macfarlane, *supra* note 25 at 169, referencing P. Ewick and S. Silbey, *The Common Place of the Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998) and their creation of the term “reified” to describe this

Indeed, the “high standard” is not a momentary thing to lose and instantly regain, but rather a trait that, like most aspects of professional (and other) respect and trust, once lost, may not be replenished. By analogy the same principles may apply to judges (especially, dispute resolution judges), as Kronman felt applied to the loss of the role of and respect for the lawyer-statesman⁵⁴⁰ in a political context:

It is because ... [lawyers’] training and experience promote the deliberative virtues of the lawyer-statesman ideal. As this ideal fades and these virtues come to seem less important within the profession, they will be less consciously cultivated by lawyers themselves. And as that happens, the ability of lawyers to provide sound ... leadership must eventually deteriorate too.⁵⁴¹

Applying the substance (if not all the language) of this truism, JDR justices must maintain these standards to continue an extremely high level of judicial respect and trust, essential for not only adjudication, but also, JDR. If they (individually and/or collectively) fail to do so, lawyers (and their clients) will lose the expectation of such a standard, and justices (especially new ones) will lose the need, in the judicial dispute resolution context, to maintain it - and the whole moral emphasis of the justice in the JDR process will be lost. Rather, as Kronman added, in another context, I believe that JDR justices must “define and defend a very demanding standard of professional excellence”.⁵⁴²

belief.

⁵⁴⁰ I note in passing that Simon, at several places directly or indirectly (see Simon, *supra* note 14 at 21, 23-4), referencing Kronman - “Lost”, *supra* note 10, was somewhat critical of Kronman’s greater emphasis on the lawyer who “work in high government jobs” - the “statesman”, rather than any practicing lawyer in the vocational sense.

⁵⁴¹ Kronman - “Lost”, *supra* note 10 at 4.

⁵⁴² *Ibid*, at 5.

What is this standard of professional excellence? Kronman had a lot to say in formulating the standard:

The ideal of the lawyer statesman was an ideal of character. This meant that as one moved toward it, one became not just an accomplished technician but a distinctive and estimable type of human being - a person of practical wisdom.⁵⁴³

Later, he redefined this specifically in the judicial context:

Judges are expected to decide cases in a disinterested manner, meaning without concern for their own personal advantage. This does not mean, however, that a judge approaches his task without interests of any kind at all. There is one interest that all judges are allowed and whose absence in a judge is indeed considered a deficiency. That is the judge's interest in the administration of justice, in the integrity or well-being of the legal system as a whole. The judge's interest in the well-being of the law encompasses a variety of concerns – the concern for doctrinal coherence, for example, and for the responsiveness of doctrine to social and economic circumstances. It also includes a concern for the bonds of fellowship that legal conflict strains but that must be preserved to avoid other, more destructive conflicts. The judge's interest in all of these things – which, far from compromising his authority, helps to constitute it – might be characterized, in general terms, as an interest in the good of the community represented by the laws. The judge's interest is thus broader or more inclusive than the interests of the parties. They are interested in their own self welfare. He, by contrast, is concerned about the well-being of the larger community of which they are members, the community constituted by the laws the parties have invoked to settle their dispute. The judge's attitude is in this sense more public-spirited than theirs and his point of view more communitarian.⁵⁴⁴

In the same way, I believe this must be the goal of the JDR justice.

⁵⁴³ *Ibid*, at 16. Later, at 49, he added “[e]xcellence, leadership, judgment, wisdom, character - essential terms in defining the lawyer-statesman's role....”

⁵⁴⁴ *Ibid*, at 118.

In addition to matters of character in JDR justices, to which the aforementioned references testify, fairness of process must be maintained. Danielson, referencing a number of sources, discusses fairness and notes that it has a number of different contexts:

It is the writer's view that participants who attend mediation with a Justice are generally expecting the judge to intervene and ensure 'fair' treatment. When the public enters the Courthouse they still, in large part, believe they are entering the Halls of Justice. There is disagreement among Justices on this matter, with many believing that the issue of 'fairness' ought to be left to the parties. Neil Brooks argues that justice means the satisfaction of the litigants. Brooks quotes Charles Curtis as saying:

'Justice is something larger and more intimate than truth. Truth is only one of the ingredients of justice. Its whole is the satisfaction of those concerned.... The administration of justice is no more designed to elicit the truth than the scientific approach is designed to extract justice from the atom.'⁵⁴⁵

However, there is a difference between the fairness of the process and the fairness of any resulting settlement. There is no doubt that a JDR justice must ensure the fairness of any part of the process (including the more draconian - apparent power imbalances, duress, etc.) in which s/he is participating, and must still, at all times, maintain a reality and perception of trust. However, except in unusual situations, and assuming no power

545

Danielson, *supra* note 4 at 58-9 (see also 59-62), referencing Niel Brooks, "The Judge and the Adversary System", in Allen M. Linden (Editor), *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, York University, 1976), at 102. See also other Danielson sources, including, Gabriel, *supra* note 107 at 89. Indeed, it is the addition of a judge to what would otherwise be a negotiation, that allows the judge to "police" (my term) the fairness of the negotiation, as there are a number of potential ethical issues between negotiators. As Richard O'Dair says "it is crucial to the operation of the 'adversary system excuse' that the contest between the two adversarial lawyers be refereed by a neutral umpire - the judge.... In negotiation, there is no such figure": Richard O'Dair, *Legal Ethics: Text and Material* (London: Butterworths, 2001), at 289-323 generally, but at 290 specifically, referencing Murray L. Schwartz, "The Professionalism and Accountability of Lawyers" (1978) 66 California L.R. 669.

imbalances and the like, a JDR justice is not empowered to provide a decision that the settlement result achieves a level of substantive legal fairness. Thus, generally, the parties, with the advice of their counsel, determine the fairness of a settlement. If it were otherwise, a party might say that the settlement was unfair when they did not achieve what they hoped for, even when the result may have been very fair in a right-based evaluation. Alternatively, a JDR would merely be a different form of adjudication because a settlement could only be identical to a judicial decision. Accordingly, I do not agree with Smith that the settlement must be given “judicial blessing” (my words) as what would be achieved at the Supreme Court of Canada. Equally so, certainly, a justice cannot endorse something as fair, that s/he believes is not. But, how is s/he to judge the fairness of a result - only on rights (which, presumably s/he knows), or on interests (which s/he may not know)? Thus, this requires a very careful participatory role of a JDR justice in a substantive sense - usually to merely provide a risk analysis, an evaluation or opinion on rights, if and when asked, but to make it clear that no resulting settlement thereafter will be evaluated by the JDR justice. It is clear from the sources relied upon by Danielson that the debate continues, although she believes procedural fairness achieves the goal:

If a Justice can ensure that the parties feel as though they have been treated fairly – that is, they have received procedural fairness – this will go a long way to achieving settlement. Studies have demonstrated that the perception of fair treatment is at least as important if not more important than the outcome in determining satisfaction with the process.⁵⁴⁶

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Danielson, *supra* note 4 at 66, relying upon Julie Macfarlane, “Why Do People Settle?” (2001) 46 McGill L. J. 663, at 698.
See also Sander, “Ohio Symposium”, *supra* note 38 at 706-7.

A. DESCRIPTION OF CURRENT ROLES

... this is the first time that I have ever appeared in a court of law, and I am quite a stranger to the ways of this place; and therefore I would have you regard me as if I were really a stranger, whom you would excuse if he spoke in his native tongue, and after the fashion of his country...⁵⁴⁷

As may be evident, for those new to dispute resolution, and for those familiar with adjudication only, new dispute resolution processes are not always clear or familiar to users. This we need to remember as we proceed - indeed, to help combat that I recommend that a JDR Program Pamphlet be prepared.

Whereas the “description of the practical details of what JDR entails [was] beyond the scope” of Landerkin and Pirie’s paper, except for a brief description⁵⁴⁸, it is precisely the most significant focus of this Evaluation Report.

The current role, and manner of proceeding, of the JDR justice, in all of the services in the JDR Program has several aspects, in rough chronological order: to receive a JDR assignment with a specific request of a type of process (mini-trial, mediation or Binding JDR); to review the Court file on the litigation to date and any other relevant material identifying the real issues and interests at play in the litigation (the latter currently most

⁵⁴⁷ The Apology of Socrates (399 B.C.), as contained in Daniel R. Coquillette, *Lawyers and Fundamental Moral Responsibility* (Cincinnati: Anderson Publishing Co., 1994)[Coquillette], at 15.

⁵⁴⁸ Landerkin & Pirie, *supra* note 25 at 276.

frequently a missing piece of the puzzle until the briefs are filed - resulting in my recommendation for the use of a meaningful and informative JDR

Booking

Confirmation form); to provide counsel with an Instruction Letter of what is expected (or directed), and to invite (or direct) a Pre-JDR meeting so as to determine and agree on the most useful JDR mechanism and manner of proceeding (e.g. is a mediation to be merely facilitative or evaluative), and to learn of any special interests or factors relevant to settlement - again, much of this should be provided by a JDR Booking Confirmation form; to receive JDR briefs and thoroughly review them and make notes⁵⁴⁹; and to attend the JDR and carry out a series of steps leading to settlement and, if achieved, doing a memorandum to confirm same. These intra-JDR steps are addressed in more detail, *infra*, but basically include: an opening; initial submissions (directed from one party to the other, not the JDR justice); clarification questions, identifying interests and determining a manner of proceeding; negotiating; evaluating (if that is the method) through a risk analysis format (including caucusing, if agreed); narrowing differences and looking for “value added” features; moving to settlement on issues in progression; and documenting the settlement. In this context, there are a number of issues in the role of the JDR justice that need to be identified and understood - at least by the novice.⁵⁵⁰

⁵⁴⁹ As I usually find that the “positions” of the parties in their respective briefs are often “apples and oranges” or described differently, I, almost invariably, prepare a “Scott Schedule” chart that lists and provides a matrix of the issues and the respective parties positions (including \$ values for damages). I leave space for adding negotiated changes and a final column for “agreement”. This allows both the JDR justice, and counsel and parties, to have a simple “score sheet” on which to focus during discussions, and it serves as a “memorandum” of settlement, when all of the “agreement” column is complete and the parties and their counsel sign it. The latter will be even more important when the New Rules come into place because only a written memorandum of settlement will pass the confidentiality provision of JDRs - an oral agreement is not enforceable - see NR 4.20(2). I recommend that all JDR justices consider using this practice.

⁵⁵⁰ See also: Goss, “An Introduction”, *supra* note 29 at 5-7 for a simple rendition of

Beyond the mere mechanics of the process, the real, important, role of the JDR justice is to, *inter alia*: use the “gravitas” of his/her office, together with knowledge, preparation and style to engender trust with the parties and their counsel; to allow the parties to negotiate in an organized and comfortable, non-adversarial way (although this does not prevent expressions of frankness, “reality checks” or relevant emotional “venting”, which are often useful); encourage disclosure and creativity to expand “zero sum” negotiations; use “principled negotiations” where rights are involved - i.e. assessment in the shadow of the law; not let negotiations lag - indeed, keep the parties “on task”, without being coercive; make suggestions that may break impasses and assess risks (if evaluation is the methodology); and bring the discussion to fruition - get a settlement, again without being coercive; and make sure that any settlement is sufficiently documented and clear to be enforceable - there is no purpose in all this work, if that is not achieved. Through all of this, the JDR justice must have an appropriate approach - a good judicial “bedside manner”, if you will - including a serious, but yet friendly, tension-breaking demeanour, while being both empathetic to, but detached from, the parties. There are few other specifics relative to the role to be discussed.

In my experience it is important, whatever the dispute resolution mechanism, that the JDR justice very carefully manage the process so that there is compliance with requirements and creativity for opportunities to permit the greatest chance of success and to avoid abuses. This does not mean micro-managing the process such as to prevent lawyer/party creativity, but to be clear as to the basic procedures and limits.

One of the requirements of current JDRs is that the client (if personal) or a decision maker representative of the client (if corporate, or a professional adjuster - one who should be able to authorize any settlement that they come to believe during the JDR is prudent⁵⁵¹) must be present. Macfarlane said this about that:

Even when processes do not require the attendance of the client, the change in culture means that judges increasingly asked lawyers to bring clients with them to settlement conferences. The introduction of dispute resolution processes that mandate or encourage client participation⁵⁵²... has positioned even one-shotter and inexperienced personal clients to evaluate their lawyers' attitude toward what appears to be common-sense procedures to encourage settlement, and enables them to draw their own conclusions (which may be at odds with those of their counsel) from their first-hand experience of such processes.⁵⁵³

I mentioned the use of "principled" negotiations of rights issues, and, in that vein, Macfarlane also made clear that the "shadow of the law" is very much a part of the JDR settlement process in the context of existing litigation:

... law inevitably provides some of the norms that can be called into aid in a conflict. Ignoring or minimizing its role fails to recognize the usefulness and power of law as a social system of norms. Where a matter is already part of the litigation system, adjudication on the basis of legal principles is the context within which negotiation will take place a sense of "law" is rarely irrelevant to the outcome of a dispute, whether that is occurring inside or outside formal litigation.⁵⁵⁴

⁵⁵¹ See Robert Lewis, "Sanctions for Lack of Good Faith Participation in ADR Process" (2002) 55 *Labour Law Journal* 148, at 151-2, referencing *Nick v. Morgan's Foods of Missouri, Inc.*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000), at 1062-3, affirmed: 270 F. 3d 590 (8th Cir. 2001) for an excellent, detailed, but concise explanation of why *this must be a prerequisite to a JDR*.

⁵⁵² MacCoun, Lind and Tyler, *supra* note 49 at 108, make it clear that clients are not supportive of settlement conferences to which they are not invited.

⁵⁵³ Macfarlane, *supra* note 25 at 138.

⁵⁵⁴ *Ibid*, at 187, with further discussion on this point at 188-9.

Thus, I believe the “shadow of the law” provides the context - the BATNA - by which the parties can assess a settlement based on interests, in addition to rights.

There is another concept to JDRs that must be constantly remembered by all participants - namely, that the resulting settlement can achieve results that a justice cannot order in a rights-based adjudication with its often “limited range of remedies”.⁵⁵⁵ One example is a structured settlement (discussed earlier); another is creative, but legal, tax planning. Macfarlane makes this point in the context of collaborative law - but, I believe, it is also applicable to JDR - where she makes reference to:

... aspects of a final settlement that are “value added” and context specific and that are unlikely to have been negotiated between lawyers alone in the absence of their clients (nor would such remedies have been available to a court).⁵⁵⁶

On the subject of management, the general rule is that there are no costs awarded for the actual JDR (costs of the action are often agreed to, but not for the JDR itself). However, if there are abuses that cause costs to the other side, the JDR justice should not hesitate to award costs on application.⁵⁵⁷ Some such situations include⁵⁵⁸ (but are not exhaustive) where:

⁵⁵⁵ Smith, *supra* note 13 at 8.

⁵⁵⁶ Macfarlane, *supra* note 25 at 149. Examples followed.

⁵⁵⁷ *Ibid*, at 212, relying upon J. Lande, “Why a Good-Faith Requirement is a Bad Idea for Mediation” (2005) 23 *Alternatives to the High Cost of Litigation* 1, reports (at footnote 55) “at least twenty -two US states now have statutes requiring good faith participation in mediation along with twenty-one federal district courts and seventeen state courts”.
While this more likely will arise in the context of mandatory dispute resolution mechanisms rather than voluntary JDR, and the prohibition against normal cost awards may be even stronger under the New Rules of Court in Alberta, I believe the authority is now clearly in place in Alberta for the judiciary to award sanctions in JDRs - indeed, I have exercised it - to stop such abuses. For one reported decision on a cost award in Alberta for party abuse in the JDR process (there are

one side withdraws after the other side has gone to the trouble and expense of preparing a JDR brief; failing to bring an instructing client, with full authority to settle; one side's brief, preparation or participation is so wholly inadequate and lacking (including failure to bring all appropriate information) as to not lead to any serious possibility of settlement - the lawyer and/or party is just "going through the motions" (presumed to be more frequent where there is a mandatory or compelled process) or is incompetent (difficult to police); the counsel and/or party is merely intending to use the process to gather information on strategy - a "fishing expedition", intimidation only, each with no real intention of settling - or any other number of scenarios that represent "bad faith"; any aspect of creating delays or increasing expenses; or other any other reason that causes cost to a party antithetical to the intent of the process.

Judicial preparation is essential, because, if "a Justice does hear the matter, but does not read ... the materials provided by the parties, the cost and disappointment to the parties is one that speaks to the justice system in general".⁵⁵⁹

B. EXTERNAL AND INTERNAL CONCERNS EXPRESSED

likely other, unreported cases), see *A.S. v. N.L.H.* 2006 ABQB 708, 405 A.R. 35, 63 Alta. L.R. (4th) 392, [2006] A.J. No. 1257, 39 C.P.C. (6th) 381, 153 A.C.W.S. (3d) 294, 2006 CarswellAlta 1297 (Lee J.).

⁵⁵⁸ See Macfarlane, *supra* note 25 at 210-1, relying, in part, on her article "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) 2 *Journal of Dispute Resolution* 241, at 257 and 267.

⁵⁵⁹ Danielson, *supra* note 4 at 50, referencing Norm Brand, "Choosing the 'Expert' Mediator", <<http://www.mediate.com/articles/nbrand.cfm>> as to choice of mediators.

In concluding, as I have done, that JDR is here to stay, Landerkin and Pirie, acknowledge, as I noted *supra*, that there are policy issues to consider to ensure that JDR remains in the public interest, and that, over time, it does not, in any way, diminish the existing adjudicative judicial system. Thus, in saying “JDR can ... be viewed as complementing, not conflicting with, the appropriate administration of justice”, they added “[t]his is not to say that the concerns raised by Resnick, Menkel-Meadow and others are diminished”, and restated the issue in a comparison of the history of JDR to that of ADR:

With ADR recast as the way for the legal profession to better exercise problem solving skills and techniques, questions about ADR's negative potential have not proved to be a barrier to ADR's rapid integration into legal practices. The policy challenge for the courts, meditatively reframed, seems to be similar. How can the positive features of ADR be incorporated into justice system structures and practices in a manner that does not undermine or destroy the essential values and beliefs that underpin the system? This challenge - how to dispute better was the same one faced by the legal profession two decades ago ... [with] ADR...⁵⁶⁰

On the concept of judges as mediators, they asked and answered the issue in this way:

Are judges as mediators or judges practicing JDR compatible with our understanding of the modern judicial function? ... a closer look at the role of the judge appears to reveal further policy grounds supporting the judicial adoption of JDR.

...

However, two reasons suggest ... [that the] adversarially-inspired and traditional role for the judge is incomplete....

First, despite the obvious advantages of an adversary system, some suggest such a system is flawed. ... [It] contributes to or causes unacceptable delays in getting disputes

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Landerkin & Pirie, *supra* note 25 at 282.

to trial, high legal costs, procedural and substantive complexities, breakdowns in continuing relationships, and other access to justice problems. The adversarial system may encourage certain beliefs and attitudes that not only obstruct fair and effective dispute resolution, but also legitimize socially undesirable behaviours.⁵⁶¹

Noting other problems with the adversarial system, they address the first point by suggesting that the “role of judge primarily predicated on a seriously flawed, publicly maligned and changing adversarial approach to justice is surely not sustainable.” On the second point, they stated that a:

... more direct line of analysis also suggests the judicial function can be broader than that traditionally expected in an adversarial system of justice. While the role of judges in North America developed within an adversarial system, descriptions of the judicial function both in codes of judicial ethics and court decisions fit with judicial dispute resolution.⁵⁶²

They conclude that “[w]hen considered from an ethical perspective, the change in judicial function is very clear, moving from traditional adjudicative limits to carefully flexing the new judicial boundaries to settlement roles”.⁵⁶³ In

⁵⁶¹ *Ibid*, at 283-4.

⁵⁶² Landerkin & Pirie, *supra* note 25 at 285, referencing:
 - the 1990 American Bar Association’s Model Code of Judicial Conduct, and in particular, Canon 3(7)(d) and (8), which authorize and encourage mediation and facilitate settlement; and
 - the Canadian Judicial Council’s, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) - online at www.cjc-ccm.gc.ca [CJC, “Ethical Principles”], including the devotion to “judicial duties *broadly defined* which include ... judicial tasks essential to the court’s operation”.
 Danielson refers to the CJC, “Ethical Principles”, *supra* note 562 at 21, in some depth at 21.
 See also, addressing the CJC Ethical Principles: Justice Georgina R. Jackson, “The Mystery of Judicial Ethics: Deciphering the ‘Code’” (2005) 68 *Saskatchewan Law Review* 1[Jackson, “Mystery”].

⁵⁶³ Landerkin & Pirie, *supra* note 25 at 286, just before considering the principles established by *Re Therrien*, [2001] 2 S.C.R. 3, that must be maintained in this process.

expanding on this, they add the language of the Supreme Court of Canada in *Re Therrien* to describe a judge:

... - impartiality⁵⁶⁴, independence, integrity, public respect and confidence, good judgment, a pillar of the process, serving ideals of Justice and Truth, irreproachable conduct, restraint, propriety, decorum, humanity, unique-might easily describe the mediator. Indeed, the Court's vision of responsibilities for judges went beyond "the traditional role of arbiter", to the judge "having responsibility for resolving conflicts between parties". The Supreme Court of Canada's words are echoes of earlier ADR sentiments urging less emphasis on adjudication. Judges appropriately helping parties to settle disputes, apart from adjudication, [are] not excluded from their judicial function by the Supreme Court of Canada. Judges acting as judicial mediators are now part of the fabric of the judicial function.⁵⁶⁵

They conclude the discussion (in a way with which I strongly agree) as follows:

What is essential to the judicial function from a policy perspective in the Supreme Court of Canada's reasoning is two-fold. First, impartiality, independence, and integrity must be maintained for they are the *sine qua non* of the essence of a

⁵⁶⁴ Another view, suggesting that the JDR justice does not need to maintain impartiality, I believe, must be discounted, but, otherwise, I believe the comments of Joseph and Gilbert (Daniel Joseph and Michelle L. Gilbert, "Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings" (1989-90) 3 *The Administrative Law Journal*, 571, at 585), as quoted by Danielson, *supra* note 4 at 28, are apropos of the settlement justice:

The chief advantage of the settlement judge is that he or she is both a visitor from outside the case who will not judge the merits – or the counsel – or have any other impact on the formal decision making, and, at the same time, is as knowledgeable and authoritative on the merits – and on the trial judge – as anyone can be who is not a part of the trial process. The settlement judge helps initiate compromise through the respect and deference that his or her position as a judge evokes. By being a judge but not *the* judge who decides the case, the settlement judge can command respect and deference without the need to observe the due process mandate to maintain impartiality. His or her role is to get the parties to drop the adversary pose and to expand efforts to reach a stage of accommodation.

⁵⁶⁵ Landerkin & Pirie, *supra* note 25 at 289, referencing *Re Therrien*, at 74-5 (emphasis in the original).

judge's being. Second, public confidence in the judge can never be eroded . These qualities are sacrosanct in everything a judge does.... These are also the hallmarks of good ... [mediators]. The virtues of impartiality and integrity are specifically included in various codes of ethics promulgated for mediators. The other fundamental characteristic of the judicial function - *public confidence* - *would be compromised if the judge as mediator was not qualified or skilled.* ... However, subject to the adoption of appropriate procedures, goals and an overarching core meaning for judicial intervention, it is difficult to imagine that a reasonable, fair-minded and informed public would not endorse and support this continued evolution of the judicial function as a part of a similarly evolving adversarial system . Public confidence would not be eroded whether the judge is judging, mediating, opining, managing, writing, counseling a distraught witness, or otherwise dispensing justice. Done uniquely well, JDR would surely not diminish the respect for the judiciary in the minds of such persons but only enhance it.⁵⁶⁶

Perhaps Chief Justice Dickson put the importance of the judicial role best of all:

... as we reflect on ways in which to improve the delivery of justice in North America, we must above all make sure that we do not undermine the legitimacy of our judicial system. ... [And to this end, ensure that ADR/JDR underlying values] are consistent with those that have evolved over many centuries and that lie at the heart of our judicial system ...[are] consistent with the principles of fundamental justice that underlie our judicial system.⁵⁶⁷

⁵⁶⁶ *Ibid*, at 289, referencing mediator ethics cited by Pirie in *Alternative Dispute Resolution: Skills, Science and the Law* (Toronto: Irwin Law, 2000), at 191-200 (emphasis added).

⁵⁶⁷ Dickson, *supra* note 14 at 234 and 241-2, as related by Landerkin & Pirie, *supra* note 25 at 292, and referenced by Danielson, *supra* note 4 at 23-4. Additionally, Barry (*supra* note 11 at 235, and 241-2) noted that the former Chief Justice had two concerns with ADR (the second in the quote *supra*):
 First, some cases may be pushed out of the courts and the parties forced to settle because of an over-burdened system .
 Secondly, ADR must be developed in a manner consistent with "the principles of fundamental justice that underlie our judicial system".
 He identified these "principles of fundamental justice" as including "equal access, established procedures, reasoned decisions, public scrutiny, and qualified

These comments generally represent the conclusions to which I have also come, supported by the comments of the participants from the Surveys. This thus effectively deals with much of the next heading, although a dagger must be firmly and finally be placed through the heart of certain invalid concerns.

1. INVALID CONCERNS

As I have already discussed *supra*, while there are real judicial ethical and conduct concerns to be maintained (to be discussed more, *infra*), there are many straw persons set up by those not enthusiastic about JDR, which, I believe, have been knocked down by comments from learned academics, scholars and justices, as articulated in the last section. Accordingly, I believe it is no longer any contribution to the debate to continue, as some might do, to repeat the essentials for judicial function mentioned *supra*, as reasons against JDR - even my colleague, Smith has come, apparently reluctantly, but honestly, to this conclusion. While the fundamental nature of these essential judicial premises remain, absent evidence that JDR has in some way diminished them in comparison to the judicial role of adjudication, there is no validity to the pining over their potential loss from some non-existent threat. In my view there is a need for those within and outside the judiciary to have confidence that our justices have the integrity and dedication to maintain these essentials, no matter what legitimate administration of justice role they take. What remains is to examine the potential pitfalls, and make some

neutrals” - the latter speaking loudly of the need for an adequate standard of JDR judicial training addressed herein. He added a note to recognize that the former Chief Justice was “especially concerned with the impact that judicial involvement in ADR may have on the public’s perception of judicial impartiality”.

recommendations to avoid them, or minimize them so that the essential high standard can remain, and the performance can be even improved.

The next matter that needs to be put to eternal rest is the debate over the Court's primary jurisdiction to do JDRs.⁵⁶⁸ A perpetual "hobby horse" of those who believe judges should not be doing JDRs, or "gun shy" judges that believe they are at professional risk, is whether there is jurisdiction to do JDRs. While there are a number of courts to which this issue may theoretically apply, I will limit myself to the jurisdiction of this Court, which has both "original" and "inherent" jurisdiction, for which the scope of jurisdiction is "broad" and "[n]o matter will be beyond ... [its] jurisdiction unless it is expressly" demonstrated.⁵⁶⁹ However, even so, more certainty was then sought, especially for non-consensual JDR procedures, than the "comfort" brought from this jurisdictional analysis.⁵⁷⁰ It is noted that Smith was less than enthusiastic - "none of these three conclusions give unqualified consent" -

⁵⁶⁸ I say "primary jurisdiction" because I specifically exempt out individual cases where a JDR justice, with primary jurisdiction, loses that jurisdiction, because of failure (or perceived failure) to carry out some pre-requisite to maintaining it. I also say "put to eternal rest", but occasionally there are attempts to raise the dead by those who castigate the jurisdictionally sound primary service rather than merely adjudicating against the occasional misplaced (actual or perceived) activities or failures of the JDR justice working to try to deliver that service, pursuant to the trust placed in the parties (and/or their counsels) apparent express and explicit request and consent, when it does not go their way.

⁵⁶⁹ Landerkin & Pirie, *supra* note 25 at 290-1, later relying on:
 - *MacMillan-Bloedel v. Simpson*, [1995] 4 S.C.R. 725;
 - I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23, at 25 and 27; and
 - *R. Cowl and Others v. Plymouth City Council*, [2002] W.L.R . 803 (English Court of Appeal (Civil Division) - Lord Woolf);
 for support, and for the statement that, especially by consent, and even by compulsion, "[i]t would seem indisputable that general jurisdiction courts in Canada have jurisdiction to engage in JDR".

⁵⁷⁰ Landerkin & Pirie, *supra* note 25 at 292-3, referencing Barry, *supra* note 11.

about the opinions of three authors that there is jurisdiction for our Court doing judicial mediation⁵⁷¹, but provides no authority or proof to the contrary.

While the matter may have been less certain in the past, it is no longer in doubt in Alberta as a result of the decision in *Abernethy*, although *L.N.*⁵⁷² has certainly attempted to limit the exercise of that jurisdiction.

2. VALID VIGILANCE

The past cautions *supra* identify the valid concerns (vigilance is a better term) to make sure that the system of justice as we know it in the Court is never diminished by the JDR Program. The valid concerns will be dealt with in the following sections, primarily on Judicial Conduct.

C. CONCLUSION

While it is clear that there is jurisdiction for, and policy reasons and user demand to support, the JDR Program, its maintenance is dependent on continuance of an extremely high standard of judicial conduct. The principles related to that standard, and the pitfalls to avoid or control merit some significant elaboration.

⁵⁷¹ Smith, *supra* note 13 at 22, referencing:
- Landerkin & Pirie, *supra* note 25;
- Michael Moore, "Judges as Mediators: A Chapter III Prohibition or Accommodation?" (2003) 14 ADRJ 188; and
- Danielson, *supra* note 4.

⁵⁷² *Abernethy* (C.A.), *supra* note 197 and *L.N.*, *supra* note 19.
See also: Barry, *supra* note 11 at 1-2.

VII. JUDICIAL CONDUCT

*A judge is a lawyer mellowed and purified by age, a [person] from whom the years have taken the illusions, exaggerations, prejudices, and perhaps even the impulsive generosity of youth. The judge is what remains after there have been removed from the lawyer all those exterior virtues which the crowd admires.*⁵⁷³

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*Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live.*⁵⁷⁴

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A. INTRODUCTION

1. THE SETTING

We have seen that there is jurisdiction, and policy reasons, for judges to do JDRs, but are there conduct/ethical⁵⁷⁵ (or other) issues to counter these

⁵⁷³ Piero Calamandrei, *Eulogy of Judges*, trans. by John Clarke Adams and C. Abbott Phillips, Jr. (Princeton: Princeton University Press, 1942), at 23.

⁵⁷⁴ Benjamin N. Cardozo, *The Nature of the Judicial Process* (London: Oxford University Press, 1921), at 66, quoting from Dillon, *Laws and Jurisprudence of England and America*, at 18, quoted by Pound, 27 *Harvard L.R.* 731, at 733.

⁵⁷⁵ There is a terminology issue, that I will address *infra* as to whether the issue is

reasons? If there are issues raised regarding judicial conduct (or otherwise) in doing JDRs, is the simple answer to avoid the problem and have judges stop doing JDRs? Some would be happy, but I believe the Survey results show that many more - the users - would be unhappy. Thus, in addition to a strong feeling in our Court of a need to provide reform from within, in the absence of other alternatives, to solve the problems perceived with adjudication, one might ask, as do Otis and Reiter, why involve judges in such programs at all?⁵⁷⁶ We have looked at some policy interests that answer this question in the affirmative. There may be some reasons to answer in the negative. Is judicial conduct one of them? The answer to these questions might provide a good start to look at potential conduct that is of at least hypothetical concern, and how any real concerns can be lessened, and vigilance for high standards may be maintained. Before that, two things need to be made clear.

First, relevant to the issue of conducting JDRs in private mediation rooms rather than public courtrooms, it is trite to remember that no one is forcing the JDR Program on anyone. It being entirely voluntary, parties are free not to use it. Even with mandatory alternative dispute resolution under the New Rules, JDR is forced on no one. Thus, the JDR Program is only for the willing. Indeed, the Survey proves that users are not only willing, they are very supportive, if not enthusiastic and are demanding more JDR services and capacity. In this regard, Cratsley notes that in the “past twenty years ... a consensus has emerged among the bench and bar that judicial participation in the settlement of civil cases is a wise and useful activity”, which, he says, Alfini calls “the settlement culture”.⁵⁷⁷ The

judicial conduct or judicial ethics - it is the former, but often the terms are used interchangeably.

⁵⁷⁶ Otis & Reiter, *supra* note 7 at 364-71.

⁵⁷⁷ Cratsley, *supra* note 52 at 570, where, in footnote 4, he references Alfini, “Risk”, *supra* note 107 at 11 and goes on to say that “Both federal and state judges have

users in the Survey certainly represent a part of this settlement culture. The others can, rely exclusively on adjudication (plus non-assisted negotiation, as in the past), or under the New Rules, can use private mediation or court-annexed mediation (where the latter is available).

Second, the JDR Program is not about the public institution conduct issue of saving judicial resources for budget conscious governments or about a judicial conduct issue of giving judges "time off". However, there are resulting judicial time saving considerations that do not raise conduct issues which should be understood.

The judicial resources are the same with the JDR Program as without it, the only change being the focus away from adjudication solely to both JDR and adjudication. To the extent that, with the Court's master calendaring system (the judicial conduct argument may be different under an individual calendaring system that is more prevalent in the United States), the JDR Program uses a justice to perform a JDR, that just means that justice is doing a judicial JDR function, instead of a judicial trial function - there is no saving in judicial resources, just a re-assignment. While there is a reduction in the total trial time required due to the high settlement rate - which the Survey establishes - the trial time released is taken up by new cases waiting in the

written at length about the reasons for and the accomplishments of this development", referencing:

- Robert Peckham, "A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution" (1985) 37 Rutgers L. Rev. 253;
- Hubert L. Will, Robert Merhige & Robert Alvin, "The Role of the Judge in the Settlement Process" (1976) 75 F.R.D. 89, 203;
- Baer, *supra* note 52; and
- Peter W. Agnes, Jr., "Some Observations and Suggestions Regarding the Settlement Activities of Massachusetts Trial Judges" (1997) 31 Suffolk U. L. Rev. 263.

queue, though they now can get earlier trial dates. This is especially so with the Court's multiple (currently triple plus) booking of trials.

As to the net time saved, there are also some realizations to be considered which support the JDR Program. Although they do not raise judicial conduct issues, they may raise lawyer conduct issues. An unsuccessful JDR will increase the total judicial time spent on a case,⁵⁷⁸ if an adjudication is still necessary. However, even so, looking at all cases, although some more total judicial time is spent on the unsuccessful JDRs with their accompanying trials, the judicial time saved by successful JDRs less the saved trial time, renders a net saving of judicial time (even without considering deliberation and decision writing time). Could the saving of judicial resources be greater? I believe so, in two related contexts that raise lawyer conduct issues. First, there could be a greater saving of judicial resources to the extent that some cases are JDRed that may never - or are even likely to - go to trial even without a JDR - part of the 95% discussed *supra*. Second, and directly related, there is anecdotal evidence that there is often little or no real negotiation before going to the JDR, such that JDRs are unnecessarily replacing negotiation - again, part of the 95%. I believe there is some basis for this concern.⁵⁷⁹ Similarly, there is also a belief that for some

⁵⁷⁸ See discussion by Otis & Reiter, *supra* note 7 at 369.

⁵⁷⁹ *Ibid* at 370, footnote 74. Otis & Reiter allude to a corollary of this - the filing of court process so as to be able to access judicial mediation. I know of no evidence to support that in the context of the JDR Program, but as I said, there is anecdotal evidence of trying to access JDR without real negotiations before hand. Indeed, the literature provides concerns that some ADR programs are "providing court-connected procedures to litigants who would otherwise settle on their own without any official intervention at all", as was once the duty and expectation of counsel: Bussin, *supra* note 5 at 481, referencing C. McEwan, "Evaluating ADR Programs", in F.E.A. Sander, ed. *Emerging ADR Issues in State and Federal Courts* (Chicago: Litigation Section of the American Bar Association, 1991), at 217. As to the 95%/5% dichotomy, referenced both *supra* and *infra*, it must be clear that this is a euphemism for the concept that almost all (95%) of cases settle and never go to trial, leaving the remainder (5%) that surely, or likely, go to trial. The actual % will change from jurisdiction to jurisdiction over time - see (as noted

cases, if they were not JDRed, they would settle through negotiation or private mediation - which I also believe to be the case. To this extent, the JDR Program is replacing a lawyer's duty to negotiate. So, if one goal is to save judicial resources, why does the JDR Program not refuse entry, without a form of certification that the case will not settle without a form of alternative dispute resolution - either JDR or private mediation? I believe that this would make JDRs easier to get for those who really need them (answering the growing demand for more JDR assignments) and save judicial resources, even without requiring private mediation first. On the latter point, should JDR be refused until private mediation is unsuccessful? I think not, for several reasons, but the primary one is that I believe, having regard to the processes and personnel available, and the cost, the parties should pick one (the most optimum) choice of alternative dispute resolution before trial. Which of the alternatives they pick is up to them, but once undertaken, and not successful, it is more unlikely that settlement through another alternative is likely to be successful. They might as well - certainly on a party cost consideration probably should - go to trial.

Before getting into the "delicacies" of conduct relating to judicial mediation, Otis and Reiter argue that there are other reasons for the choice of a judicial mediator, which leads more directly into the judicial conduct debate:

Judges are well-suited for the role of mediator for several reasons, relating both to the perceptions of the parties and to the specific skills possessed by judges. Of particular importance is the perception of the judicial office as one of impartiality and independence, which confers on judges a degree of moral authority. This can function to keep the process on track and to

infra): Frank E.A. Sander, H. William Allen & Debra Hensler. "Judicial (Mis)use of ADR? A Debate" (1996) 27 U. Tol. L. Rev. 885 [Sander *et al*, "Judicial (Mis)use"].

prevent abuses of the process by the parties or their representatives.

They argue, however, that the “moral authority is extremely delicate” because consent to judicial mediation must not be “manipulated” and the parties must not be “steered” to a particular result⁵⁸⁰ - the “coercion” factor.

As to judicial qualities, skills and benefits brought to judicial mediation, Otis and Reiter identify: experience in intervening between disputing parties; judicial commitment to both achieving resolution and dispensing justice; knowledge of the law, legal issues and procedural matters; judicial officials are already part of a publicly funded court system - thus, saving resources for the parties, if no fees are required (and, coincidentally, not costing additional public resources if, as in the JDR Program, no additional judicial personnel are necessary).⁵⁸¹ These, and other factors, have been measured motivationally and directly by the Survey.

It is important in this discussion to also recognize that there will always be a need for private mediation as well - but it is suggested earlier in time than JDR:

.... judicial mediation does not, indeed it cannot, be allowed to mean the end of private mediators outside the court system. The two are not mutually exclusive.... Each serves different purposes but at the same time works towards the same end - resolving conflicts in a satisfactory, timely, and cost-effective way. The crucial point is to develop a synergy between conflict-resolution processes, rather than defending jurisdictions.

The availability of judicial mediation in no way excludes the possibility that parties will resort to private mediators to resolve their disputes; it simply provides another option, one

⁵⁸⁰ Otis & Reiter, *supra* note 7 at 365.

⁵⁸¹ *Ibid*, at 366.

[JDR] particularly suited to conflicts at a more advanced stage. Judges mediate cases already within the formal adversarial justice system; in most cases these will be problems of a certain duration and degree of intractability that could benefit from the particular qualities of the judge-mediator we have described above. The role of private mediators occurs most effectively at an earlier stage in the conflict process, in order to resolve, even to prevent, conflicts before litigation seems to be the only possibility.⁵⁸²

While I don't necessarily agree that private mediation must always be earlier, or, as intimated, be used for less complex cases, than JDR, as noted *supra*, I do advocate that JDRs only focus on the small percentage (the 5%) that will otherwise surely go to trial, whereas I believe private mediation can take place at any place in the dispute from before litigation is commenced to trial, or during trial (JDR during a trial only happens in the most peculiar of cases and must not, in my view, be done by the trial justice). To this end, I would advocate that JDRs not conflict with private mediation, by the Court taking a two-pronged specific approach: first, that JDRs not be booked, without Court leave, unless the action is ready (or substantially ready) for trial (leaving it to party negotiations or private mediation before trial readiness); and, second, that the parties certify in some fashion that they have, in fact, tried to negotiate, but have been unsuccessful, and that a trial will surely result without some other dispute resolution mechanism. As made clear *supra*, I do not do this to protect the market of private mediators, but to use judicial JDR resources only if it will surely lessen the need for judicial trial resources - that is the current mandate, and primary purpose of the Courts role in the JDR Program.

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Ibid at 370.

2. CHANGES TO THE NORM

Macfarlane started her discussion on the “Ethical Challenges Facing the New Lawyer” by quoting from another author: “Legal ethics is the applied philosophy of lawyering; it goes to the heart of what it means to be a lawyer”.⁵⁸³ While the discussion there focused on the lawyer/client relationship, it also focused on the changing ethical role of a lawyer being involved in other than traditional forms of dispute resolution. The former is not relevant to this Evaluation Report, but the latter certainly is, and, in that context, *mutatis mutandis*, could be similarly called the “Ethical Challenges Facing the New Judge” - that is, the ethics/conduct (see differences *infra*) of a justice conducting a JDR. Additionally, Landerkin and Pirie commence their paper by identifying potential problems with judicial dispute resolution, and the need for a “careful and critical examination of this judicial role”.⁵⁸⁴

There are many publications addressing legal “ethics”⁵⁸⁵ applicable to lawyers and their practice⁵⁸⁶, some about mediation “ethics” in general⁵⁸⁷, and

⁵⁸³ Macfarlane, *supra* note 25 at 191, quoting A. Dodek, “Canadian Legal Ethics: A Subject in Search of Scholarship” (2000) 50 University of Toronto Law Journal 115.

⁵⁸⁴ Landerkin & Pirie, *supra* note 25 at 250-1 discuss allegations of: forced mediation; wasted resources from failing to reach as settlement; unfair judicial pressure (coercion) or partiality; judicial impropriety; undisclosed information; lack of judicial mediation skills; private v. public perceptions; security issues; etc. Later at 281, they raise the issues of “the utility of JDR, abuse of judicial power, diminishment of the normative functions of the court, loss of due process protections, [and] judicial vulnerability....”.

⁵⁸⁵ Emphasis is brought to “ethics” pending discussing and resolution of ethics/conduct terminology *infra*.

⁵⁸⁶ Representative examples include the work of:
 - Kronman, “Fault”, *supra* note 141;
 - Richard O’Dair, *Legal Ethics, Text and Materials* (London: Butterworths, 2001);
 Ross Cranston, ed. *Legal Ethics and Professional Responsibility* (Oxford: Clarendon Press, 1995) - but note the essay on Judicial Ethics by Sir Thomas Bingham at 35-51 (although it does not contribute anything of particular substance related to this debate);

numerous publications addressing judicial “ethics” in general⁵⁸⁸, but few in the context of judges participating in dispute resolution procedures⁵⁸⁹ - that is, those court processes⁵⁹⁰ which differ from the normal judicial adjudicative

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- Simon, *supra* note 14;
 - Singer, *supra* note 42 at 177-179;
 - Deborah L. Rhode, “Ethical Perspectives on Legal Practice” (1984-1985) 37 *Stanford Law Journal* 589, relying upon earlier critics from Plato, through the American colonists, to the early 20th Century United States legal scholars, to the then present. Rhode followed this up with a tribute to, review of, and chronicle of aspects of the subject of legal ethics beyond, the work of Monroe H. Freedman, “one of the founding fathers of [the] field”: Deborah L. Rhode, “Legal Ethics in an Adversary System: The Persistent Questions” (2006) 34 *Hofstra Law Review* 641, referencing, *inter alia*:
 - Monroe H. Freedman, *Lawyers’ Ethics in An Adversary System* (Indianapolis: Bobbs-Merrill, 1975);
 - Monroe H. Freedman, “Professional Responsibility of the Criminal Defence Lawyer: The Three Hardest Questions” (1966) 64 *Michigan Law Review*. 1469; and
 - Macfarlane, *supra* note 25 at 7-12, 220 and 232-6.
- See too: Deborah L. Rhode, *In the Interests of Justice* (Oxford: Oxford University Press ,2000).
- There are many other authorities, the relevance of which are beyond the scope of this Evaluation Report.

587 See, for example:

- Andrew J. Pirie, *Alternative Dispute Resolution: Skills, Science and the Law* (Victoria: Irwin Law, 2000), at 191-210; and
- Catherine Morris, “The Trusted Mediator: Ethics and Interaction in Mediation” in Macfarlane, “Rethinking” *supra* note 220 at 301-47, touching on aspects of judicial involvement only briefly in the context of Professor Karl Mackie, “Mediation Futures”, at 373-7 of the same text.

588 See, *inter alia*:

- Justice J.O. Wilson, *A Book for Judges* (Special Edition, printed by the Canadian Judicial Council, 1980)[Wilson];
- Canadian Judicial Council, “*Commentaries on Judicial Conduct*” (Cowansville, : Les Éditions Yvon Blais Inc., 1991)[CJC Commentaries];
- CJC, “Ethical Principles”, *supra* note 562; and
- Jackson, “Mystery” *supra* note 562.

589 One, while broader in scope than just JDRs, in 1989, now in its Fourth Edition, responded to the demand: James J. Alfani, et al., *Judicial Conduct and Ethics* (Danvers: Lexis Nexis, 2007)[Alfani, “Judicial”].

590 One author says this “encompasses a variety of mechanisms, *including* negotiation, arbitration, mediation, conciliation, and settlement”: Gabriel, *supra* note 107 at 81.

I believe that “including” is the operative word because there are many other mechanisms. Indeed, “new models of judging designed to update traditional ones have quickly become outdated. Even newer models are necessary today....”:

role. In this Evaluation Report, I will refer to the judicial dispute resolution processes, that is, very broadly speaking, those which directly involve judges in settlement⁵⁹¹, whatever sub-processes they may include, or methods they may use, as judicial dispute resolution.

As will be seen from the discussions in this Evaluation Report *supra*, I am beyond the point of view that alternative methods of dispute resolution, including that in which judges are participants, in addition to traditional judicial adjudication, “waters down the morality of the law”.⁵⁹² However, while they are becoming fewer in number, I must admit that there are (or have been) a number of “doubters”⁵⁹³, based on judicial conduct reasons. Rather, as I

Jeffrey A. Parness. “Improving Judicial Settlement Conferences” (2006) 39 University of California Davis Law Review 1891 [Parness], at 1902, relying on Jonathan T. Molot, “An Old Judicial Role for a New Litigation Era” (2003) 113 Yale Law Journal 27, at 90.

⁵⁹¹ It is represented that the “first institutionalization of something like a settlement conference” occurred in the U.S. in the late 1920s in Michigan: Marc Galanter, “The Emergence of the Judge as a Mediator in Civil Cases” (1986), 69 *Judicature* 257 [Galanter], which provides a good history of U.S. pre-trial and settlement conferences. In Alberta they started formally over 60 years later, in 1992, in the context of mini-trials, and broader JDR processes, including mini-trials and other methods, appeared in 1996. As to this history, see also:
 - Gabriel, *supra* note 107 at 82-3;
 - Susan Kaye Antalovich, “*Heilman Brewing Co. Inc. v. Joseph Oat Corporation*: Defining Perimeters of Judicial Involvement of the Settlement” (1990) 5 Ohio State Journal on Dispute Resolution 115, at 118-119 [Antalovich]; and Hogan, *supra* note 8 at 431 *et seq.*

⁵⁹² Luban, “Quality”, *supra* note 181 at 381, referencing Owen Fiss, “Against Settlement” (1984) 93 Yale L.J. 1073.

⁵⁹³ I have listed some of them *supra* but repeat (and add to) them here in this specific context. They include:
 - Gabriel, *supra* note 107 at 81-2, also identifying Owen Fiss, “Against Settlement” (1984) 93 Yale L.J. 1073, as well as Menkel-Meadow, “For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference” (1985) 33 UCLA L. Rev. 385, at 488;
 - Antalovich, *supra* note 591 at 117-8;
 - Jack B. Weinstein, “Some Benefits and Risks of Privatization of Justice Through ADR” (1996) 11 Ohio State Journal on Dispute Resolution 241;
 - Jonathan T. Molot, “An Old Judicial Role for a New Litigation Era” (2003) 113 Yale L.J. 27, at 90, as reported (but not accepted) by Parness, *supra* note 590 at 1892 *et seq.*; and
 - to a lesser extent, but with many similar concerns, Smith, *supra* note 13.

concluded *supra*, I believe JDR is here to stay in Alberta and beyond. I am not alone in this view.⁵⁹⁴ Nor, in Alberta at least, am I convinced that the JDR process is about “the judicial commitment to avoiding adjudication”, or that there is an undue “judicial preference for settlement”.⁵⁹⁵ However, although not so as to avoid adjudication, there may be many that believe (I am one of them) that, most frequently, settlement, as a mode of disposition, is to be preferred.

At the same time, I am not convinced that the majority of litigants prefer “trial-like processes”⁵⁹⁶ - indeed, the Survey and that of Professor Benson⁵⁹⁷ tell, quantitatively and qualitatively, the opposite. There are many reasons from the parties’ points of view for looking at JDR, when the only alternative is a trial - avoiding the risk, expense and stress of adjudication, and the inability of adjudication to mend (indeed, usually the opposite) ongoing relationships, are among the reasons. Canada’s own Otis and Reiter, in rejecting the dooms-day advocates, relying on a real Canadian example, addressed - indeed, capsulated - this thesis, saying:

⁵⁹⁴ “Active promotion of settlements is now unmistakably the ‘established’ position in the [US] federal judiciary”: Galanter, *supra* note 591 at 261, providing statistics to support his claim; Parness, *supra* note 590 at 1896 *et seq*; George W. Adams Q.C., *Mediating Justice: Legal Dispute Negotiation* (Toronto: CCH Canadian, 2003), at, *inter alia*, 15 [Adams]; and see the “Rebuttal to ‘Contemporary’ Critics” in Hogan, *supra* note 8 at 436 - 441.

⁵⁹⁵ Indeed, as Justice Abella observes (Rosalie S. Abella, “Professionalism in the Justice System: The Divine Comedy of Roscoe Pound” (2002) 51 U.N.B.L.J. 3, at 7), and as pointed out by Danielson, *supra* note 4 at 29, I believe that neither the public nor the judiciary wish to abandon adjudication. In this regard, Danielson said:

Rosalie Abella suggests that the public does not wish to avoid the justice system altogether, as much of ADR proposes, but that they are seeking a more accessible, substantive procedure within the civil justice system. Instead of procedural justice, the public wants substantive justice.

⁵⁹⁶ Judith Resnik, “Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement” (2002) 1 Judicial Dispute Resolution 155, generally, but specifically at 157-8, and 159.

⁵⁹⁷ Benson, *supra* note 63.

... judicial mediation heralds a new, participant-centered normative order, one that conceptualizes litigation more broadly and holistically and, thus, offers justice that is fuller and better adapted to the needs of parties with a variety of conflicts.

It is increasingly apparent that 'alternative' dispute resolution is becoming part of the mainstream, a part of the legal landscape accepted - sometimes grudgingly, sometimes enthusiastically - by litigants, lawyers, and courts alike. ...the operative question is now no longer whether ADR has a place in the justice system, but rather how, where and who should do it. It is now time to begin assessing the integration of ADR in our legal system ... [by] its normative impact....

... judicial mediation in particular ... brings ADR into the very heart of state-run legal institutions, affects both classical adjudication and also mediation itself ... [including] the key advantages of mediation by judges, as well as some of the potential concerns about it.⁵⁹⁸

3. THE CHALLENGES OF THE NEW NORM

Otis and Reiter start the real substantive focus of this discussion in recognition that moving judges out of their sole adjudicative role into one of mediation creates "important ethical implications, and "destabilizes this paradigm". They address three, non-exhaustive, matters of specific relevance to this Evaluation Report: confidentiality⁵⁹⁹; party autonomy; and fair treatment⁶⁰⁰. They say that "[a]s such, mediation requires that the legal ethics

⁵⁹⁸ Otis & Reiter, *supra* note 7 at 353-5.

⁵⁹⁹ Sander said "[p]erhaps the most sacred canon in mediation is the importance of mediation confidentiality": Sander, "Ohio Symposium", *supra* note 38 at 708.

⁶⁰⁰ Otis & Reiter, *supra* note 7 at 392, referencing, in a general way and applicable to all disputants, Catherine Morris, "The Trusted Mediator: Ethics and Interaction in Mediation", in Macfarlane, "Rethinking" *supra* note 220 at 301-2. For the three topics see 395-6, 396-7, and 397-8 respectively - I have not referenced the section on lawyer ethics because that is beyond the scope of this Evaluation Report.

be redefined away from the paradigm of competition and towards ... ‘non-adversarial ethics’”.⁶⁰¹

Otis and Reiter note that “rules and guidelines for mediation can help remedy” the “defect” in the lack of judicial ethical codes and principles applicable to judicial mediation. This was largely accomplished by the 1996 Guidelines for JDRs, augmented by individual judicial practices in general, and in response to unusual requests such as Binding JDRs. Those principles have been largely incorporated into the New Rules. Nevertheless, if new guidelines are necessary, they could be prescribed by a Practice Note or under the New Rules. Any such new guidelines could consider the newest principles in mediation ethics of all kinds.⁶⁰²

Turning more to the substance, Otis and Reiter: argue that because judicial mediations take place in closed, unrecorded, sessions protected by confidentiality, appellate review is limited and this “puts an onus on judges ... to be especially vigilant [a key word, in my view, in considering the importance of maintaining stellar judicial conduct] in protecting the interests of justice”; note that ethical principles relating to mediation are more “relatively abstract” than formal “legal principles and procedural guarantees”; and request recognition that the new close contact with both litigants and lawyers, by judicial mediators, “takes place in an atmosphere where rules and boundaries are not clearly defined”.⁶⁰³

⁶⁰¹ Otis & Reiter, *supra* note 7 at 393, quoting from Carrie Menkel-Meadow, “Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities” (1997) 38 S. Tex. L. Rev. 407, at 414.

⁶⁰² See, as recommended by Otis & Reiter, *supra* note 7 at footnote 200: National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* (2001), available at <http://www.law.upenn.edu/bll/ulc/mediat/uma2001.pdf>.

⁶⁰³ Otis & Reiter, *supra* note 7 at 394, referencing Adams, *supra* note 594 at 266-90 and Robert A. Baruch Bush, “A Study of Ethical Dilemmas and Policy Implications” [1994] J. Disp. Resol. 1.
See also, as referenced (although not addressing judicial mediators): Michael

On the three specific areas, as to the first, confidentiality, Otis and Reiter, refer to both the need as a part of the process, and the ethical dilemma for the judicial mediator. They correctly assert that “[t]he entire efficacy of mediation rests on the confidentiality of the proceedings; without confidentiality, frank exchanges of ideas and the climate of trust necessary for fruitful negotiations are both impossible”.⁶⁰⁴

As to the protection of confidentiality, they don’t provide any real answers to the ethical dilemma, but merely identify some of its aspects that derive from the “the closed nature of the mediation process”: the release to the judicial mediator of sensitive information which s/he “must know how to use ... to promote settlement while at the same time respecting the exigencies of confidentiality”; that the “balancing act comes out most clearly with regard to caucus sessions or *ex parte* meetings with the parties individually ... confidentiality within confidentiality”; and the sometime instruction to release certain information to the other side in a shuttle-diplomacy caucusing context (now called “noisy disclosure” - see *infra*) - not

Moffitt, “Suing Mediators”(2003) 83 B.U. L. Rev. 147; and Michael Moffitt, “Ten Ways to Get Sued: A Guide for Mediators” (2003) 8 Harv. Negot. L. Rev. 81.

⁶⁰⁴

Otis & Reiter, *supra* note 7 at 395, referencing, as to both need for, and protection of, confidentiality, *inter alia*:

- Adams, *supra* note 594 at 290-300;
- Carrie Menkel-Meadow, “Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities” (1997) 38 S. Tex. L. Rev. 407, at 441-3;
- Anne M. Burr, “Confidentiality in Mediation Communications: A Privilege Worth Protecting” [2002] 57 Dis. Resol. J., at 64, 66;
- John A. Epp, “Civil Pretrial Conference Privilege: ‘A Cosmic Black Hole’?” (1993) 72 Can. Bar Rev. 337;
- David A. Ruiz, “Note: Asserting a Comprehensive Approach for Defining Mediation Communication” (2000) 15 Ohio St. J. on Disp. Resol. 851;
- Ellen E. Deason, “Predictable Mediation Confidentiality in the U.S. Federal System” (2000) 17 Ohio St. J. on Disp. Resol. 239; and
- Maureen A. Weston, “Confidentiality’s Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation” (2003) 8 Harv. Negot. L. Rev. 29.

only raising the possibility of inadvertent leaks of the wrong information but also engaging potential issues of judicial impartiality. The only remedy offered is that “[n]egotiating this minefield requires solid and thorough skills training”.⁶⁰⁵ I agree.

As to party autonomy, Otis and Reiter give recognition to the fact that the role of the judicial mediator is “circumscribed in particular distinctive ways” because the parties (and their counsel) have a large measure of control of the process and the outcome, and thus the usual role of the justice as “the guardian of fairness of the process” is “limited to verifying that the parties give real consent to the agreement they reach and that the settlement respects public order and is not manifestly and extremely unfair”. Accordingly, while the judicial mediator remains a judge with all the “status, powers, and duties” that entails, s/he is “not to adjudicate”.⁶⁰⁶

As to fair treatment, Otis and Reiter correctly assert that “[t]hrough the specifics of the procedure to be followed and the substance of any agreement are up to the parties, the judge-mediator must work to protect the integrity of the mediation process from abuses of influence or power”, and add that any such issues must thus be dealt with “at the outset”, for the benefit of the subject mediation and the mediation process in general. Power and cultural issues are specifically recognized for “careful and respectful treatment, with additional emphasis on unrepresented parties.”⁶⁰⁷

⁶⁰⁵ Otis & Reiter, *supra* note 7 at 396.

⁶⁰⁶ *Ibid*, at 396-7. Note, as it relates to Smith’s view (Smith, *supra* note 13 at 10) of the need to approve the settlement as if it were a judgement, this, assuming the process is fair, in my view, is the limit to the protection of the “public order” and “fairness” of the settlement itself.

⁶⁰⁷ Otis & Reiter, *supra* note 7 at 397-8, referencing, *inter alia*:
 - Jonathan M. Hyman, “Swimming in the Deep End: Dealing with Justice in Mediation” (2004) 6 *Cardozo J. Conflict Resol.* 19;
 - Robert S. Adler & Elliot M. Silverstein, “When David Meets Goliath: Dealing with Power Differentials in Negotiations” (2000) 5 *Harv. Negot. L. Rev.* 1;

Smith argued that, with the move to alternative methods of judicial dispute resolution, “ethical issues and such [were] only being considered as settlement conferences increased in frequency”.⁶⁰⁸ She later referenced another author⁶⁰⁹ for the statement that there is a “risk of judicial non-compliance [with disclosure training and ethical standards in settlement]” and that “the clearer the ethical rules become and the more convincing the rationale behind them, the greater the likelihood of compliance”. I have no difficulty with this proposition, and thus the reason for this Evaluation Report identifying such issues⁶¹⁰. She includes in the list, dealing with those issues, and encouraging training regarding them - to that extent only, I support her statement that, rather than just the “No Trial” rule (*L.N.*⁶¹¹), it is “preferable to confront practices which have the potential to undermine the position of the judiciary”.⁶¹² Thus, it is easy to support her endorsement, in turn, of Justice Jackson:

In her work Ethical Principles for Judges, Jackson concluded that the Ethical Principles ‘dovetail(s) nicely with the goals of an integrated system for judicial mediation in Canada.’ ‘Judicial mediators are successful for the reason that they are judges

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- Trina Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100 Yale L.J. 1545, at 1582-83;
 - Penelope E. Bryan, “Killing Us Softly: Divorce Mediation and the Politics of Power” (1992) 40 Buff. L. Rev. 441, at 477-548; and
 - David Kahane, “Dispute Resolution and the Politics of Cultural Generalization” (2003) 19 Neg. J. 5.

⁶⁰⁸ Smith, *supra* note 13 at 9.

⁶⁰⁹ *Ibid*, at 22-3, relying on Cratsley, *supra* note 52 at 596 (notice that this article is also published in [2006] Dispute Resolution Magazine 16, and Smith makes reference to 48 thereof).

⁶¹⁰ *Ibid*. Smith includes (at 23) in the list “ex parte communication, private conferences with only the clients, broken promises of confidentiality, and ever increasing judicial pressure to settle”, all addressed herein.

⁶¹¹ *L.N.*, *supra* note 19.

⁶¹² Smith *supra* note 13 at 23.

bound by ethical principles: independence, diligence, integrity, equality and impartiality'.⁶¹³

Let's be clear that - the last time I checked - judges were still human, and all humans make mistakes of judgment. Undoubtedly judges will, or will be perceived by the public or appellate courts, to have made mistakes in the conduct of JDRs. But a mistake in judgment relating to process or reasoning, does not condemn the system or the service being delivered that the users want. Thus, one provides training to avoid errors, which is positive, but the existence of errors does not cause the system to be abandoned. Simon put the concept this way in the context of lawyers, but applicable to judges:

Individual lawyers will make mistakes. But as we readily recognize in the case of judges, the fact that a practice of judgment sometimes produces some controversial or even mistaken decisions does not make the practice an illegitimate one.⁶¹⁴

Nevertheless, the concerns raised by these authors and others indicate that we should take the issue of judicial conduct and the need for guidelines very seriously. Parness put it in these terms: "But the best response [to these concerns] is not to abolish or severely restrict settlement conferences. Rather, it is to add more formality and more written guidelines".⁶¹⁵ In the Court's case, the formality and guidelines are set out in the Guidelines (Appendix 7) and will be in the Rules. I am not satisfied that more formality is now necessary, but seminars and writings such as this Evaluation Report can provide continued guidance.

⁶¹³ *Ibid* at 23, quoting from G. Jackson J. A., "Judicial Ethics and Judicial Mediation", International Exchange Program for the Development of an Integrated System for Judicial Mediation. Case Study of the Judicial Mediation System in Quebec. National Judicial Institute and Court of Appeal of Quebec. Montreal, Canada, October 3-7, 2005, at 26 (emphasis in original).

⁶¹⁴ Simon, *supra* note 14 at 52.

⁶¹⁵ Parness, *supra* note 590 at 1908. The current written JDR Guideline (Guidelines, *supra* note 190) from 1996 is attached as Appendix 7.

4. TERMINOLOGY - AGAIN

Before getting to the depth of the judicial conduct issues, there is (as alluded to *supra*) conflict in the terminology pertaining to the real subject of this section. *Quelle surprise*, as that is an issue - an unnecessary one in my view - in the whole JDR area *supra*. Specifically, in the context of this discussion “ethics”⁶¹⁶ is the wrong label and “conduct” is more appropriate, because: “Ethics has to do with *character*; it asks ... “What kind of person should I *be*?” Morality - has to do with *conduct*; it asks ... “What in any given circumstance ... should I *do*?”⁶¹⁷ However, there seems to be no assistance on this point from other authors. For example, while the treatise is called *Judicial Conduct and Ethics*, Alfini et al, as far as I can discern, at least in the fourth edition, do not define or distinguish between the two terms, but seem to treat them synonymously, as seen in the following statement in the preface: “The history of judicial ethics in the United States reflects a century-long movement toward taking judicial conduct ever more seriously”.⁶¹⁸ It is in the context defined by Professor DeCoste that I intend to address “conduct”, and I shall use that term, but the reader should be aware that others whom I reference may use “ethics” in either of these two contexts.

5. PURPOSE = GUIDANCE

Leaving the labels of “ethics” and “conduct” behind for the moment, and focusing on the purpose, in providing an evaluation of the JDR Program

⁶¹⁶ Gabriel, *supra* note 107 at 89, relying on the 1985, *Webster’s Ninth New Collegiate Dictionary* 426, to define “ethics” as “the discipline dealing with what is good and bad and what moral duty and obligation; a set of morals or values; the principles of conduct governing an individual or a group. Despite the internal use of “conduct”, it does not clearly answer the question.

⁶¹⁷ DeCoste, *supra* note 64 at 274, and later, to the same effect, at 288 -9.

⁶¹⁸ Alfini, “Judicial”, *supra* note 589 at ix.

on the subject, I want to weld the theoretical to the practical in a way that provides meaningful and helpful advice to my colleagues. Indeed, the whole purpose of the section on “Judicial Conduct” is to assist in providing guidance to my colleagues for their consideration. In this context, I start with the discussion of Simon on the subject, which, with some changes, can be adapted, or expanded, to my role here. He said:

Role theorists often complain that they have trouble engaging their students in ethical discussions. Discussion often consists of serial streams of consciousness in which each student explains how she “feels” about the matter. When the teachers try to beef things up with philosophical texts, students find them boring or too difficult. The teachers sometimes complain that the students are too “vocational .” But even idealistic students who have been drawn to law school by some sense of the ethical possibilities of the lawyering role are not likely to feel that what they are looking for is ways to protect themselves from the role. And all students reasonably expect the subject of legal ethics to engage more directly the craft knowledge that they are learning in their other courses.⁶¹⁹

I don’t wish to spend too much time on ideas that others think are ethical, when they are actually only preferences for whatever reason they justify. However, I also don’t want the theory to be just that - too theoretical. I want the messages to relate to the actual process undertaken, the skills and “craft” applied, and the results experienced in JDRs. However, much of the reason for the relevance is to actually protect individual JDR justices, the reputation of the Court and the principled practice of justice, and justice in the substantive result. Thus, it is with this purpose and view point that I continue this discussion.

In looking at the history of judicial involvement in settlements activity, Judge Cratsley, in advocating formality and written guidelines (*supra*), concluded that “[t]he time has arrived ... for the enactment of *explicit* ethical

⁶¹⁹ Simon, *supra* note 14 at 18.

rules in the [American Bar Association's] Model Code of Judicial Conduct governing judicial settlement activity in civil cases".⁶²⁰ I believe that "explicit" is used in this reference because much of the United States codes of conduct, while more explicit than the Canadian "principles" are still very general. He goes on to propose "one simple ethical rule - a bar on any judge who undertakes settlement activity from ultimately trying the case if settlement fails".⁶²¹ This need for formality and written guidelines (as noted, *supra*) has been accomplished in Alberta JDRs by the Guidelines for JDR (Appendix 7), which deals with a number of conduct constraints, one of which specifically prevents a JDR justice becoming a trial justice, except by party consent, and, as we shall see, *L.N.*⁶²² has severely limited even that - thus rendering much of his article to support this Evaluation Report unnecessary for us to consider herein. Yet, notwithstanding his proposal for "one simple ethical rule", he nevertheless goes on to recommend "other more detailed ethical rules such as ... disclosure of the settlement technique to be used by the judge, and mandatory training for any judge undertaking mediation or any other form of settlement activity".⁶²³ I will be recommending both herein, the former by the JDR Justice Profile.

⁶²⁰ Cratsley, *supra* note 52 at 571 (emphasis added).

⁶²¹ *Ibid.*

⁶²² *L.N.*, *supra* note 19.

⁶²³ Cratsley, *supra* note 52 at 571. Later, at 584-6, and 591, he commented that the 2005 recommendations for amendment to the 1990 ABA Model Code of Judicial Conduct "would insure that the attorneys and parties involved receive, prior to the judicial settlement event, 'clear and objective descriptions of reasonable expectation for their participation in the settlement activity'." He also recommended training for judges be the same as required for non-judges doing mediation.

B. JUDICIAL CONDUCT - THE BASICS

The “basics” go back to the beginning of time - to examine the “appropriate historical, philosophical, or religious context”.⁶²⁴ Indeed, in a broad way, Coquillette, while addressing law students on professional responsibility, as applied ethical philosophy⁶²⁵, sets the tone for the discussion to follow. In modern times, he says, one starts with K.N. Llewellyn’s *The Bramble Bush*.⁶²⁶ Coquillette, relying on many historical and more modern sources, traces the discussion back to “moral absolutes” as interpreted by Aristotle and Socrates, and recounted by Plato. He goes on to address this under headings such as The Moral Person and Moral Responsibility, progressing to more modern times.⁶²⁷ While the depth of this philosophical review is beyond this Evaluation Report, it will give the academic scholar, who might want to research further, an introduction to the tools by which to do so. Instead, I will turn my attention to the task at hand.

For a judge, who was (along with others) once a lawyer, and to whom the same standard applies proper conduct must be the first principle:

*... judges and ... lawyers are obliged to act as the good faith stewards of the Rule of Law.... All other obligations that attach to [judges] ... depend upon and devolve from this primary obligation.*⁶²⁸

Nevertheless, Macfarlane asserts that there is an “absence of discussion of ethical questions” by professional educators and relies on

⁶²⁴ Coquillette, *supra* note 547 at xv.

⁶²⁵ *Ibid* at xv-xvi, and 1.

⁶²⁶ *Ibid* at xv-xvi, and 1, referencing K.N. Llewellyn, *The Bramble Bush* (New York: Oceana Publications Inc., 1960).

⁶²⁷ *Ibid* at Chapters I and II, at 1-54 *et seq.*

⁶²⁸ DeCoste, *supra* note 64 at 278 (emphasis in the original).

several authors to support the footnoted statement that there are “challenges of teaching ethics to prospective lawyers” and there is an “extent to which the law schools fall short” in this regard.⁶²⁹

In accord with this primary obligation, judges have a special role which demands exemplary conduct in whatever judicial role they are performing. Indeed, there is some authority to suggest that unlike the source from which they originate, judges are “traditionally held in the highest popular regard and even reverence”.⁶³⁰ Thus, it is important to recognize that:

Judges govern in a fashion more direct and more substantial than do other lawyers.... judges declare the law and determine the facts. They are in consequence especially bound by “the concern of [their] subjects which is the most basic requirement which political morality imposes on those who govern”. As Mill so eloquently understood, *this requires judges to take ever so seriously the parties who appear before them*.⁶³¹

Kronman, in a lengthy passage worthy of stating here, had this to say about role of judges:

... the role judges occupy is one in which the need for moral reflection is steadier and more insistent than in almost any other position....

...

... judges have a special custodial responsibility that others share only to a lesser degree. Judges are required by their role to do all that they can to preserve the form of social life that the laws express, and this demands a broader, more

⁶²⁹ Macfarlane, *supra* note 25 at 32 and 251, footnote 24.

⁶³⁰ Gabriel, *supra* note 107 at 89.

⁶³¹ DeCoste, *supra* note 64 at 285, quoting from R. Dvorkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) at 370, and referencing J.S. Mill, *Considerations on Representative Government* (1861), reprinted in J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, H.B. Acton, ed. (London: Dent, 1972) at 403. Emphasis in the original.

reflective understanding than most citizens possess of the background conditions that give the laws their meaning, purpose, and aspirational force. ... if a judge fails to preserve the laws because he does not understand the background that sustains them, this is a larger failing, given that the work of preservation [of the law] is for him a special duty and a defining feature of his role. So a judge not only needs reason (as we all do) to meet his custodial responsibilities, he needs it with a special urgency, because these responsibilities are in his case particularly weighty.

...

... the task of judges is ... to bring the animating principles on which our legal order rests more and more into the open, and to arrange them in an articulate system of norms that self-consciously display our character as a people and thus enhances the integrity of the laws....

...

... To preserve the peace in our morally fractious society, it is essential to maintain a regime of tolerance, and it is first and most importantly the responsibility of judges to do so. Judges have the main responsibility for ensuring that the conflict of moral commitments is moderated by an overriding (legal) norm of noninterference. They have a duty to police the conflict of ideas and make sure it remains within bounds. But in order to meet this duty, they must rise above the rival moral communities whose conflict it is their obligation to contain. They must conceive this conflict, and deal with it, from an independent and nonpartisan perspective - from a vantage point that may draw upon, but cannot owe its allegiance to, any of the communities involved, for only in this way can they construct a credible scheme of toleration that all will respect.

...

... judges, whose obligation to maintain our country's norm of toleration compels them to keep the claims of every ... community at arm's length, must also rely on moral reason to an extraordinary degree - in their case ... because the special role they occupy demands it.

... the work that judges do leaves more room for moral reason, and makes heavier use of it, than do most other social or political tasks.⁶³²

While expressed in the context of judges limiting their declarations of the law to the real issues before them, this statement is equally applicable to a judge in a JDR role: “There is something very deep and moving at play when judges do justice by honouring the limits and practice of their office”.⁶³³ In my view this is apropos, because, in the context of JDR, a JDR judge must always keep in mind the “limits and practice of [his/her] office” - that is, a judge is no less a judge because s/he is in a JDR role. My colleague, Smith, makes this very clear in her paper on judges in JDR - indeed, I believe it is one of the most important legacies of her paper.⁶³⁴

As noted *supra*, much of the material on legal professional conduct focuses on lawyers, not judges, and even there it is more on the general principles or the traditional role of a lawyer as an advocate in an adjudication, rather than as a negotiator or one involved in JDR process. Nevertheless, there is some material addressing professional conduct of lawyers in negotiations and JDRs. But, throughout, again, there is much less that is transferable to the judicial role, because, while there are some similarly based tenets, it is very different in scope. That being said, if necessary, one

⁶³² Anthony Kronman, “The Value of Moral Philosophy”. (1997-8) 111 Harv. L. Rev. 1751-1767, at 1762.

⁶³³ DeCoste, *supra* note 64 at 285.

⁶³⁴ Smith, *supra* note 13. As is clear throughout this Evaluation Report, with tremendous respect, I very much disagree with many of the views of my colleague - as I will in detail shortly - *infra*. However, there is no issue between us on at least two matters: her sincerity to her views as to the proper role of judges in the context of the rule of law (although I often disagree with the specifics of her views); and her (and my) dedication to the view that judges have a very special role in the context of the rule of law and must always put it foremost, and especially to do so in the context of the challenges created by JDR becoming a part of the new norm of justice in the Court.

could look at these sources and make the necessary adjustments to consider them from a judicial point of view.

The subject matters generally included in these materials - some aspects of which are broadly applicable to the JDR justice - are: how to deal with misleading acts and omissions, specifically, non-disclosure or only partial disclosure; issues of confidentiality⁶³⁵; and varying degrees of lying, misleading, and out and out fraud. Related issues include: allowing the other side to save face in light of negative information (especially if disclosed in a surprising way) - a matter very important to the JDR justice; lack of honesty with the client (including not giving accurate, but rather couched, opinions, to the client, and misleading a client as to the appropriate timing of settlement); overzealousness; and how to ethically negotiate without showing your hand (the playing card analogy).⁶³⁶ While the avenue of adapting such lawyerly ethical issues to judicial conduct in the JDR context is open for examination, there are *some* judicial sources.

1. CANADIAN JUDICIAL CONDUCT PRINCIPLES

⁶³⁵ Some of the generic reasons for confidentiality are explored by Singer, *supra* note 42 at 173-4. See also Catherine Morris on this subject, including caucusing, in Macfarlane, "Rethinking" *supra* note 220 at 332-335.

⁶³⁶ Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (London: Belknap Press, 2000), at 274-98.

The Canadian Judicial Council (CJC), published “*Ethical Principles for Judges*” in 1998.⁶³⁷ This publication specifically indicated⁶³⁸ that it was building upon, *inter alia*, the work of the Hon. J.O. Wilson⁶³⁹; CJC Commentaries⁶⁴⁰; and Beverley Smith, *Professional Conduct for Lawyers and Judges*.⁶⁴¹

These sources contribute nothing specific to the debate about judicial conduct relevant to JDRs. However, in its first chapter, the *Book for Judges* did repeat a principle that is symbolic of the background to the whole debate about judicial participation in any judicial function, including settlement procedures:

... general principle governing all aspects of judicial behavior. That principle is best stated in Lord Hewart’s famous dictum in *Rex. v. Sussex Justices*, [1924] 1 K.B. 256 at p. 259:

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- ⁶³⁷ CJC, “Ethical Principles”, *supra* note 562.
Otis & Reiter, *supra* note 7 at 393, say that such works, which “reflect traditional judicial ... practice”, “can be adapted to the practice of mediation only with difficulty”, saying in a footnote that the application of this specific work to judge-mediators is “neither entire nor always evident”. Regarding the United States, they reference Gabriel, *supra* note 107 at 89-95.
- ⁶³⁸ CJC, “Ethical Principles”, *supra* note 562 at 4.
- ⁶³⁹ Wilson, *supra* note 588 at 3. This source did not discuss any aspect of judicially facilitated settlements, but it was admitted: “Necessarily we do not purport to cover every problem of judicial conduct that may arise” - not surprising, because there were no judicially facilitated settlement discussions in 1980.
- ⁶⁴⁰ CJC Commentaries, *supra* note 588.
- ⁶⁴¹ Beverley Smith, *Professional Conduct for Lawyers and Judges* (Fredericton: Maritime Law Book, 1998).
Other sources identified, include:
- J.B. Thomas, *Judicial Ethics in Australia*, 2d. (Sydney: Law Book Company, 1997);
- J. Shaman et al, *Judicial Conduct and Ethics*, 4th. (Newark: LexisNexis, 2007);
and
- S. Shetreet, *Judges on Trial* (New York: American Elsevier, 1976).

“(It) is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”⁶⁴²

The author felt a need to explain, adding some valuable emphasis:

This pronouncement, so simply stated, so profound in its sagacity *can never*, how often repeated, *become a cliché*. ... Justice, of course, comes first but the appearance of justice is also of major importance.

...

Lord Hewart’s precept applies not just to the conduct of the judge in relation to litigation.... From this may follow not only distrust of the work of that particular judge but some loss of faith in the whole judiciary.⁶⁴³

Additionally, apparently unaware of the impending JDR issue of caucusing, the *Book* stated: “No judge should talk with one counsel about any case in the absence of other counsel”.⁶⁴⁴ The only discussion of settlements appeared under a title of that name, addressing both coercion to settle and caucusing:

Sometimes a judge may think that a case should be settled. It is always wrong for him to force a settlement on persons who want to litigate. If he thinks the case is so exceptional that it is his duty, in the interests of the

⁶⁴² Wilson, *supra* note 588 at 3.

⁶⁴³ *Ibid*, at 3 (emphasis added).

⁶⁴⁴ *Ibid*, at 52.

Adams, a former superior court justice, addresses (*supra* note 594 at 183) some judicial concern with caucusing. See also Smith, *supra* note 13, *inter alia*, at 15-7, 23, 25, 31 and the very last sentence at 33.

Ultimately, I believe that the issue of caucusing largely turns on whether there might be a reasonable apprehension of bias, in the eyes of “an informed dispassionate public that holders of judicial office will remain at all times worthy of trust, confidence and respect”, by that fact and a judge “inappropriately aligning” him/herself, as was the finding in the Cosgrove Final Report, at para. 6 - see also para. 31, quoting from *Moreau-Bérubé*, at para. 72.

litigants, to suggest settlement he should say so in open court and not in his chambers.⁶⁴⁵

How far the litigation world has come from that day to the day of JDRs in Alberta!

Similarly, eighteen years later, CJC Ethical Principles still did not address conduct in the context of JDRs but only on a broader basis, clearly contemplating only the traditional adjudicative function of the judiciary.⁶⁴⁶

The general nature of the guidance for judicial conduct is beyond the scope of this Evaluation Report - indeed, this Evaluation Report starts from the premise that these general principles of judicial conduct are in place, and then examines what more focused application of existing principles should apply and what, if any, additional layer of principles of judicial conduct relating to JDRs should be added thereon. Thus, I will only address the broad principles emanating from the CJC “Ethical Principles” in the context of their adaption to the JDR context, although Otis and Reiter note this caution:

Our current ethical models in law were developed primarily in the context of adversarial litigation and interpersonal conflict.... As such, mediation requires that legal ethics be redefined away from the paradigm of competition and towards... ‘non- adversarial ethics’.

⁶⁴⁵ Wilson, *supra* note 588 at 55.

⁶⁴⁶ CJC, “Ethical Principles”, *supra* note 562. However, it became widely recognized 30 years ago in the U.S., and I believe true now in Alberta and elsewhere in Canada, that the “judicial role in settlement is ‘not that of a traditional judge, [it] is that of a mediator’.”: Gabriel, *supra* note 107 at 94, quoting U.S. District Judge Hubert L. Will in Will, Merhige & Rubin, “The Role of the Judge in the Settlement Process” (1978) 75 Federal Rules Decisions 203, at 205.

Existing ethics codes and principles, whose rules tend to reflect traditional judicial and lawyerly practice, often can be adapted to the practice of mediation only with difficulty.⁶⁴⁷

Accordingly, although, broadly speaking, one can apply the CJC “Ethical Principles” to judge-mediators, its true “applicability is neither entire nor always evident”.⁶⁴⁸

It should also be noted, in limitation, that the CJC “Ethical Principles” are advisory only: “They are not and shall not be used as a code or a list of prohibited behaviors. They do not set out standards defining judicial misconduct”.⁶⁴⁹ This would seem to be appropriate in at least one sense, as codes of conduct (here expressed in the context of lawyers, but equally applicable to the judiciary) cannot anticipate every situation:

... in the discussion of codes of conduct, for any set of beliefs and values there is individual interpretation and application as well as the context to consider. An attempt to extrapolate core beliefs must acknowledge, but cannot account for, the multiple variations in the way in which they may be interpreted and played out by individual practitioners and applied by their communities of practice.⁶⁵⁰

The CJC “Ethical Principles” addresses five specific principles: judicial independence, integrity, diligence, equality and impartiality. As there are no other judicial conduct standards set in the context of JDRs, which of these principles have application to the JDR process?

⁶⁴⁷ Otis & Reiter, *supra* note 7 at 393.

⁶⁴⁸ *Ibid*, and footnotes 197-9, relying on Adams, *supra* note 594 and Carrie Menkel-Meadow, “Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities” (1997) 38 S. Tex. L.R. 407, at 414.

⁶⁴⁹ CJC, “Ethical Principles”, *supra* note 562 at 3.

⁶⁵⁰ Macfarlane, *supra* note 25 at 48.

As to judicial independence, the CJC Principles specified two principles

of some general relevance to JDRs:

3. Judges should encourage and uphold arrangements and *safeguards* to maintain and enhance the institutional and operational independence of the judiciary.⁶⁵¹
4. Judges should exhibit and promote high standards of judicial conduct so as to reinforce *public confidence* which is the cornerstone of judicial independence.⁶⁵²

That judicial independence is important is beyond debate, but that it is “intertwined” with judicial conduct should be clear:

... there can be no judicial independence if the judiciary, both in fact and in the public perception, fails to conform to rigorous ethical standards. Judicial independence can be destroyed by attacks from without, but just as surely it can be undermined from within. There is no quicker way to undermine the courts than for judges to violate ethical precepts that bind judicial officers in all societies that aspire to the rule of the law.⁶⁵³

While these principles associated with judicial independence may seem trite, in my view, they raise cautions in the JDR context. I say “cautions”

⁶⁵¹ CJC, “Ethical Principles”, *supra* note 562 at 7 (emphasis added). “Safeguards” in the design, implementation and operations of JDR systems are frequently counseled - see, for example: James F. Henry, “No Longer a Rarity, Judicial ADR is Preparing for Great Growth - But Much Care is Needed” (1991) 9 *Alternatives to High Cost Litig.* 95, at 95 -6, where the author stated:

... the courts are both the premier providers and conscience of dispute resolution in our society. As such, the courts must play a critical role in ADR.

...

... As courts institutionalize ADR programs, the designers must take pains to safeguard our system of justice. They must devise ways to assure the equity and quality of ADR initiatives.... And they must make careful choices between some competing values - for example, between confidentiality in ADR and the traditional public nature of the courts.

⁶⁵² CJC, “Ethical Principles”, *supra* note 562 at 7 (emphasis added).

⁶⁵³ Anthony M. Kennedy (Justice of the Supreme Court of the United States), “Judicial Ethics and the Rule of Law” (1995-1996) 40 *St. Louis University Law Journal* 1067 [Kenndey], at 1067.

for further guidance only, because I don't ascribe to the view of some, including some of my current or former colleagues on the Court, that this means the Court should not have undertaken JDRs, or should now retreat from providing that service⁶⁵⁴, because they are outside the traditional adjudicative role of the judiciary. My judgment on this is, I believe, strengthened by one of the points raised in the "Commentary" in the CJC "Ethical Principles", to the principle of judicial independence: "... care must be taken not to risk trivializing judicial independence by invoking it indiscriminately in opposition to every proposed change...".⁶⁵⁵ The cautions aforementioned, perhaps viewed by some as the opposite of a more open and accessible judiciary, include, as I interpret it, views (more surmised than heard) by some judges that, in effect, by coming off the bench and descending into the forum⁶⁵⁶, they (individually and institutionally) lose some of the respect with which the public now regards them. While I would recommend judges guard against undue "familiarity" that may have that effect, the positive side, is that the judiciary gets much more respect for the human and relevant role they play, rather than a public view that judges merely sit in their ivory towers and "declare the law". The Survey, and, in particular, the qualitative comments very much support this understanding.⁶⁵⁷

⁶⁵⁴ For example, Smith, who probably best represents those views. However, I don't believe any now advocate the latter view, and, indeed, there are, in addition to some who may be "neutral", many keen proponents - perhaps some that even fit into Adams & Bussin's "messianic proponents" - *supra* note 3 at 133.

⁶⁵⁵ CJC, "Ethical Principles", *supra* note 562 at 10 (Item 6).

⁶⁵⁶ This is both literal, in the sense that, normally, judges conduct JDRs in conference rooms, not courtrooms, and that they get actively involved in negotiations, rather than the more pristine role of merely hearing evidence and submissions, and rendering an adjudication. Moreover, in the JDR process the "physical and psychological distance between judge and litigants narrows as judges discard their disinterested [objective] poses and pursue more active stances.": Antalovich, *supra* note 591 at 117.

⁶⁵⁷ One satisfied client was particularly poignant on the point: "the efforts of the judge to reach a solution in this case were phenomenal - the judge's experience approach, feedback of suggestions really were the key to solving this case - I came away with a true admiration for the system of JDR's and judges in particular

Nevertheless, the words “safeguards” and “public confidence” in sub-principles to the Principles 3 and 4, are significant. The former may well be appropriate because I do believe strongly that the JDR process does add risks to the judiciary in a number of conduct perspectives, and judicial independence is one of them. Thus “safeguards” and “best practices” are important to be established, maintained and modified as appropriate. “Public confidence” or “public trust”⁶⁵⁸ in my view goes to how well a judge performs a JDR, which includes not only “conduct”, but all other aspects of trying to provide a useful service - including preparation, knowledge, fairness, impartiality⁶⁵⁹, and many other traits (some examined in the Survey, which demonstrate a very high vote of “public confidence”).

Macfarlane addressed fairness and procedural justice:

... perceptions of fair treatment are as important as outcome when disputants come to appraise dispute resolution processes. While there is an obvious relationship between a sense of fair process and a favorable outcome, this work indicates that these judgments are substantially

- I used to think that judges were overpaid - not anymore - this experience has made me re-evaluate my opinions and my trust in the legal system - or at least this aspect of it - the one factor I did not foresee in a JDR was that it forces lawyers, in particular, the, how shall we say, less desirable ones, to appear amiable towards a settlement - this was very apparent in our case, which is why I am so grateful for the judge's efforts - as well, the experience was very educational - I learned a lot from the judge and about these types of cases in that one day”: Appendix, 5, section I3.

Another said: “all I can say is, whatever the justice is being paid, it's probably not enough”: Appendix 5, section O3.

⁶⁵⁸ Smith, *supra* note 13 at 27-30, addresses this with the opening question as to “whether the public will continue to trust a process which increasingly takes place in private, in secrecy”, although she later, appropriately, acknowledges that “the judicial settlement conference has the added benefit of the trust the public still has in the historical processes of the justice system setting apart the judicial neutral from his/her counterpart in the private sector”.

⁶⁵⁹ The ability to achieve these last two goals of fairness and impartiality in a mediation is explored by Susan Nauss Exon, “How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators” (2006) 2 Judicial Dispute Resolution 387 [Exon]. While raised in the context of private mediation, it raises issues for further development in JDRs.

independent⁶⁶⁰

Procedural justice research also explores what factors are seen by process participants as being critical to fairness. These include a belief that one's issues are being given serious consideration; a feeling that one has been listened to and that the listener, even if she ultimately rejects one's argument, can explain how she took account of these factors in any final judgment; a minimal level of comfort with one's own role in the process that unfolds; and some type of control over the process. What procedural justice theorists term "decision control" translates, in dispute resolution, into some level of direct client involvement – for example, planning, anticipating, strategizing, or reviewing options, whether or not actual participation is desired.

It is noteworthy that these elements of process are generally more characteristic of less formal settlement-orientated processes – such as mediation or judge-led settlement conferences that include clients directly, address them specifically, and solicit their input and other process alternatives that encourage more face-to-face interaction at an early stage – than formal adjudicative approaches. At the same time, procedural justice research also suggests the need for dispute resolution processes to be dignified and associated with a sense of order and gravitas, including the need for third parties to be both trustworthy and authoritative, which suggests that traditional adjudication may sometimes appear more appropriate than more informal procedures such as mediation or pre-trial.⁶⁶¹

⁶⁶⁰ Landerkin & Pirie, *supra* note 25 make the same point, at 255, referencing:
 - E . Lind and T. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988); and
 N. Welsh, "Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?" (2001) 79 Wash. U .L.Q . 787.

⁶⁶¹ Macfarlane, *supra* note 25 at 57-8 (footnotes removed), referencing:
 - J. Thibault, L. Walker, S. LaTour, and S. Houlden, "Procedural Justice as Fairness" (1974) 26 Stanford Law Review 1271;
 - J. Thibault and L. Walker, *Procedural Justice: A Psychological Analysis* (New York: Erlbaum, 1975);
 - K. Lueng and E.A. Lind, "Procedural Justice and Culture: Effects of Culture, Gender and Investigator Status on Procedural Preferences" (1986), 50 Journal of Personality and Social Psychology 1134;
 - E.A. Lind, Y.J. Huo, and T. Tyler, "... And Justice for All: Ethnicity, Gender and Preferences for Dispute Resolution Procedures" (1994) 18 Law and Human

Posner calls this a “mystique” necessary to develop trust.⁶⁶² This is very much evident in the Survey results, both quantitative and, especially, qualitative.

In my view, discussion of the principle of “integrity”, as chronicled in the CJC “Ethical Principles”, is very broad and appropriate in general, but it adds nothing of specifics to the debate in the context of JDRs.

The principle of judicial “diligence” in the CJC “Ethical Principles” is very relevant to JDRs - in part due to the broader reach it takes, but also in the recognition that JDRs are very consuming of judicial energy in their provisioning. The first two sub-principles of “diligence” are specifically relevant to JDRs:

1. Judges should devote their professional activity to judicial duties broadly defined, which includes *not only presiding in court and making decisions, but other judicial tasks essential to the court’s operation.*
2. Judges should take reasonable steps to *maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.*⁶⁶³

Behaviour 269;

- E.A. Lind and T. Tyler, *The Social Psychology of Procedural Justice* (London: Plenum Press, 1998);

- T. Tyler, “The Role of Perceived Injustice in Defendants’ Evaluations of their Courtroom Experience” (1984) 18 *Law and Society Review* 51;

- T. Tyler, “Conditions Leading to Value Expressive Judgments of Procedural Justice: A Test of Four Models” (1987) 27 *Journal of Personality and Social Psychology* 333; and

- A. Lind, “Procedural Justice, Disputing and Reactions to Legal Authorities”, in A. Sarat, ed., *Everyday Practices and Trouble Cases* (Evanston: Northwestern University Press, 1998).

⁶⁶² Posner, “Judges” *supra* note 474 at 3, referencing his own work, *The Problematics of Moral and Legal Theory* (Cambridge, MS, Harvard University Press, 1999), at ch. 3.

⁶⁶³ CJC, “Ethical Principles”, *supra* note 562 at 17 (emphasis added).

The first of these sub-principles clearly recognizes that adjudication (“presiding in court and making decisions”) is not the only task that is “essential to the court’s operation”. I very much believe that, in the 21st century, JDRs fit within this broader approach. The Commentary supports this view in what it calls “other out of court activities”, in which it includes “case management and pre-trial conferences”, both of which have a relation to - indeed, may be the *raison d’être* for, JDRs.

The second of these sub-principles is the motivation for initial, and additional, education and training in all aspects of JDRs, including judicial conduct, which the Commentary says includes “continuing education programs as well as private study”.⁶⁶⁴ I will address this aspect of “conduct” *infra*, because, in my view, it is not really “conduct” but rather, although important, merely education and training.

As to equality, the sub-principles are quite general, but provide broad guidelines:

1. Judges should carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination.
2. Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.⁶⁶⁵

These sub-principles mean that: the judiciary must make all services open to the public, including SRL, without discrimination⁶⁶⁶ - this surely

⁶⁶⁴ CJC, “Ethical Principles”, *supra* note 562 at 19.

⁶⁶⁵ *Ibid*, at 23. See Otis & Reiter, *supra* note 7 at 386 for the discussion on such matters relevant to the mediation step of “communication and negotiation”.

⁶⁶⁶ Danielson, *supra* note 4 at 3 stated that the JDR Program is “only available to

includes all aspects of services, including JDRs, that would be provided to a represented party⁶⁶⁷; and the latter speaks to both the relevance of training pertaining to these factors, and that the substance behind these factors, may not only have an underlying role in the dispute, but also in the solution.

Of the sub-principles of “impartiality” the following is the most specifically relevant to JDRs:

1. Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.⁶⁶⁸

This arises in the context of caucusing, and addresses both the reality and perception of impartiality, that will merit discussion *infra*.

2. U.S. MEDIATION CODES

disputants who are represented, other than in rare exceptions”. While that may have once been close to being accurate, and a number of JDR justices do not do JDRs with SRLs, it is not longer the “rare exception”. However, almost always a JDR justice will have a pre-JDR conference when SRLs are involved to make sure that SRL understand the process, and have a genuine desire to attempt to resolve their dispute - Danielson, *supra* note 4 at 73-4, discusses SRLs and recommends this. See also the requirement of the Edmonton Family and Youth Division of Provincial Court for leave before a SRL can proceed to a JDR: Goss, “Judicial”, *supra* note 68 at 515 and 520.

In my view, it is not discrimination to ensure that SRLs wish to negotiate in good faith. That is presumed of those represented by lawyers because lawyers are officers of the court and are bound by a code of conduct that includes good faith. There can be no such presumption for SRLs.

⁶⁶⁷ This principle suggests that a whole chapter of the impending Evaluation Report could be devoted to self represented litigants alone.

⁶⁶⁸ CJC, “Ethical Principles”, *supra* note 562 at 19. Indeed, while later discussing the differing views under the headings “*The Scholarly Critique of the Passive Role*”, and “*Judicial Ethics at a Crucial Cross-Roads*”, Engler argued that “judges specifically, must be prepared to play an active role to maintain the system’s impartiality”: Russell Engler, “Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role” (2008) 22 *Notre Dame Journal of Legal Ethics and Public Policy* 367 [Engler], at 385 and 387 *et seq.*

The Canadian Judicial Counsel has not published any material for the guidance of the judiciary on judicial conduct in the context of JDRs, so the only guidance from that source is CJC, “Ethical Principles”, *supra* note 562.

As Exon (albeit referencing non-judicial mediation, but equally applicable to judicial mediation - perhaps more so - in my mind) has pointed out there are many contradictions (mostly in relation to the challenges between impartiality and fairness) in mediator ethical codes⁶⁶⁹ in various states of the United States.

While neutrality and impartiality (essentially they are the same, although often not defined⁶⁷⁰ - the latter term is most commonly used) are standards for all such codes, and while, in themselves, such principles are sacrosanct, they, and the related, usually mandated, principle of party self-determination (both to process and substance - an uncoerced decision), interfere (or may interfere) with ensuring fairness and other related principles such as ensuring a “quality process”.⁶⁷¹ Often a mediator is only allowed to

⁶⁶⁹ As set by, *inter alia*, the American Arbitration Association, the American Bar Association, and the Association of Conflict Resolution (the latter having coming into existence by the January 2001 merger of the Society for Professionals in Dispute Resolution (SPIDR), the Academy of Family Mediators, and the Conflict Resolution Education Network): *inter alia*, Bowling & Hoffmann, *supra* note 9 at 2. Now updated in 2005: see: American Arbitration Association, American Bar Association and Association for Conflict Resolution, *Model Standards of Conduct for Mediators* 2005, online:<http://www.mediate.com/pdf/ModelStandardsOfConductforMediatorsfinal05.pdf>.

⁶⁷⁰ Exon, *supra* note 659 at 397-9, and 406-7. While, some definitions focus on “freedom from favoritism or bias either by word, action or appearance” and “commitment to serve all parties”, some relate to conflict of interest concerns” (which seldom arise), and still others relate to “avoid[ing] any conduct that gives the appearance of either favoring or disfavoring any party”, which could include steps taken to protect a power imbalance (including specific manipulation, intimidation and undue influence) and opposite party coercion, for example - such that “principles of impartiality are not standardized”. The author states that the “most flagrant contradiction to mediator impartiality and party self-determination is the ability of the mediator to ensure a just result”.

⁶⁷¹ Exon, *supra* note 659 at 391 and 396, and 400-5. Exon say that this interference applies, even to the extent that a “mediator cannot personally ensure that each party has made free and informed decisions”. No state requires such an enquiry, some “caution that a mediator cannot ensure informed decisions”and, indeed, California specifically prohibits an enquiry as to substantive fairness. A general definition of procedural fairness seems to be (at 403) limited to “an adequate opportunity for the parties to participate in the mediation, and to decide when to either settle or terminate the mediation”. Some require a sufficiency of information

provide “professional advice” if “qualified by training or experience”, although it appears that most standards allow a mediator to “recommend that the parties consult with outside professional to aid informed decision making”.⁶⁷² For simplicity, this debate comes down to a contest between impartiality and fairness. While in most mediations (judicial or otherwise), both impartiality and fairness are present and not in controversy, that is not always the case - creating the “mediator’s dilemma”.⁶⁷³ Exon also points out, however, that the conduct standards “contain contradictory or vague provisions”⁶⁷⁴, and, in addition, what “fairness” itself encompasses is often not defined, and leaves doubt as to whether it is process fairness or substantive fairness, or how each is defined.⁶⁷⁵ Exon adds:

Many of the Standards illustrate such principles as party self-determination, voluntary participation, confidentiality, freedom from coercion⁶⁷⁶, and mediator impartiality. Although it

on which to base a decision. The usual requirement seems to be (at 405) that the mediator “make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) ... understands and voluntarily consents to any agreement reached in the process”.

⁶⁷² Exon, *supra* note 659 at 392.

⁶⁷³ Exon, *supra* note 659 at 388, noting the “typical mediation quandary: neutrality, impartiality, and party self-determination versus fairness and a just result”. In footnote 1, she notes that “[i]t is difficult to categorize the mediator’s dilemma into one ethical principle”, referencing *inter alia*:
 - Robert A. Baruch Bush, “A Study of Ethical Dilemmas and Policy Implications”, [1994] J. Disp. Resol. 1, at 46; and
 - Jamie Henikoff and Michael Moffitt, “Remodeling the Model Standards for Conduct for Mediators” (1997) 2 Harv. Negot. L. Rev. 87, at 101.

⁶⁷⁴ Exon, *supra* note 659 at 389.

⁶⁷⁵ Exon, *supra* note 659 at 392-3.
 See also Alfini, “Judicial”, *supra* note 589 at 4-1 to 4-69, discussing the US considerations pertaining to disqualification and withdrawal.

⁶⁷⁶ While, as Exon, *supra* note 659 at 404 explains, a number of standards specifically “preclude a mediator from compelling or coercing the parties into a settlement”, others allow “questions of fairness and feasibility of settlement options”. One, Oklahoma, “allows a mediator to suspend or terminate a mediation if she believes a party is unable or unwilling to participate meaningfully, when the mediation appears to not be productive or when a party appears to be mentally impaired”. Other provisions allow a mediator “to indicate non-concurrence with a

may appear easy to compartmentalize the various mediation principles, they all interrelate with a mediator's ability to ensure a fair result or simply to engage in a reality check for the parties.

So what is a judicial mediator to do? Exon ends her discussion by stating that most standards:

... offer advice for mediators to maintain their impartiality and emphasize party self-determination. Provisions that require a mediator to ensure a balanced process, a just or fair result, or a requirement that the parties be fully informed are contradictory to the notion of mediator impartiality. *Only one avenue for resolving the contradiction appears to exist ... essentially an escape route for mediators that requires or allows them to withdraw is unable to serve in an impartial manner.*⁶⁷⁷

However she goes on to note that often leaves one of the parties in an even more vulnerable position - no neutral to maintain any standard.

From my review of the guidance provided by the Exon article, and generally, considering the area, it is my view that a judicial mediator in our Court must:

1. ensure that impartiality is maintained;
2. ensure process fairness to the extent that, if it appears to infringe impartiality, the judicial mediator may withdraw (if all else fails).⁶⁷⁸ In the process, this includes:
 - a. ensure that there is no undue (some discretion and judgment will be necessary) imbalance of power; and
 - b. ensure that each party has independent legal advice, or the opportunity to obtain it - this may be essential with SRL;⁶⁷⁹ and

decision she "finds inherently unfair", or "withdraw if she deems a proposed resolution to be unconscionable".

⁶⁷⁷ *Ibid*, at 407-8 (emphasis added).

⁶⁷⁸ Note highlighting in the last quote. As to withdrawal, see *ibid*, at 398-9.

⁶⁷⁹ For example, Massachusetts "permits a mediator to question unrepresented parties whether they have enough information to 'reach a fair and fully informed

3. not get involved in the substantive fairness, provided that the result is not contrary to law, assuming the aforementioned principles are met.

Cratsley notes that there have been reports to state judicial conduct organizations regarding “judicial coercion and intimidation in settlement conferences”.⁶⁸⁰ Here in Canada, while not addressed to any specific aspects of allegations of judicial conduct, the Executive Director of the Canadian Judicial Council advises that no correlated or indexed data is currently kept that would isolate the number and type of complaints filed with the CJC regarding judges performing judicial dispute resolution. However, he advises that anecdotally there are very few complaints, overall, that originate from JDR - quite a small number, although there are a few complaints that originate in a case settlement conference - but still the numbers are small.⁶⁸¹

3. RESPONSE TO SMITH

In this Evaluation Report I have previously documented both my tremendous respect for my colleague, Smith, and, at the same time, my strong disagreements with her statements⁶⁸² relative to, *inter alia*, alleged threats to the high standards of the Court by concerns regarding judicial misconduct. We both agree on the need for vigilance to maintain those high standards in adjudication and JDR, and acknowledge that JDR provides new and often troublesome challenges - but from there, we largely depart. I will use this section, regrettably, to respond to those allegations.

settlement’, while ‘maintaining impartiality’”: *Ibid*, at 403.

⁶⁸⁰ Cratsley, *supra* note 52 at 575.

⁶⁸¹ E-mail correspondence between me and the Executive Director of the Canadian Judicial Council (on my file).

⁶⁸² See, *inter alia*, *supra* notes 13, 14 and 634.

The principles of judicial integrity, in adjudication or any other method of dispute resolution - that is, in their broadest form - are important to be maintained, and it is useful to periodically remind judges of them, as Smith does in her paper. However, such principles are not in dispute, and a wholesale recitation of them⁶⁸³ does not make (or even support) the slightly veiled innuendo that justices conducting JDRs are devoid of such principles, or that JDRs represent an “activity that may reasonably jeopardize” or “detract from” “impartiality or faithfulness to law”.⁶⁸⁴ Indeed, although this siren call is asserted, the now 27 year old similar prediction of a result “that *might* have consequences detrimental to the administration of justice” has not materialized.⁶⁸⁵

While it is true that, with the parties’ consent, JDRs are usually conducted “off the record” with a number of dispute resolution styles, as pertains to the statement that the “dispositive judicial settlement conference is routinely conducted off the record through a plethora of styles, in a singular departure from the traditionally public role of the courts”, I do not agree that we should be racing off to enquire, from that alone, in the absence of demonstrated harm, that “whether such departures are healthy for the administration of justice”.⁶⁸⁶ Nor am I aware of any evidence to support the claim that judicial case management or JDR are such that “the process and

⁶⁸³ Smith, *supra* note 13 at 5-8.

⁶⁸⁴ *Ibid*, at 7, referencing Justice Thomas A. Cromwell, “The Prospects for Civil Justice Reform: The Administration of Justice in Commercial Disputes”, Canadian Institute for the Administration of Justice, Annual Conference, Toronto, 1997. However, now Supreme Court of Canada Justice Cromwell’s comments about the impact of settlement procedures were in the form of questions, not statements, although it is implied that they are statements.

⁶⁸⁵ Judith Resnik, “Managerial Judges” (1982) 96 Harvard Law Review 376, referenced in Smith, *supra* note 13 at 7. [Emphasis added.]

⁶⁸⁶ Smith, *supra* note 13 at 8.

result achieved in some judicial settlement conferences may come close to standing outside the role of the court”.⁶⁸⁷

Even more broadly, I do not accept the implication of Smith’s assertions, namely that the courts must be involved in interfering with contractual agreements to settle a dispute, whether before a private or judicial mediator (unless some third person, such as a child, is affected - as the quoted example of child support) as is suggested by the statement that “[w]hen private sector dispute resolution settles a conflict, even if it is litigation before the courts ... there is no standard by which the private sector resolutions are measured other than successful settlement by fair process...”. Moreover, it is my view that it is incorrect to assert that it “is not a principle which has applicability to an evaluative model”, when one also observes that “the private dispute resolution model ... dictates an approach to settlement focused upon the parties’ interests [and i]nterest-based settlement conferences proceed predicated upon the principle that parties may, between themselves, agree to any terms and conditions just as long as no third party is negatively affected by the terms of the deal made”.⁶⁸⁸ Indeed, I know of no reason why the principles should be different between private and judicial mediators - the standard should be similarly high for both.

My concerns with Smith’s positions go even a step further. While I agree with the statement that JDR justices are in a “different position from the private sector neutral” and are “constrained by his or her role as it necessarily relates to the role of the administration of justice”, it does not necessarily follow that the “judge is obliged to apply the law, to guide the settlement in

⁶⁸⁷ *Ibid*, at 10.

⁶⁸⁸ Smith, *supra* note 13 at 10 and 11.

accordance with the principles of evidence and procedure, and to do so in as public a setting as possible”.

Similarly, while I agree that the terms and conditions must not be “illegal”, I do not agree with the sentiment that:

The evaluative approach to assisting parties to construct a settlement *requires* that the proposed terms and conditions of any agreement reached are legal, reasonable and are within the range of results which a judge could have declared at the conclusion of a trial had the parties decided to litigate instead....⁶⁸⁹.

The settlement arrangement, in which a JDR justice participates, clearly cannot be one that is contrary to law, but there is no reason, in my view, for a judge to “apply the law” to a settlement by the parties that is not unlawful - moreover, it is not a search for “*public justice*”. As in Quebec, to which Smith refers, it is what the parties think is justice for them - thus, “their interests”, “their positions” and, ultimately, their “mutually satisfactory solutions” - that is, “*their justice*”. Indeed, in Alberta, as in Quebec, it is, or should be, that “[a]ll solutions may be envisioned as long as they are not contrary to public order”.⁶⁹⁰

⁶⁸⁹ *Ibid*, at 10 and 11 (emphasis added).

Note that Otis & Reiter, *supra* note 7 at 386, declare that “[u]nlike adjudication, with its procedural and evidentiary strictures, mediation allows the parties to explore their dispute holistically....”.

⁶⁹⁰ Smith, *supra* note 13 at 11-3, referencing Suzanne Courteau, “Judicial Conciliation in the Superior Court of Quebec”, (presented at the International Exchange Program for the Development of an Integrated System for Judicial Mediation, National Judicial Institute and Court of Appeal of Quebec. Montreal, Canada, October 3-7, 2005) [unpublished].
However, while Quebec has a Civil Code that specifically permits same, I do not know of any authority that requires, in common law provinces, a specific statutory provision that “specifically permits a facilitative, interest based approach” or that any such “licence” is necessary for “judges in the rest of Canada”. On point, I know of no authority that “[j]udges in the common law provinces, absent such licence, are bound by law and by oath to uphold and advance the traditional role of the courts”, or that “[j]udicial power has always been limited”, or that it “should be”, or that judicial authority is so “circumscribed by the law and their office or role

Additionally, while fairness, order, safety and other procedural process requirements must be met, there is no need for “evidence”, or, as implied, court “procedure” - because it is a facilitated negotiation, or judicial mediation, or a judicial evaluation - not an adjudication. Nor is there any reason why it need be any more public than a pre-trial conference which, in Alberta, are always in private unless there are clients present, and that is only for security or similar reasons.

Finally, in my view, there is absolutely no reason why “the judge may not forgo the evaluative function which is intrinsic to the judicial role” - simply put, there is no reason why the judge must evaluate in any manner, just because the adjudicative function (which this is not) requires an evaluation or decision. This is simply so because the judge is not performing an adjudicative function (except, perhaps, in Binding JDRs to which I will return, although that seems limited by the decision in *L.N.*⁶⁹¹), but a settlement related function. Indeed, it is not unusual in my experience for the JDR justice to assist the parties in either a facilitative or mediation manner, without being asked to provide any evaluation, and I see nothing wrong with that, nor any authoritative source that is contrary to it.

Put another way, I see no requirement in (or for) the rule of law to support Smith’s aforementioned arguments. Simon made, in my view, a good

within democracy”. Saying it so, does not make it so. Indeed, to use the words of Simon (Simon, *supra* note 14 at 21), I find nothing about which Smith complains in the JDR process that is “inimical to the rule of law, justice, and democracy”. Nevertheless, I agree with Smith that “[t]he grant of authority in a judicial settlement conference is given by the consent of the parties to an informal process where the judge ought still to be bound by the law”.

⁶⁹¹ *L.N.*, *supra* note 19.

point about the rule of law and the circumstances of a case when he said that “exercise of judgment” is essential to the rule of law, and added:

Since legal norms don’t apply themselves, a legal outcome can only be true to a governing norm if some role players make plausible judgments about how the norm applies in the particular circumstances of the case.⁶⁹²

The rule of law must, I believe in this context, be our servant, not our master, for the good of society. This role of the rule of law in the context of dispute resolution was, I believe, astutely (but lengthily) articulated by the then Ontario Minister of Justice in 1986:

... the relationship between alternative forms of dispute resolution and the rule of law. The rule of law and our respect for it is partly an expression of the fact that, in our society, the judiciary is the final repository of social trust. Despite our social differences, and there are many, we entrust the judiciary with the responsibility of articulating the laws which are to govern our relations with each other. But... the rule of law in the court litigation model is an expensive commodity. Our courts spend precious time and a lot of taxpayer’s money hearing and resolving disputes which have little to do with public values or general public concerns. ... severe constraints are placed on the judiciary’s ability to provide justice to the ordinary citizen. The theme... which is designed to strip the judicial system of some of its adversarial component, and expand alternative dispute resolution mechanisms ..., suggests in the end that we must reconceive our notion of the rule of law. There *is* a tension between the idea of the judiciary as the institution which is responsible for articulating the laws governing our relations with others, and the establishment of structure which in the end, accomplishes precisely the opposite effect.

But the notion of the rule of law as ‘an unqualified human good’ ... ought not to be seen as a barrier to experimentation with alternative dispute resolution mechanisms or as an impediment to a re-examination of the adversarial process as a *means* to dispute resolution. The rule of law is meant to govern situations where we *cannot* live together peacefully. It should not be used to stunt the development of

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Simon, *supra* note 14 at 32.

new structures which might demonstrate and exemplify precisely that possibility.

... What is needed ... is a judicious iconoclasm in which we retain those elements from our judicial past which continue to serve us well, while at the same time, being suspicious of tradition for its own sake, we experiment with novel forms of legal arrangements, more suited to the challenges presented by our generation.⁶⁹³

Smith's assertions continue:

The evaluative role requires that when a judge presides over a settlement conference, meritless claims should not be dignified. It does mean the judge should say what is necessary to ensure the settlement accounts for precedent, weaknesses in evidence, onus, procedural problems, and such other concerns which would ordinarily arise in the courtroom. It means that terms proposed to be included in settlements which are far outside what the law would permit must be commented upon. It means that judges must speak up when the litigants or their lawyers stray from a result supportable in law. And it must mean that in the event that a judge loses control of the conference, he or she should end it. The parties may be free to settle on terms not supported by a judge, but in some other forum.⁶⁹⁴

Returning to Simon⁶⁹⁵, and to the principles of settlement only according to law, he provides an example that explains the difference in applying the norms of contract and limitation law. In my view, this example also raises the relevance of settlements based on interests. A hypothetical example will make the point of the difference between applying the substantive law (Smith's version of the role of a JDR justice) and achieving justice (a JDR justice role based on applying interests). Let's suppose that the issue between the parties is one of contract debt and there is no doubt

⁶⁹³ Attorney General Ian Scott, "Alternative Dispute Resolution and the Rule of Law", in the Pitblado Lectures, *supra* note 10 at 16.

⁶⁹⁴ Smith, *supra* note 13 at 10.

⁶⁹⁵ Simon, *supra* note 14 at 32.

that the debt is owing but for a fatal limitation date. Applying Smith's version of how a JDR justice would conduct a JDR is that, applying the law, as a judge must do in an adjudication (and in Smith's view must also do in a JDR), the claim would have to end in a settlement for \$0 in favour of the plaintiff. However, applying interests and the prospects of future contractual relations, the defendant might be prepared to pay \$0.50 on the \$1 dollar to resolve the issue. If the plaintiff agreed, that would be a form of justice for both parties, in my view, but in Smith's view it would be repugnant and unacceptable.

Another example might relate to enforcement⁶⁹⁶, a matter not relevant to adjudication. Let's assume a hypothetical where a plaintiff, as a matter of law applying adjudicative principles, would be entitled to \$1 million judgment, but the defendant's credit worthiness might mean a real likelihood of bankruptcy, with a net recovery of nothing. A settlement for \$500,000, with guaranteed payment, would be a form of justice, if the parties agreed, but would not be countenanced by Smith. A real life example is the case of *Peitkus v. Baker*, [1980] 2 S.C.R. 834, where a "winner" committed suicide because she could not collect.⁶⁹⁷

In each case, the words Simon⁶⁹⁸ applied to lawyers, in my view, should apply to JDR justices: "Lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice".

⁶⁹⁶ A matter which Simon discusses *ibid* at 40-1, where he says, *inter alia*: "The practical impact of a legal norm depends not only on the process of interpretation but also on such contingencies as the good faith, abilities, knowledge, and resources of officials and citizens. If officials (judges ...) ... lack relevant factual information... then one would expect substantial gaps between prescription and outcome.... If... resources are evenly distributed, one would expect a further adverse effect on enforcement. ... the enforcement gap is potentially large. "

⁶⁹⁷ Allen M. Linden, "Comments on How Alternative Dispute Resolution Would Apply to Canada's Legal System", in the Pitblado Lectures, *supra* note 10 at 11.

⁶⁹⁸ Simon, *supra* note 14 at 138.

As to the public or private nature of a JDR, Landerkin and Pirie suggested it might be held in a courtroom and/or on the record.⁶⁹⁹ I have addressed this *infra*, but here I want to address Smith's comments about being on the record.⁷⁰⁰

This relates to two issues raised by Smith. The first is that “[n]o reports exist of judicial mediations taking place on the record”. I have done JDRs with a recording (thus “on the record”), where there is one or more SRL, but that was for protection of the judicial process, not for the use by the parties, and only available by transcription on a judicial order related to matters of conduct. For example, if there was a complaint about lawyer or judicial conduct, the recording could be made available to the appropriate parties on the appropriate conditions (protecting negotiating confidentiality, etc.).

Second, Smith also said that “[w]hile judicial settlement conferences can occur in a courtroom (sometimes with evidence), these cases are exceedingly rare, and none are reported as having been conducted “on the record”. In my view if evidence is being taken, it is not a JDR but a hearing or trial in a courtroom and with a public record. I know of no JDR procedure that would involve taking evidence in any event - the evidence in a Binding JDR is provided by affidavit akin to a summary trial. I agree that JDRs in a courtroom are rare (although I have done so - for mediation, in addition to mini-trials). However, if a party wanted the JDR open to the public, there would be no reason why it could not take place in a courtroom, though that would raise additional issues such as confidentiality of negotiations - indeed, I

⁶⁹⁹ Note, however, that the Edmonton Family and Youth division of Provincial Court, which clearly has many SRL, do not record their JDR proceedings: Goss, “Judicial”, *supra* note 68 at 515.

⁷⁰⁰ Smith, *supra* note 13 at 18, referencing Landerkin & Pirie, *supra* note 25 at 261-2.

know of no case where the parties wanted that, nor do I believe, at this stage of the development of the law, that third parties have an automatic right to view the negotiation (as opposed to the adjudication) of a private dispute, unless there is some demonstrated public interest. If it is “on the record”, but not open to the public, it does not matter if it is in a courtroom or in a conference room. If it is open to the public, then it should be in a courtroom and on the record (although there may be restrictions as to the access to the record, as noted *supra*).

Later, at 23 (in several places), Smith, relying upon Jackson⁷⁰¹, talks about precedent - the need for “[r]egularization of the evaluative process by judges” to “reduce the urge to stray from precedent”. What, possibly, is she/are they talking about? In an evaluation of rights based issues, JDR justices use precedents, as provided by counsel to the parties, to help the parties assess the risks of adjudication. However, to say that JDR justices have the “urge to stray from precedent” in such a role is, in my view, simply incorrect. Nevertheless, and in any event, there is nothing stopping the informed party from straying from “precedent” if there is good reason (in the parties minds, not the judge’s mind) to do so - this is not a judicial adjudication based on precedent, it is a private settlement in which the judicial role is merely one of assistance, not judgment. Indeed, some studies (albeit in small claims cases, but I would believe also the case in higher value cases, especially with SRL) have shown that often “the legally orientated approach of the judges is at odds with the relationship-orientated approach that small-claims litigants bring to the court”.⁷⁰² Moreover, as to the need to

⁷⁰¹ G. Jackson J. A., “Judicial Ethics and Judicial Mediation”, (presented at the International Exchange Program for the Development of an Integrated System for Judicial Mediation. Case Study of the Judicial Mediation System in Quebec. National Judicial Institute and Court of Appeal of Quebec. Montreal, Canada, October 3-7, 2005), at 26. [unpublished]

⁷⁰² MacCoun, Lind and Tyler, *supra* note 49 at 105.

rely upon precedents, or to have cases adjudicated to establish precedents, it should be remembered "... all lawsuits do not involve important legal principles".⁷⁰³ Additionally, as Posner points out⁷⁰⁴, not all judicial decisions are based on strict precedent, but rather analysis of law (statutory and common) to determine applicability to facts, and in many cases the application of discretion - saying of legalism (which I interpret roughly as pure and binding precedent) "... its kingdom has shrunk and grayed to the point where today it is largely limited to routine cases". Thus, I believe, the JDR justice cannot, in an evaluative sense, determine precisely the law that may be applied by another hypothetical trial justice, but can merely look at the issues, the risks and the options - no different in the result than the parties looking at interests as well (which may have some kinship to discretion).

Later, Smith refers to (what I would call "interests" and issues forming a background to or cause of the rights being litigated) as "non-litigation interests", "irrelevant material", "[i]rrelevant actions and reactions" and "[e]motions and power plays", and then says (in a mis-perceiving way, in my view), as if the former are not conducive to, but are rather obstructionist to, settlement:

After dealing with such occurrences and interventions, the judge ought to discuss onus, evidence, proof, precedent, and all of the legal procedures and rules which would arise if the matter went to court. This is the exercise of the authority of the court, supported by the court's process which can be and ought to be explained and demonstrated in the conference.⁷⁰⁵

In response to these statements, in my view: there is no reason why a party, by consent (indeed, request) without any compulsion, and with legal counsel

⁷⁰³ Singer, *supra* note 42 at 3

⁷⁰⁴ Posner, "Judges" *supra* note 474, particularly, initially, at 1, 5, 9, 12 and 14-5, as later developed.

⁷⁰⁵ Smith, *supra* note 13 at 24.

present (I will address self-represented litigants separately) should not be entitled to settle for something less (or more, or different) than a trial justice might award - remembering that the JDR justice is not present in the role of a trial judge; there is no need for the JDR justice to discuss, let alone rule on, precedent, evidence weaknesses, onus or any matter (outside fair procedure) that would "arise in the courtroom" - unless the parties *specifically seek* a form of opinion or risk analysis on such matters, remembering that it is their process leading to settlement, not a judicial agenda - the JDR justice should be there to assist, not impose an agenda; nor is there any duty for the JDR justice to comment on any lawful settlement that is "far outside" that, or would "stray from a result" which, a trial justice would or might order - provided that there is no misrepresentation, coercion or other legitimate "conduct" problem, (addressed *infra* in this section); or that the judge must abandon the forum just because s/he would not, as an adjudicator, order the terms that form the basis of the settlement. That, being said, I do agree that a JDR justice should abandon a JDR where there is any party impropriety that would negatively impact on judicial participation - indeed, in that regard, the JDR justice, acting properly, should never "lose control", but maintain procedural and fairness control.

These responses having been made to refute what I consider to be false assertions, by way of ensuring fairness of process, no illegality of settlement, and no improper judicial conduct, I agree with Lalonde that "judges in settlement venues do perform the function of guarding the public order and the law".⁷⁰⁶

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Smith, *supra* note 13 at 13, referencing Louise Lalonde, "A New Role for the Judges and a New Offer of Justice for Citizens, on what Conditions?", (presented at the International Exchange Program for the Development of an Integrated System for Judicial Mediation, National Judicial Institute and Court of Appeal of Quebec. Montreal, Canada, October 3-7, 2005). [unpublished]

I could go on to other submissions in Smith's analysis, which I have done to a large extent in this Evaluation Report, but to do so further at this point would be redundant of our conflicting views of principle.

C. JUDICIAL CONDUCT - RECENT PRONOUNCEMENTS

"Recent" in this context is since JDR became a judicial process, starting with the keynote speech of Chief Justice Warren Burger in the United States (which country often leads new legal and judicial processes) at the Pound Conference, and followed up - indeed, "defined" by - Professor Frank Sander's concept of the "multi-door courthouse" of "early neutral evaluation", creating the "legal equivalency of the medical triage system", where "one size does not fit all", all in 1976.⁷⁰⁷ Six years later, in 1982, Chief Justice Burger, described what he thought was the role of the judiciary:

The obligation of our profession is or has been thought to be, to serve as healers of human conflict. To fulfil our traditional obligations means that we should provide *mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about.*⁷⁰⁸

Here in Alberta, "recent" is informally since 1992 and formally since 1996⁷⁰⁹, when the Court started attempting to provide alternatives to traditional adjudication that fit different cases. Indeed, generally, "[j]udges have discretionary authority to vary their approach with different rules".⁷¹⁰

⁷⁰⁷ Goldberg, Sander and Rogers *supra* note 33 (2nd ed.) at 7. See discussion on this by Landerkin & Pirie, *supra* note 25 at 273-4.

⁷⁰⁸ Hollett *et al*, *supra* note 335 at 345 [emphasis added]. The emphasis is added because this is exactly the philosophy I have developed, independent of Chief Justice Burger's words, as I describe in my "closest to the goal" analogy *infra*.

⁷⁰⁹ Guidelines, *supra* note 190, and attached to this Evaluation Report in Appendix 7.

⁷¹⁰ Bussin, *supra* note 5 at 480.

1. U.S. JUDICIAL CONDUCT CODES

In the United States, the American Judicature Society (AJS) described the changes in the judicial role thus:

Until *recently*, judges had only performed the traditional role of adjudicator of disputes within the context of trial. In this day and age, in order to preserve scarce judicial resources, judges are now required to make greater efforts to facilitate settlements of civil cases.

Like the conduct related to other judicial duties, judicial involvement in settlement raises ethical questions. A primary concern is whether judges lose their impartiality by using aggressive settlement techniques.⁷¹¹

Lawyers at the bar, academics and the judiciary, in the U.S. began discussion about JDR, and the appropriate standard of judicial conduct in the period after ADR was “invented” at the 1976 Pound Conference and expanded at that conference by Harvard Professor Sanders who proposed the “Multidoor Courthouse”, although others trace the roots of ADR back much further than that.⁷¹² However, there seem to have been few steps toward providing guidelines for judicial conduct in this regard until 1990.

In 1990 the American Bar Association’s *Model Code of Judicial Conduct*⁷¹³ addressed⁷¹⁴ the issue of caucusing which is one of the key

⁷¹¹ Committee of the American Judicature Society, “Judicial settlement ethics”, Editorial (1997) 81 *Judicature* 48 [AJS, “Editorial”], at 48 [emphasis added]. See also, generally, the discussion by Cratsley, *supra* note 52 at 577-94, noting his various observations on the 1990 Code, and his recommendations for change.

⁷¹² See discussion by Danielson, *supra* note 4 at 29, relying on Valerie A. Sanchez, “Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today” (1996) 11 *Ohio State Journal on Dispute Resolution* 1, at 35-6. See also Sanchez, *supra* note 36.

⁷¹³ Referenced by the CJC, “Ethical Principles”, *supra* note 562 at 4. I should make clear at this point that this Evaluation Report is not a thesis on the ABA Code of Judicial Conduct, which has a detailed history of consultations and

judicial conduct issues.⁷¹⁵ At that time they resolved to “permit a judge, with the consent of the parties, to ‘confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge’”. Even since then, in the mid-1990s, this was considered by some of the highest on the US judicial hierarchy to be, in the context of the traditional adjudicative function, otherwise absolutely forbidden, with settlement discussions being neither included in the exceptions for emergencies or administrative matters, nor recognized as a special form of *ex parte* proceedings otherwise considered legitimate (e.g. applications for search warrants).⁷¹⁶

The commentary accompanying this rule allowing settlement and caucusing, moved into another (but related) area - coercion - stating: “A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.”⁷¹⁷ In this regard, I agree with Smith that, whatever authority judges

changes relating to judicial dispute resolution principles in the last 19 years. While I refer to some of this history, aided by the literature, there are new proposals for change and actual change from time to time. I do not pretend the discussion to be up-to-date as to the most recent pronouncements - indeed, references to dated literature is often limited in value by the passage of time. Thus, the reader should look at this discussion as being one of principles based on ABA Judicial Conduct provisions, not a verification of their most current status.

⁷¹⁴ Updating its recommendations to the new reality not seen in the 1972 Code, which was interpreted as imposing restrictions on judicial involvement in ADR: Gabriel, *supra* note 107 at 89 *et seq.*

⁷¹⁵ On this and some other issues, one way to avoid the judicial conduct issues, and yet get the judicial experience, is to use retired judges, as a settlement conference program in Virginia has proven: Geetha Ravindra, “Virginia’s Judicial Settlement Conference Program” (2005) 26 *The Justice System Journal* 297 [Ravinder].

⁷¹⁶ Kennedy, *supra* note 653, at 1069.

⁷¹⁷ Some believe that even “the interposition of a judge into the settlement process is coercion”: Frank E.A. Sander, H. William Allen & Debra Hensler, “Judicial Mis(ue) of ADR? A Debate” (1995-96) 27 *University of Toledo Law Review* 885, at 893.
On this debate, see also: Antalovich, *supra* note 591 at 134-7; and, including

possess to do JDR, they must not be part of the “concerns about the ‘all powerful’ judges forcing settlement on unwilling parties”⁷¹⁸.

The reason for this view of “coercion” appears reflected in the discussion in Alfini regarding “Coercing Case Dispositions” and the statement that:

A judge who abuses power of the judicial office by coercing parties into disposing of their cases out of fear or intimidation falls far short of the... impartiality requirement, particularly in the duty to allow all those legally interested in a proceeding the “right to be heard according to law”.⁷¹⁹

Connecting the dots of preventing coercion in the context of the rule allowing settlement and caucusing, Alfini also noted this rule as one of the exceptions to the general rule that prevented, unless excepted, what is labeled in the U.S., “*ex parte* communications”:

... the 1990 and 2007 [Model] Codes authorize *ex parte* communications for the purpose of encouraging settlement. In part because of the risk of overreaching that can arise in the context of *ex parte* settlement discussions, the 2007 Code has a separate rule prohibiting judges from acting “in a manner that coerces any party in settlement”.⁷²⁰

references to the (im)propriety of sanctions, Hogan, *supra* note 8 at 457-9.

The most coercive and unacceptable of these practices in an adjudication model was described by Landerkin & Pirie *supra* note 25 at 266, in these terms, namely of lawyers “being called into the judge’s chambers early in a trial and being ‘helped’ to settle the case. This judicial intervention, often would be given in a manner suggesting counsel proceed with the trial at their peril or accept the judge’s recommendation”.

⁷¹⁸ Smith, *supra* note 13 at 13.

⁷¹⁹ Alfini, “Judicial”, *supra* note 589 at 2-29 and 2-30.

⁷²⁰ Alfini, “Judicial” *supra* note 589 at Chapter 5, at 5-1 to 5-24, but particularly at 5-3. See also discussion by Otis & Reiter, *supra* note 7 at 369-70, referencing Daisy Hurst Floyd, “Can the Judge Do That? - The Need for a Clearer Judicial Role in Settlement” (1994) 26 *Ariz. St. L.J.* 45, at 50-56, which they say “explor[es] several coercive techniques that ... trial judges ... have used in mediating disputes”.

The AJS went on to note that, as late as their date of publication (fall 1997) there was, beyond the ABA's 1990 Model Code:

... little guidance for judges on how to conduct settlement conferences while maintaining high ethical standards. This has created misunderstandings between judges and litigants, which can lead to judicial misconduct complaints.⁷²¹

In face of this void, in 1997, the AJS noted that the “articulation of official standards for judges in this area is long overdue”, created a “curriculum for judges on ethical settlement techniques”, which had as its “centrepiece”, a “set of settlement ethics guidelines for judges, formulated by an advisory committee with extensive experience in settlements of civil disputes”. The intent was to provide two things: general guidelines for judges to follow in the settlement process; and “advisory committee’s conclusions regarding whether more than 70 various settlement techniques are ‘acceptable’ or ‘inappropriate’”, and whether “a given technique may be ‘acceptable’ in one context but not another.” The intent was that the “settlement ethics guidelines” created would be “only the beginning of what is hoped will be a process of thorough examination of, and dialogue about, the subject of judicial settlement ethics.”⁷²²

⁷²¹ AJS, “Editorial”, *supra* note 711, at 48. Cratsley, *supra* note 52 at 577, and in footnote 25, came to the same conclusion as to the 1990 Code, namely that, quoting from Alfini, “vague and ambiguous references to ‘coercion’ in ethics rules give insufficient guidance to the judge engaged in settlement activities”. He referenced:
 - Alfini, “Risk”, *supra* note 107 at 14;
 - Gabriel, *supra* note 107 at 89;
 - Daisy Hurst Floyd, “Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement” (1994) 26 *Ariz. St. L.J.* 45, at 84;
 - Peter W. Agnes, Jr., “Some Observations and Suggestions Regarding the Settlement Activities of Massachusetts Trial Judges” (1997) 31 *Suffolk U. L. Rev.* 263, at 265; and
 - James A. Wall & Lawrence F. Schiller, “Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log” (1982) 6 *Am. J. Trial Advoc.* 27, at 33.

⁷²² AJS, “Editorial”, *supra* note 711, at 48. Permission has been long since sought, but never received, for receipt and publication of the current AJS curriculum.

As Alfini noted⁷²³, in 2007, American Bar Association Model Code of Judicial Conduct was adopted in February 2007, but evaluation and implementation is still proceeding.⁷²⁴ Except to follow up with Alfini, detailed discussion of the 2007 Model Code is a matter beyond the scope of this Evaluation Report. However, it is to be noted that, generally, the provisions specifically applicable to this debate include: Canon 1 (upholding independence, integrity and impartiality)(at 10) and Rule 1.2 (promoting confidence in the judiciary)(at 12); and Canon 2 (performing the duties of judicial office impartially, competently, and diligently) (at 14), Rule 2.2 (impartiality and fairness)(at 16), Rule 2.5 (competence and diligence⁷²⁵)(at 20), Rule 2.6 (ensuring the right to be heard and permitting encouragement of settlement, but prohibiting coercion)(at 21), Rule 2.8 (decorum and demeanour)(at 23), Rule 2.9 (*ex parte* communications)(at 24-5), and Rule 2.11 (disqualification/recusal)(at 27-9).⁷²⁶

Alfina, through the voice of the Chief Justice of the Wisconsin Supreme Court, noted the 2007 Model Code, established “minimum standards for the ethical conduct of judges”.⁷²⁷ While the current extensive text addresses many issues not directly relevant to JDR, some are generally relevant in their

⁷²³ Alfina, “Judicial” *supra* note 589 and *supra* note 720.

⁷²⁴ See: American Bar Association, *Model Code of Judicial Conduct*, 2007 Edition (Chicago: American Bar Association Centre for Professional Responsibility, 2007)[2007 Model Code].
For a discussion on the current evaluations and implementation of the 2007 Model Code, see American Bar Association, Joint Commission to Evaluate the Model Code of Judicial Conduct, on line at <<http://www.abcnnet.org/judicialethics>>. For a comparative standard, but applicable specifically to ADR, see: American Arbitration Association, American Bar Association and Association for Conflict Resolution, *Model Standards of Conduct for Mediators* 2005, online:<http://www.mediate.com/pdf/ModelStandardsofConductforMediatorsfinalo5.pdf>.

⁷²⁵ Relevant in the context herein to judicial JDR training and the conduct of a JDR.

⁷²⁶ 2007 Model Code, *supra* note 724, at pages noted.

⁷²⁷ Alfina, “Judicial” *supra* note 589 at vii. Perhaps influenced by Cratsley’s 2006 paper advocating same: Cratsley, *supra* note 52 at 571.

broader context of the theory, and U.S. examples. However, as directed to JDR itself precious little is said. Alfini does, nevertheless, address the topic, mostly in the context of the code provisions established (which I will address *infra*), in two of several hundred pages of the treatise. The text draws attention to Rule 2.6 and its commentary as the most important to the subject of settlement. The text provides⁷²⁸:

The 2007 Model Code directly addresses improper judicial coercion during the settlement process.⁷²⁹ Rule 2.6(B) was added in recognition of the fact that out-of-court settlement is an increasingly important, and increasingly used, method of case resolution. Yet as its use increases, judges must remember that a litigant's right to be heard can be inadvertently impaired by a judge who is overzealous in encouraging an out-of-court resolution. Accordingly, the new provision draws a line between encouraging settlement, which is permitted, and coercing settlement, which is not.

In comment 2 of Rule 2.6, the Model Code offers a judge more specific guidance as to six factors a judge should consider when deciding upon appropriate settlement practices: 1) 'whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions' - participation up to the level consented to is obviously less problematic than participation in excess of that agreed upon⁷³⁰; 2) 'whether the parties and their counsel are relatively sophisticated in legal matters' - the less sophisticated

⁷²⁸ Alfini, "Judicial", *supra* note 589 at 2-44.

⁷²⁹ As noted *infra*, there is also the aspect of trial judge coercion to settle, which suggests, except in special cases, the prudence of the separation of the two functions - JDR judge to try to settle, and the trial judge to adjudicate: Peter Robinson, "Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to them for Trial" (2006) 2 *Journal of Dispute Resolution* 335 [Robinson], referencing, *inter alia*, (as does Ravinder, *supra* note 715), Alfini, "Risk", *supra* note 107 and F.E.A. Sander, "A Friendly Amendment" [Sander - Amendment], both at (1999) 6 *Dispute Resolution Magazine* 11.

⁷³⁰ While these provisions do not apply in Canada, query whether the sentiments of these provisions should be re-examined when settlement procedures are mandatory, as they are proposed to be in Alberta in 2010. My first impression is that the views need not change, because the New Rules will specifically mandate this procedure (NR 4.16 and 8.4), whereas, I believe, this provision was set for settlement proceedings that were directed *outside* the mandatory rules, without the consent of the parties.

the participants, the greater the concern for judicial overreaching⁷³¹; 3) 'whether the case will be tried by the judge or jury' - where the judge will be the trier of fact, aggressive pre-trial settlement negotiations may contribute to a perception that the judge has a vested interest in the outcome of the case and will be less than impartial at trial⁷³²; 4) 'whether the parties participate with their counsel in settlement discussions' - if the parties are present, they may be more susceptible to coercion⁷³³; 5) 'whether any parties are represented by counsel' - parties unrepresented by counsel⁷³⁴ are more vulnerable to

731 Does this give licence to the judge to be more interventionist to "protect" a party who is self-represented, or whose counsel is, less sophisticated than the otherside? This is relevant to the "imprudent settlement" discussed *infra*.

732 This is not overly relevant in an Alberta context for two reasons: there are relatively few civil juries in Alberta; and it is not expected, due to other reasons discussed *infra*, that a judge who conducts a JDR would also conduct a formal full trial (exceptions, now severely limited, are discussed *infra* for a "Binding JDR" conducted as a summary trial). However, is there any problem with - or, indeed, would it not be more prudent for - the judge who conducted the settlement conference, and thus is familiar with the parties, counsel, and the issues, to conduct a trial afterwards where the jury is the trier of fact? One author seems to suggest that as long as the judge is not the trier of fact at trial, this is acceptable: Antalovich, *supra* note 591 at 116. However, another author suggests that the ability to influence a jury is equally problematic, so, perhaps, my "reflection" needs more scrutiny: Gabriel, *supra* note 107 at 96.

The whole debate about judges attempting to settle cases assigned to them for trial, as opposed to latter trying a case earlier assigned to them for settlement (the "flip side", if you will, of the discussion at this point, but raised earlier, namely, coercion by trial judges to cause the parties to settle), is documented in an extensive article of the same name: again, Robinson, *supra* note 725, referencing, *inter alia*, (as does Ravinder, *supra* note 715), Alfini, "Risk", *supra* note 107 and Sander, "Amendment", *supra*, note 729.

733 This is not relevant to Alberta, because JDRs require the presence of the client, or in a corporate sense, a person who has express authority to settle.

734 However, the Model Code Judicial Conduct and supporting commentaries "provides little direct guidance as to how active or passive a judge should be in handling cases involving [self-represented] litigants", and the "Canons of Judicial Ethics require judges to remain fair and impartial and to maintain the appearance of fairness and impartiality, but gave no further guidance about the meaning of those terms when [self represented] persons appear in court": Engler, *supra* note 668 at 370, quoting in the second passage: Rebecca A. Albrecht et al., "Judicial Techniques for Cases Involving Self-Represented Litigants" (2003) 42 Judges' Journal 16, at 19.

He did, however go on to note (also at 370) that in 2007 in Rule 2.2 of the Model Code, the American Bar Association did add: "It is not a violation of this Rule [impartiality and fairness], however, for a judge to make reasonable accommodations to ensure [self represented] litigants the opportunity to have their matters fairly heard".

overreaching; and 6) 'whether the matter is civil and criminal'⁷³⁵ - some jurisdictions limit judicial involvement in plea negotiations by law or practice, which will have an obvious impact on the propriety of judicial involvement in the resolution of criminal cases in those jurisdictions.

2. PRELUDE TO JDR JUDICIAL CONDUCT ISSUES

Flowing from the preceding discussion on the regulation and/or guidance of judicial conduct in judicial dispute resolution, what are the more specific issues to be examined that are of relevance to the Court in respect of the JDR Program, and the JDR justices providing this service? I believe that Otis and Reiter put this in a proper perspective for examination when they stated:

Judicial mediation brings into sharp relief the issue of the relationship between state-sanctioned and private forms of normative ordering. It raises a host of interesting questions... including: What are the implications of this trend for a legal system still primarily based on the paradigm of adjudication of adversarial disputes? What limits (practical, normative, or ethical) does the dominant model place on judicial mediation? What challenges does judicial mediation present for the dominant model? How can the sometimes conflicting needs of disputing parties and justice best be reconciled? And, how can the judge-mediator best manage the sometimes conflicting ethical obligations of the participants?⁷³⁶

In response to these questions, they identify three issues for discussion, the third of which is to consider the "crucial question of ethics in mediation,

⁷³⁵ This is not relevant to my analysis, which only deals with civil claims. I keep it in the text only because it may be relevant to future potential examinations of more formalized settlement procedures in criminal cases.

⁷³⁶ Otis & Reiter, *supra* note 7 at 355.

signaling some of the problems in applying ethical models developed in the context of classical adversarial litigation and at advocacy to mediation.”⁷³⁷

Macfarlane, talking from a lawyer’s perspective, but also applicable to judges, cautions that while settlement decisions “may be reached more rapidly and in an intense climate” when clients attend a dispute resolution process, to avoid the possibility of time and momentum toward settlement to “railroad” a client into premature agreement, and to avoid the impact of internal pressures (pressures external to the litigation - here the JDR justice likely would not be aware) - the JDR justice, as well as the lawyer, need to be “aware of psychological pressures and incentives that may move ... [a party] toward settlement, and deal openly with these”.⁷³⁸

Later she brought this out directly in the context of settlement pressure from judges and other third party neutrals:

... there is also the possibility that such pressure may come from the mediator, judge, or other third-party actor. Third parties, especially authoritative ones, are provided with many opportunities to pressure disputants. The three highly coercive mediator styles memorably named “hashers, bashers, and the trashers” by James Alfini more than fifteen years ago are just as prevalent today. There is a sense among some professional mediators that part of the “value-added” service they offer is their ability to twist the arms of parties in order to push them toward settlement.

...

... lawyers themselves are sometimes acquiescent in mediator pressure. They may seek out “hashers, bashers, and trashers” (or “muscle mediators”) for clients who they feel need some strong “reality checking”. While it may be appropriate to sometimes use an authoritative third party to convince an

⁷³⁷ *Ibid*, at 356.

⁷³⁸ Macfarlane, *supra* note 25 at 216-7.

otherwise unpersuaded client that, for example, she faces a poor outcome at trial, counsel must be careful not to allow or encourage undue pressure, especially from a third party who has no decision-making role.⁷³⁹

If lawyers need to be aware of the limits of this pressure, a JDR judge, recognizing the special nature of their judicial role, must be exceedingly careful. But, Macfarlane did not stop there and addressed judges specifically:

A final source of potential pressure to settle in the process comes from an increasingly activist bench and the rising use of judicial dispute resolution, including settlement conferences and judicial mediation. This trend is a reflection of a wider interest in settlement throughout the civil court system, as well as the social pressure of a judge to persuade a party that they should settle....

Whatever the source of the pressure to settle, the key ethical professional issue ... is the line between reasonable and legitimate pressure and coercion. A measure of investment and subsequent entrapment is inevitable in any dispute resolution process. Pressure is inherent in any lawsuit – to settle, to continue – and often parties succumb to it. There is a natural desire in most cases to close the conflict and move on, and this may be heightened in the moment and in the negotiation process itself. As well,... the most significant factor in producing pressure to settle in litigation is cost. The goal of cost reduction almost always influences reluctant parties to at least consider settlement. In making explicit the search for a cost-efficient solution, informal dispute resolution processes are recognizing the reality of cost pressures, but how far should this information be pressed on the parties?...

... this requires a realistic appraisal and up-front

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Macfarlane, *supra* note 25 at 218, relying on:

- J. Alfani, "Trashing, Bashing and Hashing it Out: Is This the End of 'Good Mediation?'" (1991) 19 Florida State University Law Review 47; and

- J. Lande, "How Will Lawyering and Mediation Practices Transform Each Other?" (1997) 24 Florida State University Law Review 839, at 885.

Landerkin & Pirie, *supra* note 25 at 261, define "muscle mediation" as "where a judge unfairly pressures parties to settle, give up rights, or grudgingly compromise", and at 296 describe it as "wood-shedding" - which is, of course, "entirely inappropriate and has no place in today's adjudication system" - or any other dispute resolution system.

discussion of other pressures to settle, including costs, stress, and simply the rush of the moment in negotiation.⁷⁴⁰

Goss added what I consider to be an acceptable form of mediator pressure, using the BATNA principle. She said:

Generally, a mediator will not bend arms or lean on one party by telling them they are being unreasonable... However, the mediator will lean on the parties to ensure that, if they are going to walk away from a solution package that has been generated, the other options which are available to that party are clearly better than the solution which has been placed on the table.⁷⁴¹

With the above background, it is this last area that I will now explore.

D. JUDICIAL CONDUCT - JDR ISSUES AND ANALYSIS

Judicial conduct in dispute resolution processes will be the subject of scrutiny. In looking at allegations of potentially bad judicial conduct relating to, *inter alia*, “confidentiality, negligence, judicial immunity, fiduciary duties and the like”, I agree with, and suggest that all JDR justices in seeking to maintain judicial conduct excellence recognize the validity of, the assessment that appeal courts will have “no hesitation in scrutinizing details of the mediation”.⁷⁴²

⁷⁴⁰ Macfarlane, *supra* note 25 at 220-1.

⁷⁴¹ Goss, “An Introduction”, *supra* note 29 at 7.

⁷⁴² Landerkin & Pirie, *supra* note 25 at 297, footnote 162, referencing *Varga v. Varga* 1998 ABQB 492, [1998] A.J. No. 646, 1998 CarswellAlta 1566 (Hembroff J.), noting that this was a motion to a justice of the Court to vary a mediation settlement brokered by another justice of the Court and adding the comment that “there was clearly no hesitation in scrutinizing details of the mediation”. More recent appellate judicial review mentioned herein in other cases re-enforce this view.
Note the related case of *Varga v. Sihvon* (2001), 288 A.R. 1, 2001 ABQB 276 (Burrows J.).

The context is important. Macfarlane focuses her discussion of the conduct pertaining to a lawyer in a dispute resolution context. She said:

The role opened up to the client in some processes – for example, mediation ... – takes counsel beyond the parameters of her traditional relationship with her client....

Other ethical issues arise specifically in the context of negotiation, collaboration, and mediation. These are informal and unregulated environments and, as such, encounter and deal with problems behind closed doors.... There are many questions about what types of behavior should be deemed ethical in these settings.⁷⁴³

While the JDR justice will make sure that the proceedings are much more “formal and regulated” than a private mediation (thus removing some issues raised by Macfarlane in the context of “informal and largely unregulated processes”), again, the necessary changes being made, the same thing applies - maybe even more so, but for different reasons - to the judiciary involved in such processes.

Judicial conduct in dispute resolution is not a static issue and the answers may not be easy:

... as our experience of new dispute resolution processes grows, so does our awareness of potential and previously unanticipated ethical issues – issues that are no less (and possibly more) important because they are not addressed by any existing professional codes....

... In contrast with more traditional notions of professionalism, ethical and professional behavior in this environment may be more fluid and contextual, admitting no one “right” answer.⁷⁴⁴

Analysis of judicial conduct issues in JDRs is not an easy exercise because there are so many variables. The AJS recognized this in 1997, when

⁷⁴³ Macfarlane, *supra* note 25 at 191 - see also 198.

⁷⁴⁴ Macfarlane, *supra* note 25 at 198.

it said that standards developed demonstrate:

... the complexity of the ethical issues arising from settlement conferences, each one being different depending on the type of judge hosting the conference ..., the stage of the litigation process in which it is conducted, the parties present and whether they are represented by counsel, and other variables.⁷⁴⁵

These variables will be relevant to future education, as I will address *infra*.

So, if the scrutiny is likely, with the context understood, the future uncertain as time progresses, and the variables numerous, how does one prepare for remaining vigilant against conduct that is detrimental to the judicial role? The answer, I believe is to look at numerous individual actual problems that have arisen and hypothetical potential problems, and draw lessons and best practices from them in the context of general judicial conduct and legal principles. Indeed, to achieve the goal of responsible practice relative to judicial conduct issues, although originally stated in a broader context, there is a need for “cultivation of the ability to see ethical dimensions of situations as they are likely to arise in practice”.⁷⁴⁶ Thus, that is my focus for the rest of this section - looking at individual situations and discussing the principles and best practices.

I will address some examples of judicial conduct issues that have arisen in Alberta during my experience over the last 12 years as a JDR justice on the Court, have arisen in practice in other jurisdictions as documented in the dispute resolution literature and discussed at educational seminars, or which arise from those who focus on the concern for judicial conduct “what ifs” - the hypotheticals. Many potential hypothetical considerations are

⁷⁴⁵ AJS, “Editorial” *supra* note 711 at 48.

⁷⁴⁶ Robert P. Burns, “The Purpose of Legal Ethics and the Primacy of Practice” (1997-98) 39 *William and Mary Law Review* 327, at 327.

available for consideration relative to JDR judicial conduct. I will not attempt to list all hypothetical issues - the list will never be closed.

Hypothetical judicial conduct issues are developed in the context of the culture of an organization - including the Court. Interestingly, most of these hypothetical “ethical” issues have arisen from concerns of members of the Court in Edmonton, not Calgary. Smith is the primary among them, ever vigilant to be the Court’s conscience for good judicial conduct in JDRs - it is her positive legacy to keep us vigilant too. While there are those in Edmonton that will mediate, caucus and, in general, use the JDR process as an open book of options, as most do in Calgary, there are a number of justices in Edmonton, who, at least historically: wouldn’t participate in JDRs; demand that only special terminology be used, notwithstanding that adopted by the Court; will offer a mini-trial opinion at the beginning of a JDR and won’t “mediate” after that⁷⁴⁷; etc. Perhaps this reflects the “communities of practice” mentioned *supra*, as between Edmonton and Calgary.

In this regard, Macfarlane referenced other authors in stating:

McEwen, Mather and Maiman built on the idea of local legal culture in their concept of “communities of practice”. They argue that such communities play a critical role in defining professional norms and values via the mediated influence of collegiality.... [They] argue that “communities of practice” are as or more significant in the development of lawyers’ professional

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According to one interview Danielson had with a non-Edmonton justice, the interviewee said “We have heard that Edmonton only gives opinions and leaves the room. That is not JDR.” While I don’t accept that all Edmonton JDR justices do that, there is clear evidence from the Survey that at least one or more do, and, in my view, it is not appropriate. It is the duty of the JDR justice, in my view, to make certain that the parties only want an opinion and nothing else (and another interview, from an Edmonton JDR justice, recorded on the same page, indicate that this does happen), or, if the parties want assistance after the opinion, to stay involved to provide it, unless and until the parties agree that the JDR justice is no longer necessary. Some of the Survey results suggest the latter is not happening, at least on occasion, in Edmonton. See Danielson, *supra* note 4 at Appendix F, at 2.

identity as codes of conduct. These communities, which are some times self-consciously selected but more often are simply a matter of chance, determine the acceptable and unacceptable ways of practice, the appropriate professional goals, the way of relating to clients ..., and so on....

Particular community characteristics are often associated with a tendency towards greater or lesser degrees of cooperation/adversarialism and degrees of informality and formality.

...

.... Like every other aspect of the lawyers's role, negotiation behaviors are tempered by the conventions that exist within immediate communities of practice. For example, is negotiation in this community usually hardball or cooperative, is information routinely disclosed or withheld, is aggressive behavior tolerated or not? Is it expected that one will generally contact the other side and propose informal negotiations or would this action be considered a sign of weakness? Does counsel habitually speak privately and frankly with counsel for the other side.... Are local judicial settlement conferences, mediations, or pre-trials seen as an important resolution opportunity, or do counsel attend simply in order to "go through the motions"? ... These and many other dimensions of negotiation practice reflect the values and norms of the local legal culture and relevant community of practice.⁷⁴⁸

I believe that this explains the difference between the two largest communities in Alberta, in terms of their attitudes to JDR. It has always been thus in adjudication, so why should it be different in JDR? Simply put, there are different legal cultures. This may be (but is not necessarily so) acceptable with lawyers, clients and judiciary from the "same town", but what about the clash of legal cultures when one lawyer, client or justice is from "out of town".

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Macfarlane, *supra* note 25 at 35, referencing L. Mather, C. McEwen, and R. Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford: Oxford University Press, 2001).

This is not just about Edmonton and Calgary, but also Toronto and Ottawa, and other cities.⁷⁴⁹

While judicial independence is respected, minimum standards must apply if a program is to retain its focus and goals. As Brazil prescribed, and I believe, courts must “*preserve ‘process integrity’*” where:

... neutrals [must] *follow prescribed procedural protocols. Parties and their lawyers have a right to know, in advance, what kind of procedure they are entering - what it will consist of and what the rules are. Neutrals in court-sponsored programs must not strike out into their own, uncharted procedural waters by inventing as they go or converting one kind of ADR into another without notice, midstream.*⁷⁵⁰

Accordingly, it is not sufficient, in my view, for those with experience to merely say things such as: “I will do it my way, as I always have done it”, or “we don’t need any more formality”, or “people like the way I do a JDR - I have my ‘regulars’, so why would I change”? Minimal standards and judicial independence can still provide the best program and the best judicial mediation skills at the same time.

No formality should be introduced, if it can be avoided, or it has no purpose. That is not the situation here. In my view, as to both the original point and the “out of town” point, the Court, recognizing judicial independence, needs to set a number of judicial minimum standards or best practices to respond to lawyers and clients reasonable expectations and requests (as reflected in the Survey), and then, at least in a “grand-parenting” sense, identify the individual judicial proclivities that separate some JDR justices from that norm.

⁷⁴⁹ See Macfarlane’s comments about the difference in legal culture between Toronto and Ottawa - at 36, and many other locations.

⁷⁵⁰ Brazil, “Now”, *supra* note 11 at 507 [emphasis added].

For the JDR Program, that means, in my view, creating such a minimal standard, and providing a JDR Judicial Profile of those who either wish to depart from that standard or wish to establish a clear initial profile. Additionally, so that there is no judicial confusion as to what the parties seek (as sometimes arises in my personal experience and as the Survey demonstrates)⁷⁵¹, a simple JDR Booking Confirmation form might be used to start the process, once booking is complete. In this latter regard, I recommend that the JDRC consider such a province-wide form, in conjunction with the JDR Coordinators, incorporating only the “*need to know*” information that the JDR Coordinator and the proposed JDR justice will require⁷⁵² to: set up the JDR; prepare the Instruction Letter (that must, in my view, go out confirming the procedure to be utilized for every JDR, whether or not there is a Pre-JDR); and determine whether a Pre-JDR is requested or

⁷⁵¹ Agrios, *supra* note 12 at 25.

⁷⁵² Some of the items in the Agrios Pre-JDR Checklist (Agrios, *supra* note 12 at 19 - 16) might be included in such an JDR Booking Confirmation form so as not to waste the time of further discussion, such as (using the Agrios numbers):

1. case type;
2. essential issues (to be elaborated on in the briefs);
3. enumeration of previous offers;
4. confirmation of good faith wish of the parties to settle - perhaps adding any exceptions or limits (e.g. municipal governments may need municipal counsel approval beyond a certain limit - see the Edmonton “Protocol” (Agrios, *supra* note 12 at 68, item 6));
5. confirmation of full disclosure, and exceptions;
6. type of JDR and process proposed (fill in the blanks to maintain consistency, with room for comments) - including wishes on caucusing - item 12 below);
9. whether the clients will make statements at the JDR;
10. proposed attendance of any non-party (e.g., expert (party retained, or mutually retained), family member, etc.);
11. technical equipment required;
12. caucusing position (see item 6 above); and
17. other relevant information.

The remaining items (7, 8, and 13 - 16) are all appropriate to be included in the follow-up Instructional Letter, along with other items - inviting a Pre-JDR if counsel wish it for any purpose to disclose any matter relevant to settlement that they do not wish to put in the JDR Booking Confirmation form, or the JDR justice directing a Pre-JDR is s/he sees anything in the JDR Booking Confirmation form which s/he believes makes a Pre-JDR prudent (such, as Agrios identifies at 50, “what the fight is all about and why the lawyers (and clients?) are apart”).

required.⁷⁵³ I believe that most counsel would prefer to fill out such a form than waste additional (and sometimes unnecessary) time (and client's money) to attend a Pre-JDR. This is neither rocket science nor new - I note that the Edmonton Family and Youth division of the Provincial Court wisely used a simple form to meet the requirement for their JDR procedures⁷⁵⁴ (which might also contain the provisions of the Guidelines for JDR (Appendix 7) and reference to the New Rules when they are implemented). And, as discussed *supra*, I am of the view that a Pre-JDR should not be mandatory (except for SRL and Binding JDRs) but held only if the parties wish one or the JDR justice sees a real need - that is, it will provide information not already disclosed in either the JDR Booking Confirmation form or the JDR Instruction Letter. And, if a Pre-JDR is requested or required, it should be determined if it can be as usefully accomplished by a telephone conference, rather than a time consuming (and, thus, expensive) personal appearance of counsel.

Let's identify, examine and discuss some actual or hypothetical situations. Based on the experience of others (but according with some of my own experiences), recent Alberta cases, the dispute resolution literature, and - yes - the worries of those who are our vigilant judicial conduct consciousness, specific hypothetical examples have been developed. These were the subject of exercises discussed at the NJI Vancouver JDR Settlement Conference in October 2008 and the Court's NJI Court Seminar in November 2008.⁷⁵⁵ They have been very helpful to me in considering some of

⁷⁵³ In some jurisdictions in the U.S. a Standing Order is used to cover some of the issues I have identified for the Instruction Letter and JDR Booking Confirmation form - they may offer assistance in drafting same for the Court - see, for example: Morton Denlow, "Breaking Impasses in Settlement Conferences: Five Techniques for Resolution" (2000) 39 Judges J. 4, at 8.

⁷⁵⁴ Goss, "Judicial", *supra* note 68 at 515 and 521-2 (Appendix B).

⁷⁵⁵ National Judicial Institute. Judicial Settlement Conference, Vancouver, British Columbia, October 15-17, 2008 [NJI Vancouver Conference]; and National Judicial Institute. Court of Queen's Bench of Alberta Education Seminar, Calgary, Alberta, November 13-14, 2008 [NJI Calgary Conference].

the key issues and the recommendations that I make in this Evaluation Report. In these exercises, aided by video role playing from a script, an “analytical framework” was used for each hypothetical. That process, I believe is adaptable for use in considering any potential issue of JDR judicial conduct. The analytical framework, adapted for this paper, included the following: (a) in a given fact situation, is there a problem that raises an issue(s) of judicial conduct? (b) if so, articulate what is/are substance of the problems and what is/are the specific issue(s) of judicial conduct raised; and (c) once the problem is identified, what is/are the preferred course(s) of conduct that should be taken (or have been taken) on them to address (and, hopefully) resolve the issue, and answer why?⁷⁵⁶ I will use, generally, this analytical framework and some of the broad hypothetical examples (and others) *infra* to discuss some of the issues relating to, and the solutions or best practices to avoid, judicial conduct problems in JDRs.

Justice - Lawyer and Client Relations

Macfarlane devotes much of her book to the changing roles between lawyer and client in the context of ADR and JDR - from one in which the lawyer is solely in control (except for “instructions”) to one where the client has much more participation in the settlement process (perhaps, occasionally, even to the exclusion of the lawyer). Her thesis, I perceive, although beyond the scope of this Evaluation Report, is that lawyers have to learn to get used to the change in focus and find one that is comfortable to the individual lawyer and client in a given case.⁷⁵⁷ What is relevant to this Evaluation Report is the way in which the JDR justice uses or avoids this:

⁷⁵⁶ NJI Vancouver Conference, *supra* note 755 at tab 24; and NJI Calgary Conference, *supra* note 755 at tab 3.

⁷⁵⁷ See Macfarlane, *supra* note 25 at, *inter alia*, 62-3 for the discussion relevant to this issue.

In judicial settlement conferencing, the degree to which clients are expected to participate depends on the approach of the individual judge, although there are signs that as experience grows with this forum, judicial attitudes may be changing. In family matters, in particular, judges are increasingly convinced of the value of having the clients speak up and be spoken to.⁷⁵⁸

There is a broad spectrum from the shy (perhaps ignorant, in a legal sense) client who wants the lawyer to do all the talking, to the outgoing (perhaps “know-it-all”, in the legal sense) client who wants to take control - most are somewhat in the middle where the lawyer conducts the mediation, with the client’s comments as appropriate. As Macfarlane recognizes, there are some lawyer-client issues (beyond this Evaluation Report) - some lawyers: “use their control to ensure that their clients’s participation is minimal and that the discussion remains dominated by the lawyers, with the goal that the lawyers will dominate the proceedings and their clients will simply be ‘wallflowers’”.⁷⁵⁹ However, I have heard some of my judicial colleagues remark to the effect that they “shut the lawyers up” and tell the participants that they only want to hear from the parties, as it is “their” dispute. I strongly believe that is wrong and an unnecessary and unhelpful interference with the counsel-client relationship - indeed, it might be ultimately prejudicial to the client - especially the shy one. I believe that while the client should be encouraged to actively participate in the JDR process, it is the counsel and the client (together) who should determine the nature of their respective participation, not the JDR justice. Brazil strongly and clearly agrees, noting that this is one of the things that will drive lawyers away from ADR. On the contrary, he said that “[g]ood court ADR programs must attack ... by ... reducing lawyers’ fear that the neutral will ... displace them or invade their

⁷⁵⁸ *Ibid*, at 74, referencing, *inter alia*, B. McAdoo, “All Rise, the Court Is in Session: What Judges Say About Court-Connected Mediation” (2007) 22 Ohio State Journal on Dispute Resolution 377, especially at 397-402.

⁷⁵⁹ *Ibid*, at 147.

relationship with their client".⁷⁶⁰

Bad Faith

There many inter-related issues for discussion regarding bad faith. Again, focusing on lawyers, Macfarlane raises the substantive issues of advantage-taking, disclosure issues, issues of good faith, informed consent to the type of resolution process, and pressures to settle, but also the general or background issues of "high ethical standards, competence, civility, collegiality, and commitment to public service."⁷⁶¹ She points out that the issue is not just a "here and now" (my term) issue, but rather what I perceive to be a generational issue, and she relates it to some of the works of Kronman that argue "that the legal profession is in a state of change ... [that causes] a fear that the profession is no longer tethered to the fundamental ideals of a vocation or calling and, as a consequence, has 'lost its way' - "away from what Kronman calls the "lawyer-statesman".⁷⁶²

Informed Consent

Macfarlane raises an issue of informed consent that impacts on judges and one to which they should never be a party:

One area in which the problem of informed consent reemerges is where mediation is not mandatory but court personnel or judges placed pressure on the parties to agree to mediation. This situation gives the impression, perhaps accurately, that participating in mediation is a way of buying favor with the judge, especially if lawyer and client anticipate a future hearing before him or her. Sometimes the degree of pressure a judge

⁷⁶⁰ Brazil, "25 Years After", *supra* note 14 at 133.

⁷⁶¹ Macfarlane, *supra* note 25 at 191-3, and as discussed throughout her Chapter 8 - 198-222.

⁷⁶² *Ibid*, at 195.

places on a disputant who is uninformed about mediation may result in a confusion or constellation of mediation with adjudication in the disputant's mind.⁷⁶³

Client Information

A second problem arises with the amount of information that the party has coming to the JDR. In this regard Macfarlane had this to say:

Even more disturbing is the consistency with which research data suggests that clients in mandatory processes such as case management, court-connected mediation, and settlement conferences often come to these sessions with *little or no idea what to expect*. The fact that these processes are mandatory does not relieve or reduce counsel's obligation to inform his client and ensure that she has a sufficient understanding of the process. The efforts of court programs convey *explanatory literature* to parties is often frustrated by the failure of lawyers to pass on this information to their clients.⁷⁶⁴

These comments on informed consent and client information raise obvious issues for the JDR (or case management) justice. Two come to mind. First, while Alberta does not have an individual docket judicial case management to trial system and there are, except in a couple of small centres, many justices before whom an action may come for trial, the practice is to make a justice exclusive to an action to which s/he has been appointed case manager or pre-trial conference justice. Thus, while not as potentially troubling as in an individual docket system, or a small community exclusive judicial "presence", judges must be clear to recommend dispute resolution

⁷⁶³ *Ibid*, at 203.

⁷⁶⁴ *Ibid*, at 203-4 [emphasis added], relying on:
 - J. Nolan-Haley, "Court Mediation and the Search for Justice through Law" (1996) 74 *Washington University Law Quarterly* 47; and
 - T. Heden and P.G. Coy, "Community Mediation and the Court System: The Ties That Bind" (2000) 17 *Mediation Quarterly*.
 She also noted that, in her experience, while most lawyers say they briefed their clients in such situations and provided information, many clients report independently that is not so.

processes, but never make them appear mandatory, if they are not. The second is that in case the parties lawyer(s) do not explain the process to them, and recognizing that each JDR justice might have a slightly different process, appropriate information should be made available by the Court, directed to the client. Such information would be that discussed herein as the JDR Program pamphlet which would be available online but referenced in the JDR Instruction Letter (for them advising their client) and a brief repetition of the salient points of the process should be reviewed at the opening of the JDR.⁷⁶⁵

Coercion to Settle

On the issue of pressure to settle, the JDR justice can play a very important role in providing a “reality check” to a party who is not getting the message from his/her lawyer, or the lawyer has not tried to give, or cannot convince the client of the need for. However, it cannot, in my view, be too aggressive. The problem is illustrated in the following passage:

... ‘Mediators and lawyers may find that they share an interest in pursuing principals to settle’. For example, counsel may use a particular (‘muscle’) mediator to ‘reality check’ (or arm-twist) his client when he is concerned that the client’s expectations are unrealistic. While resorting to a ‘muscle mediator’ may be a carefully chosen and appropriate strategy in some cases, it is important for lawyers representing clients in mediation to be clear that their primary relationship and commitment is to their client and not to the mediator.⁷⁶⁶

Justice - Lawyer Familiarity

⁷⁶⁵ Note that the Edmonton Family and Youth division of the Provincial Court, after some experience and evaluation, recommended a standard Opening: Goss, “Judicial”, *supra* note 68 at 523 (Recommendation 4).

⁷⁶⁶ Macfarlane, *supra* note 25 at 208.

Equally important, JDR justices must recognize that they must remain fair to both/all the parties, and must not take direct steps which do, or may, or be interpreted to intend to, jeopardize the lawyer/ client relationship. At the same time, JDR justices must maintain some reserves/boundaries and refrain from signs of overt amicability or attachment to the counsel on either side (such as “how about a golf game some day”), or to both counsel (such as “remember when the three of us had the case of ...”). Clients may well not understand the ability of most judges and lawyers to separate legal and social issues and might see these statements as alarming - as favouritism to one party, or an “old boys⁷⁶⁷ network” not interested in the parties.

1. WHICH HAS PRECEDENCE - JUSTICE OR EXPEDIENCY?

In my view the answer to the question in this heading is simple - if there is only one choice, the answer is clearly “justice” - but why must there only be one choice; why can’t both be valid interests? The U.S. Seventh Circuit, as interpreted by one author, apparently came to the same conclusion, namely that, the rule of law must not suffer: “speed and judicial efficiency should not be sought at the expense of justice or due process”⁷⁶⁸.

All of this is easy to say, but what does it mean? As just alluded to, has “efficiency” (less aggressive than “expediency”) no role? As to the conflict, see the discussions *supra* relating to the theory of Fiss. As to the concerns, see also the use of coercive power scenario discussed *infra*.

⁷⁶⁷ Not here intended to be gender specific, but to represent an informal fraternity. However, note the comments about the JDR justice being “too chummy” in the clients’ qualitative comments.

⁷⁶⁸ Antalovich, *supra* note 591 at 133, and 137-9. Indeed, the argument is advanced that there is some evidence to show that case management may not increase efficiency or settlement, and it must be used in “the correct way” to obtain “a quick, efficient and just result”.

Relative to this issue, the AJS curriculum provides:

The judge 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.⁷⁶⁹

Otis and Reiter, before addressing fair treatment in a broader way relating to process and consent, endorse this, but add a caveat:

... though the judge-mediator is the guardian of the fairness of the process... as to its substance his or her role is limited to verify that the parties give real consent to the agreement they reach and that the settlement reflects public order and is not manifestly and extremely unfair.

This caveat is all the more important because during mediation the judge-mediator remains a judge, imbued with particular status, powers and duties, whose opinion and presence are highly influential for the parties and counsel alike. In these circumstances it is essential that judge-mediators keep in mind that their role is to facilitate and promote the autonomy of the parties and not to adjudicate.⁷⁷⁰

Concerns over a management model to limit and control litigation, and an “obsession” “over clearing court dockets”⁷⁷¹, that causes “judges to pay

⁷⁶⁹ AJS, “Editorial”, *supra* note 711, at 48.

⁷⁷⁰ Otis & Reiter, *supra* note 7 at 396-8.

⁷⁷¹ Danielson, *supra* note 4 at 30, quotes from Peter N. Thompson, “Enforcing Rights Generated in Court-Connected Mediation - Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice” (2003-4) 19 Ohio St. J. On Disp. Resol. 509, at 516, as to the mutual reasons for the ADR and adjudicative process linking:

Certainly, the rapid growth of the ADR movement was fueled in large part by a rejection of the adversariness and inflexibility of the litigation process. Courts and legislatures, on the other hand, have readily accepted mediation, not necessarily because of an interest in self-determination, but because cases settled with little effort or expense by the judicial system. The overlapping interests in resolving disputes cemented the marriage between the ADR community and the judicial system, despite what might appear to be differing values.

more attention to their statistics rather than quality of their dispositions"⁷⁷², instead promoting adjudication as a process that is open for the determination of rights, is an ethical issue that may need more examination.

There is another aspect to this discussion. Is a focus on right-based advocacy one that makes it difficult to move to settlement? Macfarlane put it this way:

[Disputes] may also become significantly more difficult to resolve once entrenched rights positions have been traded back and forth. This is a profound limitation for rights-based dispute resolution and exposes the weaknesses of a belief in a default to rights. Once made, positional statements are hard to take back without appearing weak. Compromise and accommodation become harder to achieve.

Yet rights still are a back drop to any interest based negotiation:

Addressing emotional needs may take a very different form from a contested distribution of rights. Bargaining over these goals looks different than asserting rights and justifications for entitlement (a low rights claims may still provide an important set of criteria or alternatives if bargaining fails).⁷⁷³

a. IMPRUDENT SETTLEMENT

If the parties, each represented by counsel, in your presence, arrive at a settlement which you believe is, or may be, imprudent⁷⁷⁴, what should you

⁷⁷² Gabriel, *supra* note 107 at 93, relying on:
 - Resnik, "Managerial Judges" (1982) 96 Harv. L. Rev. 374; and
 - Antalovich, *supra* note 591 at 117, who makes a similar statement relying on the same source.

See also Ravindra, *supra* note 715 at 300, relying on Alfini, "Risk", *supra* note 107.

⁷⁷³ Macfarlane, *supra* note 25 at 53.

⁷⁷⁴ From Exon, *supra* note 659 at 388, comes the example where a settlement is based on an eighty/twenty split, whereas the mediator's perception is that a court would award a 50/50 split.

do? Nothing? Something? If the latter, what should it be? Does the reason for the perceived imprudence make a difference?

Some perceptions as to the reason for apparent impudence include, for example, junior and/or incompetent counsel or a weak party.

Smith argued, in effect, that the JDR justice must ensure that the settlement met the standard appropriate to adjudication.⁷⁷⁵

Almost 1,900 of 3,500 U.S. lawyers surveyed on this type of a question responded 54% that the judge should not take steps to encourage the party believed to be accepting an imprudent settlement to reconsider, and only 24% thought the judge should.⁷⁷⁶ Vancouver lawyers were similarly against a justice “ruling” on the fairness of a settlement, the author noting that the “Canadian Bar Association Code of Professional Conduct assumes that a lawyer has the ability to recognize a fair settlement” and expressing the opinion that one reason for this view is that it is quite likely that “*the settlement judge cannot be cognizant of all the circumstances and reasons for the willingness to settle at the proposed amount*”.⁷⁷⁷

I believe that, in this hypothetical, as stated, the JDR justice should be very careful, and merely not give any impression that s/he is countenancing the settlement. There are several reasons for this. First, the judge is not a deity that is almighty in vision. There may be reasons of “interest”, as compared to “rights”, why a party might make what, without that knowledge, may appear as an imprudent settlement - that is, there may be external

⁷⁷⁵ Smith, *supra* note 13 at 10.

⁷⁷⁶ Brazil, “What Lawyers Want” *supra* note 238, at 89.

⁷⁷⁷ Epp, *supra* note 333 at 103 - 5, specifically at 103 and 104 and 105 respectively (emphasis added).

reasons that are not within the JDR justice's knowledge that make the settlement prudent (note examples, *supra*, pertaining to ability to enforce, and family property settlement). Second, the JDR justice is to assume that the lawyer is competent as is required by the law society - the JDR justice is not to be a law society police officer. Third, conducting a JDR does not mean that a settlement must have the judge's imprimatur - indeed, the parties have every right to negotiate a settlement on their own, without judicial blessing. Why should it be different when a JDR justice is present, as long it is a settlement based on express and informed agreement, and it is clear that there is, in fact, no judicial blessing going with the settlement? Fourth, if a settlement is offered and accepted, interference with it might implicate the JDR justice in an action for inducing breach of contract.

In the end result, if I were the JDR justice, I might observe, in the presence of all parties and counsel, that an agreement seems to have been made and ask the parties and counsel to confirm that the agreement is based on informed consent. If they do, then I might add that it is not the court's role to "judge" the prudence of the settlement, but rather that the court respects the right of the parties to make the settlement.

Would this recommendation be the same if there were a clear balance of power favouring the offering party or the offeree was a SRL? The answer, in my view, is "yes", depending on the circumstance.

I will not dwell on the imbalance of power due to junior or incompetent counsel here, because the hypothesis *supra* is that the offeree is represented by counsel, and, for the reasons aforementioned, that would be him/her role. If the client and his/her lawyer remain happy, that is the end of it. If there is offeree regret, that person can deal with it through counsel, or a malpractice

claim, if necessary. While I would have to think long and hard on it, I might, through the Chief Justice and the Law Society/Court “Bench & Bar Committee”⁷⁷⁸, get a future message to the counsel or his/her superior as to the concerns of the JDR justice in such a case, and make some recommendations.

As to SLR, there is debate on the subject. While expressed in the context of adjudicated, not settled, justice (I do not believe there is a difference in the context I use it), the different views include: “unrepresented litigants must play by the same rules as represented parties and can expect no special treatment”; “caution that the judge may not play the role of advocate or attorney for the unrepresented litigant”; and “judges must provide some measure of assistance to the unrepresented litigant to avoid a miscarriage of justice, and must do so in construing [self-represented] pleadings”.⁷⁷⁹ Considering these alternatives, I am of the view that the judge cannot give substantive advice to SRL, any different from represented litigants. Thus, if the offeree was a SRL, the court might suggest that the SRL may wish to get independent legal advice on the proposed settlement, and ask that it be kept open for a fixed period of time to accept/ after such advice. This would have a potential benefit to both parties - the SRL gets real legal advice, and if after the advice, the settlement proceeds, the offeror gets a settlement that cannot easily be set aside, even if it means (likely minimal) delay. If the settlement does to proceed, then it might be perceived in the context of the expression that “it was not meant to be”. At minimum, the judge must be certain that the SRL understands the proposed agreement and what,

⁷⁷⁸ An informal committee between the Chief Justices of the Court and the President of the Law Society to deal with personnel complaints by a member of one against the other.

⁷⁷⁹ Engler, *supra* note 668 at 370, relying on his previous publication: Russell Engler, “And Justice for All - Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks” (1999) 67 Fordham Law Review 1987.

if any, rights are to be waived.⁷⁸⁰

Relevant to this, and other issues, it is to be noted that a JDR can assist with a number of matters not able to be achieved in private mediation: dealing with power imbalances between litigants and their counsel (presumably including SLR); enforcement of settlements agreed⁷⁸¹; and compelling attendance of important participants.⁷⁸²

b. USE OF COERCIVE POWER

Recognition of the potential for, and the avoidance of, coercive power (as discussed *supra*) is not new, but has been clearly recognized by this Court since the advent of the Alberta mini-trial.⁷⁸³

Judges, I believe, should discuss with the parties (in caucus or otherwise) the general issue of risk⁷⁸⁴, and, if asked, the specific risks as to

⁷⁸⁰ Although going beyond the depth of this Evaluation Report, Engler notes that “Proposed Best Practices” adopted by the American Judicature Society and the State Justice Institute, emphasizing encouragement, not coercion, advocated that “[o]nce a settlement is presented to the court for approval (Alberta judges would normally not be presented with a settlement “for approval” in a JDR), judges should ‘engage in allocution to determine whether the self-represented litigant understands the agreement and entered into it voluntarily;’ this process includes determining ‘that any waiver of substantial rights is knowing and voluntary’”. While this paper is not a comparative study, it is interesting to note that a similar guideline (with added commentary) was promulgated in Massachusetts in 2006: Engler, *supra* note 668 at 376, and 377-8.

⁷⁸¹ As to enforcement, there is research to establish “that mediation procedures are in fact more likely to produce decisions that are obeyed than our adjudication procedures”: MacCoun, Lind and Tyler, *supra* note 49 at 101. Enforcement, however, as opposed to voluntary payment, will follow only if the parties reduce the settlement into a consent judgment.

⁷⁸² Parness, *supra* note 590 at 1897.

⁷⁸³ Moore, “Mini-Trials” *supra* note 288 at 198.

⁷⁸⁴ Danielson, *supra* note 4 at 67, quoting from Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (San Francisco: John Wiley & Sons. Inc., 1999), at 385 (note that there is a later edition in 2003), linked “risk

the possible trial outcomes relevant to the issues in the litigation in question.⁷⁸⁵

The judge should address the range of risk and the general likelihood of the risk materializing. For example, in a case involving whether or not there is insurance (e.g. life or disability) coverage, the risk will be as to whether there is liability, the quantum unlikely to be in doubt. Therefore, the JDR issue will be liability only, which will depend on the specific facts and the law, but the risk of it materializing at trial is either 0% or 100% for one of the parties, if not compromised, because the trial judge must pick only one answer. However, if, say in another fact situation like a personal injury case, liability is not in doubt and the JDR issue is quantum, it would raise two types of issue. The first is the theoretical appropriate quantum, on which fact and credibility findings may have a broader range of reasonableness than coverage liability. The second, on the theory that reasonable people (judges) can differ, is the risk of predicting what the unknown trial justice would do with

assessment” and “doubt”:

...through the risk assessment, the Justice can create doubt in the mind of an over-confident litigant. One of the primary reasons to utilize a risk assessment is to create doubt.

Mediators often use doubt to influence parties toward settlement. Doubt about the viability of the position or settlement option can be raised or explored in joint session, where both parties must hear the potential negative consequences; but more often, the mediator instills doubt in one or more parties in a caucus.... Through careful questioning that may vary in degree of directness, the mediator may begin to create doubt in a party's mind about the feasibility of his or her adherence to an option. If misused, this technique obviously approaches manipulation and raises questions about the ethics of mediator influence.

⁷⁸⁵ I refer to this as “principled negotiations”, namely trying to best determine the range of possible trial outcomes (thus, the “risks”). Others have referred to this as “bargaining in the shadow of the law”, as discussed *supra*: see, *inter alia*, Galanter, *supra* note 591 at 257. However, it is important to recognize that a JDR provides the ability to resolve disputes in “far more expansive than the [purely] justiciable claims ... more claims, interests, and people than would be have been involved in any adversarial proceedings in the same case”: Parness, *supra* note 590 at 1900 and 1908.

the those facts and the credibility - the “judge risk”.

In all these situations, it is important that the JDR justice not be timid in advising each party of the risk - in my view, the judge can be less timid in caucus than in joint session, and there may be good reasons to do it in caucus (this point goes, however, to the merits of caucusing, not the conduct associated with it, so I won't pursue the latter matter at this juncture). As to the “judge risk” aforementioned, while this should not be a “dodge” in giving a risk analysis, it is, in fact, part of the risk and the JDR justice should deal with it straight up, with advice, as noted, that even reasonable judges may differ - thus introducing the risk of the decision maker, whose decision will replace that of the litigators if they don't settle. A judge should almost never be emphatic as to a specific or absolute result or state that all judges would clearly determine a matter in a certain way - that, in my view, would, in addition to being inaccurate, be a improper use of the coercive power of the office of the JDR justice, and it would (or might) minimize the role of the Court in the eyes of one or more of the litigants.

There is a hidden aspect of coercive power that I believe judges should also avoid. As Macfarlane noted:

... concerns are sometimes expressed that mediation and settlement processes may be co-opted back into an adjudicative mode by the widespread use of evaluative mediators, whose often-pressured approach focuses on the legal merits of the dispute.⁷⁸⁶

Thus, in my view, judges have to be very careful not to pressure a settlement on the legal merits or “rights”, resulting in a failed JDR, while preventing a settlement of a case in a way that meets the parties' interests.⁷⁸⁷ For

⁷⁸⁶ Macfarlane, *supra* note 25 at 21.

⁷⁸⁷ Bussin, *supra* note 5 at 491, referencing:
- T. Tyler, “The Quality of Dispute Resolution Procedures and Outcomes:

example, in the coverage liability hypothetical, a “rights” determination might argue for a specific result (either 0% or 100%), whereas an “interests” determination, addressing the risk, would surely be to compromise in-between those goal posts.

One must distinguish between coercion and avoiding an unconscionable settlement. Nevertheless, the problem is not that easy to resolve. Macfarlane speaks to the issue from the point of view of a lawyer, but, *mutatis mutandis*, the same problem faces the JDR justice:

What if the instructions the client gives are simply not in his or her best interests? Should the lawyer assume he knows best and persuade his client of this? How far should counsel press the client to hold out for a better deal when the client is ready to settle? There is a risk of paternalism, such that counsel assume she “knows best” within the narrow scope of the particular expertise that she offers. Conversely, there is a risk the client will be so influenced by the lawyer’s opinion that they cannot make a personal decision. Many lawyers find the balance between client decision making and lawyer expertise a difficult one to strike, especially within the context of a primarily adversarial system that assumes fighting is “more” and settling is “less”. It is difficult for lawyers to know how to manage a conflict between their rights-based advice and a client’s desire for resolution based on other factors.⁷⁸⁸

In response to this dilemma, Kronman has proposed a solution, but one with which Macfarlane appears to disagree:

... Kronman has pointed out that the morally “blind” adherence to the clients’ goals is not the way law was

Measurement Problems and Possibilities” (1989) 66 Denver U. L. Rev. 419, at 430-2; and
 - Luban, “Quality”, *supra* note 181 at 404-5, asserts that “dispute resolvers have no obligation to consider the public interest in the manner that judges do” - meaning, in my understanding, in an adjudication.

⁷⁸⁸ Macfarlane, *supra* note 25 at 105, referencing W. Simon, “Lawyer Advice and Client Autonomy: Mrs. Jones Case”, in D. Rhodes, ed., *Ethics in Practice: Lawyers Roles Responsibilities and Regulation* (Oxford: Oxford University Press, 2000).

traditionally practiced or the way that lawyers... understand their role. Kronman argues that a more perfect approach, and one that is more faithful to the professional identity of lawyers, mediates the zealous advocacy approach with the responsibility of lawyers to enable the client to evaluate and appraise their goals and options and to offer judgment or “deliberative wisdom”. Deliberative wisdom is more than simply a legal evaluation or the advice of a technical specialist. It also includes considering other non-legal implications of the decision to act. It might also include advice on the dilemmas inherent to bargaining described ..., which are always present in the space between the lawyer’s legal appraisal of the value of a case and the client’s expectations or settlement goals. Kronman’s position is that offering deliberative wisdom on how a client might achieve his goals is an honorable and valuable role, which much contemporary legal practice, especially corporate commercial practice, inadequately recognizes and affords space for.

... For the new lawyer, it means inviting discussion of client goals that goes beyond the information deemed necessary to formulate a rights-based approach in order to produce a more complex, multi-layered version – for example, considering business goals and priorities, weighing the needs of the client for closure, and re-emphasizing the needs and interests that lie behind the asserted position. Translating this additional information into client advocacy and pursuing the clients’ core needs and interests, whatever these might be, looks quite different than advocating only for the goals framed through the lens of legal rights.⁷⁸⁹

Again, while relating to lawyers, does this have substantive advice for the JDR justice? In fact, reading Kronman’s discussion at the subject pages, while his view perhaps gives a very formalistic, even anachronistic, view, he clearly addresses the ways in which a lawyer can consider a client’s goals and provide appropriate advice. But let’s move the debate to the issues at hand - whatever the role of counsel, which Macfarlane and Kronman address, and which I will leave lawyers to consider, the pertinent question here is, what

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Macfarlane, *supra* note 25 at 107-8, referencing Kronman - “Lost”, *supra* note 10, especially at 128-34.

is the role of the JDR justice on what might appear to be an improvident settlement?

Later Macfarlane emphasized the need for closure, including obtaining the results of the resolution, and the expenditure of emotional energy:

Emotional closure or business viability and recovery are often pushed further away in litigation. In civil trials, the process of resolution may be further prolonged by the need for enforcement steps after securing a favorable judgment The most frequently given reason for any negative or partly negative assessment of outcome [at trial, based on Macfarlane's research] was the length of time and emotional energy consumed⁷⁹⁰.

She might have also added the possibility of an appeal (not present in a negotiated settlement), which puts the result in jeopardy to a successful party, and means more costs - in either case also the consumption of emotional energy. However, even there dispute resolution is often available.⁷⁹¹

Later she expanded on this in a way which also directly impacts the judicial role:

In envisioning and evaluating potential outcomes, conflict resolution advocacy will certainly include a measures-based proximity to an "ideal" (i.e., successful) legal outcome, but many other factors will also be important. For example, responsible counsel will always consider the issue of costs in planning a conflict resolution strategy. Conflict resolution advocacy should consider how far any one outcome will meet client interests. Aside from "winning", these might include, for example, recognition and acknowledgment, business expansion or solvency, future relationships both domestic and commercial, vindication and justice, emotional closure, and reputation. These interests have both short-term and long-term elements.

⁷⁹⁰ Macfarlane, *supra* note 25 at 115.

⁷⁹¹ Otis & Reiter, *supra* note 7. See also Paperny, *supra* note 396.

They reflect not only outcome goals but also the importance of procedural justice – feeling listened to, being taken seriously, and being fairly treated. In a conflict resolution model of advocacy, it is not only the final deal that matters but also how the client feels about how it was reached, which includes the sense that the outcome is fair and wise in light of the clients' interests, and a recognition of the limits of the system to offer alternative, better solutions.⁷⁹²

I might have also have expanded the “feeling listened to” concept, in a JDR context, that the parties felt that they “had their day in court” and that they were able to tell their story - not to anyone, but “to a judge”.⁷⁹³ The importance of telling their story to an empathetic, but detached, judge must not be underestimated - because of the role and gravitas of the office of judge, it often gives the person some validation, regardless of the (perhaps otherwise unsuccessful) outcome - which allows the person to move on and settlement to proceed to that outcome These points reflect directly on how the JDR justice conducts the JDR. It is apparent from the Survey, I believe, that most of the lawyers and parties who participated felt, with some minor (and judicially unacceptable) exceptions, that they were listened to, taken seriously, and fairly treated by the JDR justice, regardless of the outcome. This is extremely important, because this, I believe, means that, again regardless of the outcome, they felt that “justice was done”.

Macfarlane also added other, perhaps unexpected, motivations and outcomes:

⁷⁹² *Ibid*, at 115-6.

⁷⁹³ Danielson, *supra* note 4 at 6-7, noted that “Another clear measure of success of the Alberta JDR program is indicated by its popularity. ... Litigants like the opportunity to tell their story to a judge and to do so in an informal way, free of the complicated rules of evidence. ... ‘They still want their day in Court’”. See also Danielson, *supra* note 4 at 65, and Landerkin Evaluation Report, at 655, referencing F. Lind & T. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988), and at 658, referencing F.E.A. Sander, “Varieties of Dispute Processing”, in R. Tomasic & M. Feeley, *Neighbourhood Justice: Assessment of an Emerging Idea* (New York: Longman Inc., 1982), at 27-30.

In some disputes, it is important for the outcome to be responsive to a sense of systemic and underlying issues. This may come at the urging of one party or another – for example, the employee claiming discrimination who wants to see future procedures changed to avoid the problem reoccurring, or the manager who sees the need for a new set of procedures and protocols to enhance clarity and fairness in decision making. In some conflicts, it may also be important to set the stage for future re-engagements , which may be inevitable.... By stepping outside the limits of remedying the immediate problem, the conflict resolution advocate takes a proactive approach to averting future conflicts. ...

... Not every outcome will include these dimensions of future problem solving, but in conflict resolution advocacy they should at least be on the table for consideration.⁷⁹⁴

This is common in class proceedings settlements in terms of the goal of “behaviour modification”.

This discussion demonstrates legitimate motivations for settlement, but if they are unknown to the JDR justice, the settlement might be perceived by him/her to be imprudent. In my view, in face of an apparently improvident settlement in a rights-based context, due to the client making a decision on the basis of his/her legitimate interests (perhaps undisclosed to the JDR justice), a JDR justice’s duty where the party is represented by counsel (thus, will have received independent legal advice), is to canvas - presumably in caucus - whether the client has received the lawyer’s advice on the settlement, and, if so, to leave to the client to make the decision, based on that advice. As I have said, the alternative is to interfere with the lawyer-client relationship. However, if the party is unrepresented by counsel, that poses another dilemma for the JDR justice.

If the party is unrepresented by counsel, and it appears that the party

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Macfarlane, *supra* note 25 at 116.

may be making an improvident rights-based decision, due to interests beyond the rights of the case, I believe it is the duty of the JDR justice to canvas it with the party, in caucus, to make as certain as possible that the party is making an informed position, free from coercive power on the other side. The JDR justice might recommend that the party seek legal advice before entering the settlement (or enter into a settlement, specifically contingent on independent legal advice) - because the JDR justice cannot give legal advice. In such a situation, assuming that the caution from the JDR justice is recorded (as I have recommended in this Evaluation Report anytime a client is unrepresented), if the client still wants to approve the settlement, the JDR justice, having given that advice, has done all s/he can do. If, however, the settlement is still so improvident as to be unconscionable and without, in his/her view, adequate interests considerations, in the extreme case, I believe that the JDR justice must advise both the party and the other side that such a settlement is so improvident that the JDR justice cannot lend the judicial office to entertaining it, or being present during its acceptance, and depart the JDR - all of which will be recorded in case there are complaints against the JDR justice or counsel. The parties are then left to settle (or not) as they would in a private negotiation, without the benefits that continued judicial presence might provide.

There is another issue under the related topics “coercive power” and “improvident settlements” that is often not discussed because it is an anathema to the whole concept of judicial participation in a judicial process. That issue is having one’s biases impact directly or indirectly (indeed, even subliminally) on the negotiations. Macfarlane gives one example of this to make the point, although there are undoubtedly numerous examples:

Many of the concerns articulated about informal processes ... relate to a fear that informal processes will not protect basic rights and that the development of private

agreements will undermine formal protections for those individuals otherwise disadvantaged in terms of resources, social status, and political power. Coercion behind closed doors can persuade less powerful parties to give up entitlements that seek to adjust the balance between their lack of power and the advantage of institutional actors and those privileged by gender, race, or class. ... there are additional fears that the agenda of the mediator may skew the process and the outcome ...

She went on to reference examples in family law of mediator prejudices for “family preservation” and “joint custody”, apparently in face of the “best interests of the child”, and a form of potential “systemic discrimination” for those who cannot afford rights-based adjudication. While these may seem far-fetched to the normative judicial observer, it is not difficult to realize that some parties may have this fear, and this is especially so, when, as noted *supra* the process takes place “behind closed doors”, a practice which is very different from public adjudication. For these reasons JDR justices must be very careful, in my view, in three areas.

First, while many parts of adjudication are done “behind closed doors” - including many case managements, pre-trial conferences and the like, no final resolutions are normally achieved there - JDR is an exception. The parties don't want the public there but it does raise the issue of whether the proceedings should be recorded so that there is a “record”. I seriously doubt whether Alberta Justice would provide enough recording devices (and operators?) - it is difficult enough to get recording (and operators) for self-represented litigants now. If the cost/benefit analysis is no JDR because of no recording, or JDRs with no recording (except for self-represented litigants), the choice is obvious. However, judges must be very aware of this sensitivity.

Second, a justice must not bring to a JDR any views or comments that s/he would not state in open court, and should not express any personal opinions - as opposed to judicial opinions.

Third, whether a party is represented by counsel or not, justices must be very alert to parties that are “vulnerable or susceptible to undue pressure from the other side ... [when] the parties may often be considering some degree of deviation or waiver from legal entitlements”.⁷⁹⁵

The continuing risk of vulnerability, power-imbalances and security must be carefully monitored, by the JDR justice, as well as the lawyer, as this passage suggests:

The obligation to ensure informed consent to mediation ... should be especially strictly adhered to when there is potential for harm to a vulnerable client. The necessity of carefully screening potential mediation ... clients for a history of violence and intimidation has come to the fore in the last 20 years but complaints continue that some counsel (and mediators) do not take these issues seriously enough and sometimes place their clients at risk. If the new lawyer [or mediator] works with at-risk clients, she should understand that these clients will often avoid or be less than truthful in answering questions about family violence. They may feel embarrassed and feel ill at ease being asked such questions by their lawyer. Screening is more than a matter of putting questions to the client – they must be asked clearly and sensitively. Ideally, counsel [and mediators] should be trained to recognize signs and cues that suggest a history of violence.⁷⁹⁶

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Ibid, at 173.

See also the comments of Smith, *supra* note 13 at 26, relying on:

- Thomas A. Cromwell, “The Prospects for Civil Justice Reform: The Administration of Justice in Commercial Disputes”, (presented at the Canadian Institute for the Administration of Justice, Annual Conference, Toronto, 1997)[unpublished]; and

- Landerkin & Pirie, *supra* note 25 at 278, quoting Owen Fiss, “Against Settlement” (1984) 93 Yale L.J. 1073, at 278.

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Macfarlane, *supra* note 25 at 204.

This is a matter specifically addressed, with supporting references, by Landerkin

All of these points are necessary “to ensure informed consent and the absence of coercion”, and judges, in addition to lawyers, “should be especially careful to ensure that clients do not waive rights as a result of oppression, intimidation, lack of knowledge, or lack of power” and it is “very important that

informal processes continue to be monitored for signs of abusive or oppressive use against less powerful parties”.⁷⁹⁷ The integrity of the judicial system depends on this protection, because the

... law has an especially important role to play in ensuring fair bargaining process and equitable outcomes in informal dispute resolution. Lawyers [and judges] are the guardians of these protections and carry the responsibility of ensuring that the law plays out its role even when negotiation and mediation takes place in informal, unmonitored settings.⁷⁹⁸

2. NON-PUBLIC PROCESS, CONFIDENTIALITY AND CAUCUSING

While the primary focus here is on the issue of caucusing (that is, private meetings between the neutral and one party) in a JDR which, by consent is held in private, the very issue of a JDR, with a justice as the neutral, being held in private, differing from the “in public” adjudication norm, has been raised as an issue. I shall deal with both of these issues in this section.

a. TRANSPARENCY

& Pirie, *supra* note 25 at 254 (footnote 8).

⁷⁹⁷ *Ibid*, at 173-4.

⁷⁹⁸ *Ibid*, at 174-5. While some of these discussions are phrased in the context of informal dispute resolution settings, I believe that they are equally important in formal dispute resolution settings whenever a judge steps into the room.

i. PUBLIC SCRUTINY

Smith, picking up on a Jackson concern of “lack of public scrutiny” responded that “[r]eduction or elimination of caucusing would to some extent address concerns about lack of public scrutiny, although as long as a procedure takes place in private, the public in the larger sense is excluded”.⁷⁹⁹ While JDR in private, with or without caucusing, is a change from the old adjudication only norm, there is now a new norm - adjudication and JDR, as I have asserted, with support, *supra*. Moreover, this issue begs the question of whose rights are being potentially infringed? Is it the parties’ right to have the proceeding in public, or is there some public “watch dog” function? If it is the parties’ decision, then they make the decision by express, informed consent to the process - because, almost invariably, they don’t want to wash their private laundry in public.⁸⁰⁰ However, if it were a compelled process to any degree (either specifically mandatory or as one of the methods prerequisite to a trial date under the New Rules), it might well be that a party to JDR would demand the process in public - in that case I, personally (I don’t propose to impose this - or any other - view on independent justices), would have no issue with accommodating it. If the parties are in disagreement about this, then it may be necessary for them to

⁷⁹⁹ Smith, *supra* note 13 at 23, referencing G. Jackson J. A., “Judicial Ethics and Judicial Mediation”, International Exchange Program for the Development of an Integrated System for Judicial Mediation. Case Study of the Judicial Mediation System in Quebec. National Judicial Institute and Court of Appeal of Quebec. Montreal, Canada, October 3-7, 2005, at 26.

⁸⁰⁰ Indeed, one of the advantages of JDR recognized by counsel is that “[t]he process is private and confidential, which can avoid the disclosure of confidential information and in some cases, the potential embarrassment that may result from a public trial”: Tettensor, *supra* note 116 at 9. Agrios, *supra* note 12 at 10, noted, however, that “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.”

bring the matter before a motions justice (or, more likely, the proposed JDR justice) for a ruling.

If the issue is one of watch-dog, in my view it should not be without some other evidence, in the public interest, and with an appropriate mechanism. I say, first, "evidence", because with judges sworn to conduct themselves in a principled fashion and fairly, I know of no need for oversight, unless there was "evidence" before the Court of systemic or frequent abuse of the basic principles, or a specific issue in the subject JDR. I say, second, in the "public interest", contemplating that there may be situations where a public corporation is in litigation (say, for example, a municipal corporation), and where a shareholder (or member of the municipality) would wish to attend and might make an application to make the process public, notwithstanding the opposition of the parties to the dispute, because of some "public interest". Those matters would have to be decided on the merits of the evidence and arguments presented. As to the third, an appropriate "mechanism", I say that in two contexts. One is the context of the imposition of some legislative or regulatory requirement for public viewing. The other relates to a mechanism to deal with confidentiality and other conditions related to JDRs.

The bottom line, in my view, is that, *prima facie*, and by way of default, the parties get to decide (as they specifically have the right to do under the New Rules), with the concurrence of the JDR justice, how they will involve the JDR justice in assisting them to solve their private (albeit litigated) dispute. In the absence of dispute between the parties, or an intervention from some third party which would have to be determined by the Court, private is the norm and the parties "rule" - it is a process for the willing.

Similar to my second item, Smith, again picking up on the comments of Jackson⁸⁰¹, raises the “public law dimension” in saying:

Policy ought to be developed to screen out cases with a public law dimension. Very little, if any, policy exists in Canada for preventing certain kinds of cases from being placed in the settlement conference stream. Decisions of this ilk are usually left to the judge selected for the conference. Absent the development of sensitive policy, a time may come when the dialogue provided by the courts to the country will be impoverished indeed.

She follows this up with the assertion that, even if judicial mediation is ethical (she shows her doubt, in principle, while I have none), it should not take place by reason of the lack of public scrutiny:

Finding judicial mediation to be within judicial ethics is not satisfactory justification for continuing as we have in the past. Compliance with ethical guidelines does not constitute examination of the work product, nor the message that product sends to the public.⁸⁰²

Before dealing with the main point of Smith’s assertion, the last sentence in the second last passage is somewhat vague. It appears to relate to the reduction in the publication of precedent decisions, of which there is some validity, but, on further examination (as discussed *supra*), the reduction of the number of written decisions, many without any precedential value, may not be all bad. I have long believed⁸⁰³ that the growing requirement in law (or practice) for judges to give reasons for their decisions floods the law libraries (physical or electronic) with decisions that add little or nothing new to the law, but merely apply existing legal principles to new facts. While I have no

⁸⁰¹ Smith, *supra* note 13 at 23.

⁸⁰² *Ibid.* However, one of the interviewee’s in the Danielson judicial survey said (see Appendix F, at 5) that “if there are two sides [to a dispute], you can do a JDR - even if it is a constitutional issue. Not everyone wants their case tested in Court”.

⁸⁰³ See, for example, my case of *Shaw v. Standard Life Assurance Company*, 2006 ABQB 156, at para. 2.

dispute with the need for the parties to understand the basic reasons for an adjudicated decision, even if not novel, or for the benefit of a true precedent (which can be often be done more concisely than at present - I fear that, to date, I have been a prime offender), I see no reason for the parties to consent to a result that requires reported judicial reasoning to support a settlement (except where otherwise required by law - e.g. approving a settlement for a minor). Thus, in my view, restricting publically available reasons more to those setting a real precedent and limiting the others is not always a bad idea.

Returning to the main point in Smith's assertion, there are cases with a "public law dimension" that, perhaps, should be adjudicated, not settled. At present, that is not an issue, because it is only by consent that cases are sent to JDR - if one of the parties believes it should be adjudicated, it will be, due to the lack of consent. Under the New Rules, where there is compulsion to have some form of dispute resolution process before getting a trial date, there is also a mechanism for a party that is opposed to seek a judicial waiver. In addition, it is not beyond the realm of possibilities, as I alluded to *supra*, that an affected third may seek to apply to the Court to have any such JDR, for which there is otherwise consent between the parties to a private JDR, to have the JDR conducted in public. Nevertheless, one should not go too far, because some cases which, on first blush, would appear to be only for public adjudication, may still permit private settlement.⁸⁰⁴ All of this tells me that, notwithstanding the truth that "ADR does nothing to assist the judiciary to develop the common law", bringing closer to reality the overreaching worries of some⁸⁰⁵, there are ways to bring forth public judicial

⁸⁰⁴ See my "opinion" (referenced *supra* note 440), pursuant to s. 27 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, in the case of *Chow v. Mobil*, where I opined that, consistent with the legislation, a negotiated resolution was permissible.

⁸⁰⁵ See Smith, *supra* note 13 at 25-6, referencing, *inter alia*: Michel Robert, "Judges

pronouncements on the affirmation of rights and the denouncement of “improper behaviour, thus setting standards” without every case having to be adjudicated in public - such as behaviour modification in class proceedings settlements. I am confident that there will be sufficient cases brought forward by parties, that do not wish to, or are unable to, settle to establish such standards.

In the end, as it relates to JDRs in private or public, I am not satisfied, as a default, that the norm should be public - indeed, all the reasons would seem to favour the private in most cases. However, if there is evidence and convincing argument to support an “open to the public” forum for a JDR, in the absent of consent of the parties, those arguments can be made in the right case to a court of competent jurisdiction and decided.

As noted, however, the prospect of a public mediation does open up significant other issues as to how to deal with confidentiality⁸⁰⁶, bargaining strategies, etc. Frankly, from a personal point of view as a potential presiding JDR justice, it would makes no difference to me, but, even if all the problems could be worked out, I believe that the resulting utility would not be as effective for the parties as it is now. It would force them to private ADR only (where they would be bound by no such restrictions), not involving the

as Mediators in Criminal Matters: The Canadian Experience”, *The International Society for the Reform of Criminal Law, 20th International Conference*, Brisbane, Australia, July 2-6, 2006 (this Evaluation Report does not address settlement of criminal matters); and quoting from Peter Underwood, “Alternative Dispute Resolution as a Judicial Tool (A Comment)”, *Contribution to the Seventh Worldwide Common Law Judiciary Conference*, in London, April 2007.

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In James F. Henry, “No Longer a Rarity, Judicial ADR is Preparing for Great Growth - But Much Care is Needed” (1991) 9 *Alternatives to High Cost Litig.* 95, at 96, the author said that courts “must make careful choices between some competing values - for example, between confidentiality in ADR and the traditional public nature of the courts”. While this has continued to be a debate maintained by some, I believe it has been effectively resolved in favour of confidentiality.

judiciary. That, I believe, would be to the lesser public good, in the sense that it would effectively remove one dispute resolution alternative, but to the great joy of those who oppose JDR in concept.

ii. CAUCUSING

Caucusing has been a part of the JDR Program from the beginning, where the JDR justice is prepared to use it and where the parties want it, or the JDR justice suggests it and the parties concur.⁸⁰⁷

Danielson did not address caucusing in any detail, but noted that “[p]ersonal interviews revealed that Justices who do and Justices who do not use caucus feel very strongly about their position and each provide good reasons for having taken such a position.”⁸⁰⁸

As noted *supra*, this issue of caucusing, which was a key issue in the U.S. (and remains so among some JDR justices doing Alberta JDRs), resulted in the ABA’s Code of 1990 permitting caucusing between judges and parties by consent of the parties on settlement matters, provided that there was no “coercion” (thus linking the concepts) - see Guideline 10 and the New Rules⁸⁰⁹.

Under this view, caucusing is permissible by express consent, but should a JDR justice do it? Most Alberta JDR justices will (and do) caucus, a few will not, and many of us will do so only if the parties request it by express

⁸⁰⁷ See: Tettensor, *supra* note 116 at 6.
See also: Guidelines, *supra* note 190, guidelines 8 and 10 - Appendix 7 to this Evaluation Report.

⁸⁰⁸ Danielson, *supra* note 4 at 48.

⁸⁰⁹ Guidelines, *supra* note 109 and Appendix 7.

consent, or, if the JDR justice believes it appropriate and proposes it, again, only with express consent.

There may be a number of answers why you should or should not caucus as a matter of principle, as a means to a successful resolution. In the context of judicial conduct, I will only address a couple of issues, before making some recommendations.

One of the reasons for some judges not wishing to caucus, as a matter of principle, is that it removes the process one further step away from courtroom transparency - one step further because the JDR is already a process in an “in camera” courtroom or conference room, removed from third party, public scrutiny. This is a departure from the norm, as, traditionally in Canada, as well as the US, “[a] fundamental aspect of the adversarial system is that, except in unusual circumstances, all proceedings should be conducted in open court”⁸¹⁰. Although, not an “unusual circumstance”, JDRs are invariably conducted in private. Alternatively, to the extent that the rationale of the statement applies, it appears that JDRs have become one of the “unusual circumstances”, although, I believe, becoming more and more the norm. Unlike traditional adjudication, JDRs are not supposed to be adversarial.

Smith states that Quebec and British Columbia “have each made the policy decision ... to minimize caucusing”⁸¹¹. Smith further reports (at 14-5) that Quebec permits caucusing for “evidentiary problems”, whereas in the British Columbia small claim’s court, where judicial mediation was promoted, caucusing was “discouraged”, on the basis that it contravenes

⁸¹⁰ Alfini, “Judicial”, *supra* note 589 at 2-23.

⁸¹¹ Smith, *supra* note 13 at 9.

transparency and impartiality⁸¹². In face of this, Smith asserted the “conclusion” that “long term institutionalization of caucusing would do damage to the administration of justice”.⁸¹³ However, to be clear, it is my contrary view that, if properly undertaken, in a judicial context, caucusing need not do any “damage to”, but would rather “enhance” the “administration of justice” - see all except *de minimis* comments in the Survey responses.

Another reason for a party wanting to avoid caucusing is the concern that one party may perceive that the judge is unduly helping the other party, at the first party’s expense.

These concerns have some more potential validity and each judge will have to decide if either of these reasons, or others, prevent them, in principle, from caucusing, and if not so preventing, how they should manage - that is, ameliorate the problem. Indeed, in my view, if there is disagreement between the parties on caucusing or not, the norm of no caucusing should be the default - in other words, on this - and any other - issue, I believe that express and informed consent should be the requirement for a departure from the norm.

Later, Smith repeats her campaign against caucusing in this way:

The use of caucus by judges should be discouraged because justice must not only be done but be seen to be done. Where judges work off-the-record, it is more important, not less, to ensure that *the public who are participating* are able to see all of the work of the judge. The essence of the judicial role is to work in public. Where the presence of the ‘public’ is reduced, opposing parties ought to view all steps to resolution.

⁸¹² *Ibid*, at 16.

⁸¹³ *Ibid*.

It can be difficult to convince judges that the effects of settlement caucusing can be damaging. Caucusing can be a useful settlement tool when it increases efficiencies. If a deal is made, everyone may go away happy. However, the focus expected of the justice system is of necessity longer term. Irrespective of intent, on occasion appearances deceive impressionable observers. The perception that judges doing settlement conferences are retreating into privacy becomes conviction when caucusing is employed, as it separates the people from the settlement process.⁸¹⁴

The only remaining points that this raises that I perhaps haven't dealt with *supra* are: the concept of public; and the concept of forced caucusing. In a JDR we are not talking about "the public who are participating" (with some exceptions discussed *supra*), but private parties to a private (albeit litigated) dispute, only brought into the public realm to seek a public officer to assist in its resolution. While the mandate of the judicial officer is public, it does not mean that the settlement of the dispute must be public (consider, for example, pre-trial conferences, desk applications, etc.), and the full answer is "consent" of the parties. Indeed, that addresses the second point, because I agree with the assessment that caucusing should only be undertaken with the express and informed consent of both parties - absent consent of both parties there should be no caucusing.

**b. COMMUNICATE THE "RULES" OF CAUCUSING
IN ADVANCE**

However, if a judge decides, in principle, to caucus, these concerns do not evaporate, but must be "managed". From my experience, I believe that the concerns can be minimized by the judges communication to the parties -

⁸¹⁴ Smith, *supra* note 13 at 25 [emphasis added.]

in the JDR Instruction Letter and orally at the JDR itself. This communication would cause the JDR justice to advise, *inter alia*:

- (a) obviously, caucusing will only be used if the parties or the judge consider it helpful to the end result, and then only with the specific oral informed and express agreement/consent of the parties;
- (b) all communication in caucus is confidential, subject to specific rules about fraud - that is, any disclosure to the judge that is not proposed to be disclosed to the other side, must be so disclosed, or the judge will withdraw from the JDR⁸¹⁵ and it will be cancelled, if that information would result (or may result) in a fraud being perpetrated on the other side or a third party;
- (c) while the judge might discuss the strengths and weaknesses of each case confidentially, the judge will not be expressing different opinions in different caucuses on the subject; and
- (d) other - it is not a closed list.

3. CAMOUFLAGE, DECEPTION OR FRAUD

Litigation is, at least in recent times, based of full disclosure of relevant material. Thus, as alluded to *supra* in the “rules of caucusing”, it is clear that a judge must not be privy to any relevant and material information that could affect a settlement, to which the party opposite does not have access. To do

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The concept of withdrawal from a mediation for any number of reasons is well understood. Macfarlane talks about this at one point (at 172) in the context of the duty of a lawyer to make sure his/her client

... is not bullied or intimidated into accepting a prejudicial agreement, compromising important rights entitlements that she does not voluntarily cede and that have potentially long-term impact on the client or others. There may be a useful parallel here with the approach taken by many codes of conduct developed for mediators, which commonly require their members to withdraw rather than abet an oppressive agreement.

so would, or is likely to, make the judge a party to a deception or, at worst, fraud.

An example used in the NJI Vancouver Conference was where a settlement offer was equivocal and went with a masked representation which caucusing proved might be suspect, and/or a negative contingency that may (unknown to the other side) have a real risk of coming to fruition. In such a case, in my view, the judge has a duty to advise the party using the deception or knowing of the negative contingency, to remove the equivocation, representation, or lack of disclosure of the contingency, so that there is no deceit. Failing that, I believe that the judge must withdraw (the judge cannot disclose the information, as the judge is bound by the confidentiality provisions not to release any confidences not permitted by a party), because he/she could not continue if that was not rectified.

Another example may be where a claim is proposed to be settled on the basis of a fraud, or potential fraud, on a third party - say on a subrogated claim, or for taxation (e.g., on the Canada Revenue Agency). While the parties may be happy, the judge clearly cannot be a party to a fraud on third parties, and would clearly have to advise the parties to restructure the settlement to make it lawful, or the judge would have to withdraw.

4. CONFIDENTIALITY AND KNOWLEDGE OF BARGAINING POSITION

Another hypothetical involves a situation, where a judge, in caucusing, learns of one party's negotiation limits and then is asked by the other side if a prospective offer to the first party (much different than their previously disclosed position) might be acceptable to them (which the judge knows it

likely would be). The question is how do you answer that question with the knowledge you have. The answer is easy - you cannot disclose the information, but you also cannot make any representations about it. The answer would be to the effect: "Well, let's put that offer to them and we will see." You see, if a JDR justice caucuses⁸¹⁶ and learns the strategy of a party, that may be useful in trying to settle a case, but, absent fraud, is clearly covered by the confidentiality rule - while s/he is put in a troublesome position by this circumstance, there is no decision to be made - the communication must remain confidential. Put another way:

The entire efficacy of mediation rests on the confidentiality of the proceedings; without confidentiality, frank exchanges of ideas and the climate of trust necessary for fruitful negotiations are both impossible.... As facilitator of the process, the judge-mediator gets knowledge of sensitive information and must know how to use this information to promote settlement while at the same time respecting the exigencies of confidentiality.⁸¹⁷

Another potential knowledge pitfall is the very lack of knowledge of a potential consequence of a settlement. While in JDRs with lawyer represented clients, it should be their responsibility to be aware of such situations, the JDR justice must be careful to raise these potential post-settlement issues, so that a settlement may be contingent on appropriate advice in this regard⁸¹⁸. An obvious example includes tax consequences (including not only taxation, but process, such as restriction on fund transfers outside of jurisdiction without a withholding tax). However, some other less obvious situations may arise - regulatory approvals (e.g. to subdivision of real property), or any legislation or regulation restrictions or pre-requisites. Often

⁸¹⁶ Otis and Reiter, at 396, refer to this as "confidentiality within confidentiality".

⁸¹⁷ Otis and Reiter, 395-6. The same point is made by Singer, *supra* note 43 at 173. In such cases the JDR justice must be absolutely clear own what s/he can and cannot communicate - i.e., get explicit communication "instructions". Sometimes this includes the concept of "noisy disclosure" discussed *infra*.

⁸¹⁸ See discussion in Macfarlane, *supra* note 25 at 176.

these problems can be avoided if the settlement is specifically structured in such a way to take advantage of any legal amelioration of the direct consequences (e.g., a tax “roll-over” of RRSPs). JDR justices must be astute enough to recognize and raise these concerns in unusual cases.

As alluded to, apparently a resent “hot button” (but identified at least 15 years ago⁸¹⁹) is the reference to “noisy disclosure”, which means, knowing the confidential position of a party on a point, usually learned during caucusing, the third party neutral is given some limited authority by that party, without disclosing the position, to “signal” the other side that there may be room for movement in a certain way. It is a very necessary process of facilitative mediation in my view, and a good tool, but like any sharp power tool, can be very dangerous if not very carefully used within the mandate of the party allowing for such disclosure.

5. OTHER

a. SELF-DETERMINATION

Smith asserts that:

The element which sets mediation outside of the purview of the judiciary is the parties’ right of self-determination.

In the judicial settlement conference, the judge ought not to manage the non-legally described conflict to a party determined result. Rather, the parties consent to seek the assistance of the judge with settling their litigation. Ultimately, the judge has the authority to speak out against a settlement proposal or to refuse to continue with a conference.⁸²⁰

⁸¹⁹ See: Jennifer Gerarda Brown and Ian Ayres, “Economic Rationales for Mediation” (1994) 80 Virginia Law Review 323, including at 327 - 329. See also: Edward Brunet, “Judicial Mediation and Signaling” (2003) 3 Nev. L.J. 232, at 235.

⁸²⁰ Smith, *supra* note 13 at 21.

In response, I know of no authority or logic for the implications of some of these assertions, for several reasons. First, indeed, the litigants do “seek the assistance” of the JDR justice to help settle their litigation, but it is the *parties who determine* if the matter should be settled, and *not the justice* - thus, of course, it must be the parties “self-determination”, not that of the justice. Second, a judicial determination is an adjudication at trial, not assistance to settle at a JDR. Third, while I won’t repeat in any detail my comments that the “interests” must be related to the litigation, references such as the “non-legally described conflict” are not helpful - indeed, such matters may be very related and relevant to settlement. Fourth, while touching on some of the points recently discussed *supra*, I would argue as well that, for those reasons, the JDR justice does *not* have “the authority to speak out against a settlement proposal”, unless it is illegal in substance (e.g. would defraud the income tax law) or process (e.g. is a coerced settlement, or one based on a non-disclosure, etc.). And, fifth, of course, the JDR justice always has a right, for any proper reason, to “refuse to continue with a conference”, but s/he should not do so lightly or on any improper ground. The parties have incurred costs in expecting that the JDR justice will work diligently⁸²¹ to help the parties come to a fair and reasonable settlement, not turn tail on some whim or philosophical disagreement with a legitimate, Court approved, process.

⁸²¹ Danielson noted that judges find doing JDRs is hard work - some of the “toughest work that a Judge does” - that is, JDRs are no easy assignment, but require significant diligence. See Danielson, *supra* note 4 Appendix F, at 4 and 9. See also then Manitoba Court of Queen’s Bench Associate Chief Justice Scott on “Pre-Trial Conferences” in the Pitblado Lectures, *supra* note 10 at 48-9. Agrios, *supra* note 12 at 3 and 10, said it was “tough work”.

b. JUDICIAL STATUS

Smith, quotes Resnik, another voice against settlement, to raise the issue of “loss of judicial status”:

‘...as judges themselves press to alter juridical modes ... it is not clear how they will or why they should sustain claims on resources or rights of independence from political oversight.’

‘I think that the judicial embrace of settlement is unwise - especially for judges. Through their practices, rules, teaching, and doctrine, judges have not only made plain the many facets of the role of judge (judge as settler, judge as negotiator, judge as deal maker) but also have deconstructed the role of judging, rendering it more vulnerable politically and legally. The concepts of ‘judge,’ ‘court,’ and ‘adjudication’ are beginning to lose their coherence. Judges, ever reliant on public funding, are pushing away the very constituencies that they ought to be enlisting. Research on courts reveal that positive views of courts are associated with direct experiences - as jurors or witnesses as well as litigants - with courts. By sending litigants elsewhere for judging, judges erode their own basis for popular support.’

Based on this gloom and doom for the future of the judiciary by Resnik, Smith goes the next step in “crying wolf” to assert, without one iota of evidence to support the assertion, and contrary to the evidence found in the Survey, that:

If judges conduct their settlement conferences like private sector neutrals, and refuse to exercise the authority of their office and the obligations of their oath, what indeed is the difference between the settlement judge and the private sector neutral.⁸²²

While in no way am I critical of competent private mediators, or the right of those with disputes (litigated or not) to use those services, the answer is that judges in a JDR role are only available for disputes that are litigated,

⁸²² Smith, *supra* note 13 at 24-5, with extracted quotes from Judith Resnik, “Civil Processes”, Oxford Handbook of Legal Studies, 2003, Ch. 33, at 748, and Judith Resnik, “Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement” (2002) 1 Journal of Dispute Resolution 155 respectively.

and interests causally connected thereto. JDR justices, including Smith, are trained and experienced judicial officers who provide a trusted, value added, service to the process of settlement. The demand, results and comments of the Alberta users, as reflected in the Survey, support this conclusion. This is exactly counter-intuitive to the Survey results where the parties welcome the judicial participation in alternatives to adjudication. Indeed, it appears that the same high views that parties have of the judiciary in an adjudicative role, while weary of the time and cost in getting there, makes them very welcoming of the same high ethical and principled standards available to help them settle - and at the same time resolving some of the things that made them weary in the first place.

As to funding, at least in Alberta, this is exactly the type of dispute resolution service that I believe Alberta Justice is happy to see, where funds (mostly Federal in terms of judicial salaries, but Provincial in support and facilities) are provided for a more friendly, less costly, more timely access to justice.

The role of the Court's judiciary is merely to keep doing the good JDR job they have been doing, supported by practicing good judicial conduct and ethics and a highly principled role - as long as this is individually and collectively maintained, I believe that judicial independence is not only not compromised, but is enhanced.

6. JUDICIAL INVOLVEMENT POST JDR
a. IS IT INAPPROPRIATE JUDICIAL CONDUCT TO PARTICIPATE IN A BINDING JDR?

This section will address policy and jurisdictional issues surrounding Binding JDRs, and, to the extent that both allow for continuing to do Binding

JDRs, how judicial conduct may impact on the retention or loss of jurisdiction.

As a preface to this discussion, one might ask why the JDR Program offers Binding JDRs? The answer is simple - parties demand it - indeed, in the Survey, they specifically asked that more Binding JDR capacity be provided. In short, they seek a mechanism that, if the JDR does not result in a successful settlement, instead of the cost, delay and stress of continuing on to a full trial adjudication (what they would have had if they went straight there, and, otherwise, must now have, with an unsuccessful JDR), they want a quick, no-delay (the same day) result that is fair and final. At the same time, they want either a settlement or adjudication that is more informal and stress free, and cost and time beneficial and efficient (no further costs pleading before another judicial officer).

At one or more places in her book, Macfarlane stated words to this effect: "All settlement programs, including pre-trials, are careful to ensure that the same judge never presides over both a settlement and a trial of the same matter."⁸²³ That was gospel in the Court's JDR Program⁸²⁴ until the participants - lawyers and their clients, not the Court's justices - asked that it be changed. As to why Binding JDRs are their preference, that is because, if they cannot settle, the parties often do not wish (most often because they could not afford to, or wanted final closure forthwith) to go onto trial, but rather want the JDR justice, in such event to impose a binding result.

⁸²³ For example, Macfarlane, *supra* note 25 at 235.

⁸²⁴ See Barry, *supra* note 11 at 5, referencing Alberta Law Reform Institute, *Civil Litigation: The Judicial Mini-Trial* (Edmonton: Alberta Law Reform Institute, August, 1993), at 33.
See also: Guidelines, *supra* note 190 (Appendix 7).

In the private world this is called med/arb (mediation/arbitration), but in the judicial world, it might be more appropriately called med/adj (mediation/adjudication)⁸²⁵, as discussed *supra*.

If policy decisions do not restrict Binding JDR, legal decisions have specifically conferred jurisdiction, but in a way where it has been recently (and temporarily?) lessened. *Abernethy*⁸²⁶ declared that the Court has jurisdiction to conduct Binding JDRs, if jurisdictional prerequisites are met - primarily express, informed, consent. However, if attained, jurisdiction may be lost, if the presiding JDR justice does something in a negative judicial conduct sense.

Is jurisdiction lost if a JDR justice who has presided over a JDR then makes a binding decision, even with the consent of the parties. The answer appears (in theory, and, now in law, with *L.N.*⁸²⁷) to be dependent on whether the justice has provided an non-binding opinion in the JDR:

An individual judge may believe that involvement as a mediator in a specific case could infringe upon his or her actual or apprehended impartiality if there is a possibility that the same judge may preside at the trial of the action. This judge would be justified constitutionally to decline to preside at the trial even if assigned by a senior judge with administrative powers. Moreover, I believe that a judge should not preside over the trial after delivering a non-binding opinion at the conclusion of a mini-trial when settlement does not occur. The judge has already prejudged the case. Because the constitutional value of judicial impartiality is impugned, I do not believe that the consent of the parties cures the defect. The importance of the constitutional principle of judicial impartiality transcends the

⁸²⁵ See definition and discussion by Adams & Bussin, *supra* note 3 at 139.

⁸²⁶ *Abernethy* (C.A.), *supra* note 197.

⁸²⁷ *L.N.*, *supra* note 19.

confines of one case.⁸²⁸

There is no issue with a JDR justice declining to do a Binding JDR. However, what about the JDR justice who is prepared to do a Binding JDR, even with written consent?

As the case of *L.N.*⁸²⁹ demonstrates, where there is a possibility of a party to a Binding JDR reneging on the consent, it is a dangerous area, where a JDR justice must proceed very carefully. However, that, in my mind, is not a reason to decline to do so, any more than (without such legal entitlement of refusal) one would wish to decline to do a complicated criminal jury trial, because they too are “dangerous”, or the need to “proceed very carefully”. Thus, in proceeding carefully, this valuable advice by Barry means that a JDR justice doing a Binding JDR should be careful not to express a non-binding opinion during the JDR portion, but use that portion of the case as a form of argument (I am presuming that a careful JDR justice would require the parties to present all the evidence necessary to give a decision in at least summary trial, affidavit, form) in the final decision, after giving the

⁸²⁸ Barry, *supra* note 11 at 6, with references to authorities on collective and individual judicial independence, which I will not reference. However, note that the problem seems to have been specifically cured in British Columbia, where the rules specifically so authorize, as they will in Alberta with the Alberta’s New Rules (Appendix 7), as now proposed, or, with possible amendment. As to B.C., Barry states “Rule 35(8) of the *British Columbia Rules of Court* permits a judge who has heard a mini-trial or attended at a settlement conference to preside at the trial if all parties of record consent”, referencing Alberta Law Reform Institute, *Civil Litigation: The Judicial Mini-Trial* (Edmonton: Alberta Law Reform Institute, August, 1993), Appendix A at 42, and Hon. Madame Justice Beverley M. McLachlin and James P. Taylor, QC, *British Columbia Practice* (2nd edition) Volume 2, looseleaf (Markham, Ontario: Butterworths, 1979), at 35-22. Note, however, that the JDR Program’s Binding JDR process does *not* contemplate the same justice who was the JDR justice later doing a separate trial, even with consent, but rather contemplates the JDR justice doing them together in one, continuous, summary process.

⁸²⁹ *L.N.*, *supra* note 19 - all other quotes are from *L.N.*, unless indicated to the contrary.

parties an opportunity on the record in a public courtroom to make further submissions. While not this clear, it appears that this was the problem in *L.N.*⁸³⁰.

The med/arb process was described and the conflict issue immediately raised in the following fashion in 1986:

The latest buzz-word from the United States is the 'med.arb.' technique in which the mediation and arbitration models are combined into a single, homogeneous, and sequential process. The parties, by agreement, simply provide that the mediation phase leads directly into the arbitration phase if and when the mediation process itself breaks down. The same person often acts both as mediator and arbitrator, though that is not a necessary precondition of the model.

A number of general observations about this model should be made.... one of the problems with the med.arb. model is the continuing ambiguity surrounding the utilization of information obtained in the mediation process when switching to the arbitration mode. That, of course, is an extraordinarily important consideration because the mediation process depends on the parties being able to trust, to make full disclosure, to strip themselves bare, without fear that such disclosure will later rebound on them to their disadvantage. It is this very trust which differentiates mediation from the other resolution models.⁸³¹

Twenty three years later the same debate continues, yet the demand keeps continuing, as the Survey establishes.

While London talked of legislation to regulate this issue (now in B.C., and coming to Alberta in the New Rules (Appendix 7), I will examine his principles in general:

⁸³⁰ *L.N.*, *supra* note 19.

⁸³¹ Jack R. London, Q.C., in "Implications for the Lawyering Process and the Lawyer", Pitblado Lectures, *supra* note 10 at 70.

... One recognizes ... the traditional dilemma between two conflicting objectives: on the one hand, ensuring that later arbitration or judicial intervention, if it results, will be conducted on an informed basis with full and complete disclosure of all relevant facts; and on the other hand, inducing reliance and trust, and therefore chances of success, in the earlier mediative efforts by protecting the confidentiality of disclosures. In my view, given the obvious advantages of the mediative process, the dilemma ought to be resolved in favor of full protection of confidentiality, though that may lead to less than full disclosure of facts in other, later dispute resolution processes.⁸³²

Thus, the issue is whether a judge should participate in any aspect of a case after an unsuccessful, or partially unsuccessful, JDR. There would seem to be no serious issue with ongoing case management, and perhaps even adjudication of rather mundane interlocutory issues by the same JDR justice after an unsuccessful JDR. However, should the judge make any significant, substantive, decisions?

The AJS had an early opinion on this: “[w]here feasible, the judicial functions in the settlement and trial phases of the case should be performed by separate judges.”⁸³³ Although it is not clear what “where feasible” means, on first blush, that looks quite acceptable, if the functions are separated in some time, and/or in a formal sense. Indeed, I would concur with such a

⁸³² Jack R. London, Q.C., in “Implications for the Lawyering Process and the Lawyer”, Pitblado Lectures, *supra* note 10 at 70.

⁸³³ AJS, “Editorial”, *supra* note 711, at 48. Gabriel, *supra* note 107 at 95, also suggested this as the solution to the conflict between the benefits of judicial participation in settlement (including the “speed, inexpensive, and ... just resolution of the civil disputes”) and its detriments (perceived risks of unethical behaviour).
I use this point to record an exception to the views I otherwise hold, namely that the usual separate functions mean that a trial justice should not, in my view, except in the rare exception (if any), be “mediating in the middle of a trial” (Landerkin & Pirie, *supra* note 25 at 252). Trials are trials, not JDRs, and, in my view, the presiding trial judge should not assume that the parties wish mediation at that point, but rather that there have been previous opportunities for same (whether taken or not), and absent the parties initiating the matter anew (independent of the trial, with a trial adjournment as appropriate), the trial justice’s only role at that point in time is to adjudicate.

recommendation in the normal case. However, what about what a process - which our Court calls "Binding JDRs", or the ADR literature references as mediation/arbitration ("med/arb")⁸³⁴, where the parties specifically set out a process by consent that not only requests, but, indeed, beseeches the judge to have a role in the adjudication of an unsuccessful JDR, and, at least in such a case, mandates it? Why should it be a judicial conduct issue if the parties do so with express, and informed, consent?

First, there is a policy issue as to whether judges of our Court should ever do Binding JDRs. However, the users are driving policy because the whole demand is party driven - the parties often want a quicker, less stressful and less expensive, but more efficient (not repeated submissions) summary adjudication by a judge they know and trust, than a full trial with a new judge, if they don't settle one or more, or all, the issues in a JDR.

The process is well known to the bar and the bench, but, for the benefit of others, it usually arises in one of two ways: (1) independent of the judge, but most usually (and appropriately) with his/her knowledge, the parties agree in some fashion that, at the end of an unsuccessful JDR, they will ask the judge for his/her non-binding opinion and that they will accept that opinion as binding on them - thus what becoming what I call a Binding JDR opinion; or, (2) similarly, but closer to the med/arb model, the parties, with the requested active participation of the judge (usually by a formal agreement, the precedent for which is provided by the judge), consent in writing to the judge issuing a formal decision at the end of the JDR on any issues that don't settle - what I have called a Binding JDR decision.

The principal differences between these relate to confirming (or disputing) the agreement as a judgment ripe for enforcement: (1) the first is

⁸³⁴ *Inter alia*: Luban, "Quality", *supra* note 181 at 382.

binding by reason of an agreement only and does not become a judgment until the agreement is reduced to a Consent Judgment by the parties that is then signed by the JDR judge, or another judge; and (2) the JDR judge issues a decision and executes a formal judgment, without more. If there are any disputes in getting to the judgment stage in the former, the remedy is another suit to prove the settlement. That is avoided in the second case, and the dispute then becomes a matter of appeal (if open to the parties - they often agree (in writing) to waive it).

As noted, the Court's jurisdiction to do Binding JDRs have been expressly approved, by an articulate judgment that recognizes their value in the eyes of litigants: *Abernethy*⁸³⁵. At para. 17 of *Lastiwka v. Bray*, in referencing paras. 35 and 36, Burrows J. said:

In *Abernethy* Fruman J.A. discussed the desirability of flexible, efficient and inexpensive methods of dispute resolution. She suggested that the JDR process which has developed in this court, including the binding JDR process, is a legitimate and worthwhile innovation.

From *Abernethy*, without being exhaustive, there arise other points of information, law, judicial conduct, policy and reform.

As a matter of information, the following are to a few points to be noted. First, the case is a good chronicle of the history of ADR, and the need for and the implementation of the Court's JDR program, including the use of Binding JDRs. JDR are:

'...now an accepted component of the civil justice system ... welcomed by lawyers and litigants': Alberta Law Reform Institute, Promoting Early Resolution of Disputes by Settlement (Consultation Memorandum No. 12,6, Alberta Rules of Court Project)(Edmonton: Alberta Law Reform Institute, 2003) at para. 178. While other alternative dispute resolution processes are available and effective, the involvement of judges sets

⁸³⁵ *Abernethy* (C.A.), *supra* note 197.

JDR apart "because judges are skilled at analyzing and interpreting legal issues and because their views carry weight with parties who are reluctant to settle": *ibid.* at para. 174. Alberta Justice is also a strong proponent of JDR because it is cost effective and increases access to justice: Alberta Justice, Annual Report 2003-2004 (Edmonton: Alberta Justice Communications, 2004) at 41.

...

The court has developed Guidelines for Judicial Dispute Resolution⁸³⁶ that outline the purpose, voluntariness, and confidentiality of JDRs. The Guidelines are flexible and do not limit the types of dispute resolution techniques judges may use.

*The concept of "binding" JDR's was initiated by lawyers, who wanted to bring finality to disputes by having their clients agree to accept the JDR judge's opinion should they be unable to negotiate a settlement.*⁸³⁷

And, finally, and most significantly:

Queen's Bench has endorsed a multi-door approach by incorporating voluntary judicially-facilitated settlement into its court processes⁸³⁸. The move has been embraced by litigants, who "want to tell their story to a judge and hear a judge's opinion" in a setting less intimidating than a witness stand, and in a process less costly and time-consuming than a trial. ... *The immense popularity of JDR and its positive impact on access to justice strongly suggest the process should not be jettisoned because some litigants, lawyers and even judges disagree with particular JDR procedures.*⁸³⁹

As a matter of law, there are a number of points. Authority for JDRs derives from s. 8 of the *Judicature Act*, R.S.A. 2000, c. J-2 and Rule 219 of the *Alberta Rules of Court*, A.R. 390/68, as amended. A binding JDR does

⁸³⁶ Guidelines, *supra* note 190 and Appendix 7.

⁸³⁷ *Abernethy (C.A.)*, *supra* note 197 at paras. 8 and 11-2 [emphasis added].

⁸³⁸ I use this reference to note that Agrios, *supra* note 12 at 6-7, identified 8 different types of scenarios in which different cases could be directed to different doors of the multi-door courthouse - there may be more.

⁸³⁹ *Abernethy (C.A.)*, *supra* note 197 at para. 35 [emphasis added].

not violate s. 56(1) of the *Judges Act*, R.S.C. 1985, c. J-1. The opinion of the Judge was binding on the parties, not because it was a judgment (it wasn't), but because it was a binding contract - they had agreed to accept the opinion - thus, the first type referenced *supra*. The importance of this, in light of my comments (*infra*), merits specific reference to the decision of the Court:

The second flaw in the appellants' argument is their mischaracterization of the judge's role in a binding JDR. According to the appellants, a JDR judge imposes a binding decision on litigants.... In fact, the decision is not imposed on the litigants as a result of judicial control; authority for settlement always remains with the parties because they choose to be bound by the judge's decision.

Litigants are free to resolve a dispute in any manner they wish. They may, for example, agree to flip a coin, consult a Ouija board, or let a third party decide. The parties agree on the mechanism for settlement and are bound by their agreement. In the case of a binding JDR, the parties agree not only to participate in the JDR, but also to implement the judge's views if they are unable to negotiate a settlement. What makes the JDR "binding" is the parties' binding contractual commitment: the judge's decision is imposed on them as a result of their contract, not the court's authority. Therefore, if the settlement falls apart, the parties must sue on their contract, not enter a judgment based on the judge's opinion.⁸⁴⁰

Finally, the JDR justice, on the facts of this case, had no authority, absent consent, to turn the settlement into a judgment - although, clearly, the judge hearing the summary judgment application had the jurisdiction, not impacted by the JDR, but rather impacted by the settlement (which, coincidentally thereto, was derived from a JDR).

Second, as to judicial conduct, the appellant's arguments, that a Binding JDR offended s. 56(1) of the *Judges Act* "since there are no procedural safeguards to maintain the integrity, and appearance of integrity,

⁸⁴⁰ *Ibid*, at paras. 25-26.

of the judicial office”, were rejected, which would seem to confirm that performing a Binding JDR is not judicial conduct that offends the “judicial office”⁸⁴¹.

Third, as it relates to JDR polices, the Court of Appeal notes it is “currently under review” in the context of the New Rules, which have subsequently directly incorporated the substance of the Guidelines (NR 4.17 - 4.21⁸⁴²), the court astutely noting in the process that:

... while this Court can correct legal, jurisdictional and factual errors of lower courts, as a statutory court it does not have general supervisory jurisdiction over the Court of Queen's Bench. This Court is not well-positioned to set Queen's Bench policy or direct the manner in which its settlement processes should be conducted. Finally, the Queen's Bench JDR process is currently under review as part of the Alberta Rules of Court Project. ... This type of broad-based consultation, in collaboration with Queen's Bench judges, is a better way to set JDR policy than by appellate decree.⁸⁴³

As to reforms, Fruman J.A., wisely in my view, added this, along with examples:

That is not to say, however, that JDR processes should be exempt from review. Binding JDR's can create difficult problems for judges and litigants, and deserve careful scrutiny. *Better delineated and more consistent procedures might also be in order.* For example, it might be worth considering the form in which judges provide written opinions, to dispel any perception they are adjudicative decisions. *Current practices for issuing and publishing binding JDR opinions are inconsistent.*⁸⁴⁴

That is the purpose, in part of this evaluation, namely to make recommendations for improved practices in light of issues as they arise.

⁸⁴¹ *Ibid*, at para. 13.

⁸⁴² See Appendix 7.

⁸⁴³ *Ibid*, at para. 37.

⁸⁴⁴ *Ibid*, at paras. 36 [emphasis added].

However, as seen in the majority decision in *L.N. v. S.M.*⁸⁴⁵ (which did not even mention *Abernethy*⁸⁴⁶), and notwithstanding a clear and strong dissent, Binding JDRs can also go terribly wrong, in a way which seem to send Binding JDR “decisions”, as I have styled them herein, to the judicial dust-bin.

I had hoped that the decision might be properly interpreted to permit Binding JDR decisions by informed, express and unequivocal, consent, on the basis of a finding by the majority that the consent in *L.N.* had been less than express, but, regrettably, such appears not to be the case. Nevertheless, it seems to me that *L.N.* still leaves open the possibility of a Binding JDR based on a “Binding” JDR “opinion”, remembering it is not binding because the JDR justice says so as a matter of authority, but because the parties agree, as a matter of contract, to it being so. This is notwithstanding that it does not become truly binding until the parties accept it as so by a declaration or consent order or judgment. In other words, if the parties renege on their agreement it is merely a non-binding JDR opinion, unless a court of competent jurisdiction holds them to their agreement. Thus, it is a Binding JDR opinion only in this sense.

I interpret the case of *White v. White*⁸⁴⁷, to add noting additional. Although it’s unique facts - post-trial confidential meetings with the parties unrepresented by counsel - were expressed to be “in respect of factual underpinnings not unlike the facts of this case”⁸⁴⁸, it was taken into account

⁸⁴⁵ *L.N.*, *supra* note 19.

⁸⁴⁶ *Abernethy* (C.A.), *supra* note 197. In *L.N.*, *supra* note 19, McFadyen, in dissent, at para. 79, noted that “this Court upheld the Guidelines’ provisions which allowed parties to agree to binding JDR, and allowed the parties to agree to resolve some issues by JDR and others by trial.”

⁸⁴⁷ 2003 ABCA 358, [2003] A.J. No. 1501.

⁸⁴⁸ *L.N.*, *supra* note 19, at paras. 24, 30 and 33.

by the majority in, and is superceded by, *L.N.* Moreover, as I believe McFadyen J.A. correctly stated (at para. 95) in *L.N.*:

White was decided in the context of a particular set of circumstances, and is distinguishable from the present case. It involved unrepresented parties who appeared separately before the trial judge following the trial decision and discussed outstanding issues with him. No consent had been obtained to this post-trial process....⁸⁴⁹

One could write a whole paper - perhaps, indeed, a thesis - on the reasoning and implication of these three cases but that must be left for another time. For the purposes of this Evaluation Report, what can we learn from these cases as to whether judges should/may do Binding JDRs?

As I said, *L.N.*, appears to scuttle the real substance of a Binding JDR decision concept, but leaves open the Binding JDR opinion, and that may be sufficient reason for JDR justices to avoid the hassle and refuse to do either of them in the first place, or easily recuse themselves if the JDR portion is not successful. The less faint of heart, and those who want to provide the real access to justice service that most litigants and counsel who ask for Binding JDR want, as recognized explicitly in *Abernethy*, should interpret *L.N.* in a way that they can provide a Binding JDR decision (if there is express and informed consent) on only "small outstanding issues", or merely a Binding JDR opinion that the parties can accept if they want, and, in either case, be careful in proceeding, and easily recuse themselves. The conflict is between access to justice and the administration of justice, and there can be no middle ground say the Court of Appeal. However, recognition of the ability, if all precautions are taken, to render a Binding JDR opinion, accomplishes both.

⁸⁴⁹

Ibid, at para. 95.

Before getting specifically to the ratio in *L.N.*, one must wonder about the incongruity of the facts in *L.N.* in comparison to the normal Binding JDR. In the normal Binding JDR there is no formal trial after the unsuccessful JDR portion, and other than a proceeding on the record in a courtroom where the parties are asked by the JDR justice if they have any further submissions (or the equivalent), the JDR justice, based on the express written agreement giving him/her authority, grants a Binding JDR decision, which on the motion of one or both of the parties, or the Court's own motion, becomes a formal Judgment. The evidence base is that submitted prior to the JDR (as I have said herein, which should be clearly directed to the parties to be all the evidence they would want to file if the matter in the first instance had proceeded by way of a summary trial). The prior judicial mediation component becomes the arguments, if you will, leading to the opinion. However, in *L.N.*, the trial justice didn't have solely the "arguments" during him at the JDR, but on an issue (for which there is a factual dispute between the majority and the dissent) that may not even be clearly the focus of the JDR - custody - heard extensive oral evidence almost a year later, before making his decision. Such procedures are not the norm, and are normally the subject of the usual rule that the JDR justice will not hear the trial, unless the parties expressly consent which they purport to have been.

The reasoning in the majority decision in *L.N.* would seem to ever preclude a Binding JDR decision, except in the most minor of cases. The *ratio* in *L.N.*, as I interpret it, is that a JDR justice shall not perform any significant - perhaps any - *adjudicative decision* post-JDR that *relates to a non-trivial issue that was the subject of any communication at the JDR*, unless the parties (not just counsel on their behalf), with full knowledge of their rights and all the circumstances, expressly and unequivocally waive the entitlement to a new judicial adjudicator. I believe that, except for the highlighted passage *supra* for the moment, this is clear in the following

passage, that deals with waiver of entitlement of a separate adjudicator - or, in effect, consent to the JDR justice:

It follows that for a waiver to be effective it must be express and unequivocal and it must be clear that the party waiving the safeguard or jurisdictional taint full understands the consequences of doing so.⁸⁵⁰

Stopping there for the moment, this is consistent with the Guidelines, and the proposed New Rules (NR 4.21) to the effect that unless the parties consent, the judge will not hear any applications or the trial of the matter⁸⁵¹. Moreover, so far, this makes a lot of legal sense. We learn, as a matter of law, that a JDR justice must not hear a subsequent trial of the matter without express and unequivocal authority from the parties. As a matter of judicial conduct, infused with policy considerations, there are good reasons for the point of law established, including: the confidentiality of JDR discussions is to be maintained, including from trial judges, the goal of which is to further

⁸⁵⁰ *Ibid*, at para. 29.

⁸⁵¹ While *L.N.* was decided in the context of a mere "guideline", with NR 4.21 coming into force as a matter of statutory (regulatory) law (Guidelines, *supra* note 190 and Appendix 7), it is arguable that the restrictions in *L.N.* will no longer be applicable (having been expressly provided to the contrary by a subsequent enactment), once the New Rules are enforce, such that a Binding JDR decision may be given provided that there is express, informed, consent in writing, in compliance with NR 4.21.

candour in the JDR settlement process; separation of the roles of JDR judge and a subsequent adjudication on the merits of the case promotes transparency of process and prevents “the spectre of an apprehension of bias” in subsequent adjudicative proceedings; and, together, these and other elements “enhanced the efficacy of the process and facilitated the settlement of disputes”⁸⁵².

But what about the following statement:

In so holding, I do not say that there will not be situations where a judge will be invited to conduct a JDR with respect to a discrete number of issues with the consent of the parties and then proceed at a trial where the remaining issues in dispute, *which were not discussed at the JDR*⁸⁵³, are adjudicated. But even in those cases, a judge must be very careful to consider whether there would be an appearance of bias and, accordingly, must ensure that the matter is thoroughly canvassed and an express, informed consent obtained. Judges, litigants and their counsel must understand that implied waiver of apprehension of bias in these circumstances will not immunize the trial verdict from appellate intervention.⁸⁵⁴

I have highlighted the passages *supra* in italics in my summary of the *ratio* and the text, because it would seem clear that if the Binding JDR justice does make an adjudication - a Binding JDR decision, as I have defined it - on any *non-trivial* issue (trivial, “small outstanding issues” seem to be exempt from this decision of principle, but even then only with “clear and unequivocal”, express consent of the parties, by para. 35) that was the subject of *any* discussion at the JDR, the decision will be held to be void *ab*

⁸⁵² *L.N.*, *supra* note 19, at para. 38.

⁸⁵³ I surmise that what is contemplated here, for example in a family case, is that the JDR justice might do a JDR on matrimonial property issues, but the child custody, access and support issues, could be sent to trial with the same justice by express consent. This appears to follow from Fruman J.A.’s comments, in *Abernethy* (C.A.), *supra* note 197 at para. 34, about the multi-door courthouse, expressly recognized by McFadyen J.A., in dissent, in *L.N.* at para. 79.

⁸⁵⁴ *L.N.*, *supra* note 19, at paras. 34 (italicized emphasis added).

initio on appeal. Regrettably, this puts the Binding JDR justice in a difficult - on first blush, an impossible - position because, in my experience, the parties usually requesting a Binding JDR want the finality of an enforceable decision and judgment, without having to sue on an agreed settlement mechanism, to avoid a full trial with another decision maker (all as happened in the result in *L.N.*). However, in such cases, under the reasoning of the majority in *L.N.*, even where there is express informed consent, the then adjudicating Binding JDR justice, will, on appeal, be summarily deemed to have contravened the law. The only possible way a Binding JDR justice could possibly provide a remedy that could be turned into a judgment is to merely render a Binding JDR opinion - that it is binding and final only if the parties follow their agreement (or are forced to follow their agreement) to make it a binding decision and judgment. Indeed, *Abernethy*⁸⁵⁵ remains authority that such agreements will be enforceable. Otherwise, it is not binding or enforceable if challenged, and is, in such a case, only a non-binding opinion.

A number of standard Binding JDR agreements have an option for the parties to also agree not to appeal the result - whether Binding JDR decision or Binding JDR opinion - or agree to have the option of appeal open, due to express agreement or absence of unanimity. However, it is not clear whether such an agreement not to appeal would stand in the face of *L.N.*. Thus, the Binding JDR justice still remains in a difficult position, but surely should never subject the parties to any further lengthy process.

⁸⁵⁵ *Abernethy* (C.A.), *supra* note 197.

In my view it is extremely unfortunate that, because of *L.N.*, the parties may have difficulty avoiding the costs of a full trial with another adjudicator, if the other side reneges on the agreement and the courts won't enforce it, as a matter of contract. This unfortunate result too seems to have been understood by the majority in *L.N.* - see para. 36. The result is that in Alberta, absent a reconsideration by the Court of Appeal, or, at least until, the express statutory provision in NR 4.21 comes into effect, Binding JDR decisions are effectively dead, along with a significant part of access to justice for parties that cannot effectively afford the cost of a trial to resolve their disputes that are not resolved in a non-binding JDR.

What does this mean for those JDR justices who wish to continue to offer the possibility of a Binding JDR opinion, if the parties want it. Well, it means several things.

First, before agreeing to do what was, before *L.N.*, a Binding JDR, the proposed JDR justice must, in my view, have a Pre-JDR with counsel, and the parties if they wish, to make that there is a genuine wish to negotiate - if not, the matter might as well go to a trial, perhaps a summary trial.

Second, if the proposed JDR justice agrees to do what was, before *L.N.*, a Binding JDR, the parties *must*⁸⁵⁶ execute and deliver to the JDR justice an agreement in writing setting out, in express terms, and with independent legal advice (that is almost always axiomatic in my experience), that they will accept the Binding JDR opinion of the JDR justice if the JDR does not settle, together with an undertaking not to appeal (if they so wish - or otherwise), and contemplating that the JDR justice will only provide a non-

856

I don't purport to impose on the parties such an agreement, unless they wish, but if they wish, the JDR justice has a right to know if there is such an agreement before s/he does a Binding JDR because such an agreement will affect how s/he conducts the JDR - e.g. caucusing.

binding opinion, which can become a Binding JDR opinion only in the context of the agreement between the parties, if the matter does not settle - otherwise, the matter can proceed only as an ordinary JDR in the usual course.

Third, the parties must clearly understand, and have an opportunity, before the Binding JDR, to present all the affidavit (and other) evidence they could produce at a summary trial. If it is more extensive than that, they might as well proceed to trial as no saving would be achieved by the no longer binding, Binding JDR.

Fourth, the JDR justice should not express any non-binding opinions on what s/he might do if s/he were making a adjudicative decision until the end of the JDR, after it has been determined to be unsuccessful.

Fifth, the JDR justice should caucus with a party only with great care, and perhaps only with a recording.

Sixth, after the JDR proper, if there are any issues that are not settled, the JDR justice can only render a Binding JDR decision on those that were not the subject of discussion at the JDR, or are "small outstanding issues". If the parties still wish the JDR justice to give an opinion that they wish to be a Binding JDR opinion, they must again, in writing (or on the record) with independent advice, re-affirm that they want such an opinion. At this point, the JDR justice should give them an opportunity to make representations on the public record - in essence what is then happening is similar to the arguments at a summary trial, based on the evidentiary record. That means that if there are issues that were the subject of discussion at the JDR, or are not "small outstanding issues", even with consent the JDR judge cannot give a Binding JDR decision, but can only give a Binding JDR opinion.

Finally, if at anytime, the JDR justice has any qualms about any confidential information that s/he learned during the JDR that might impact either a Binding JDR decision or opinion, or has qualms about the express nature of the express consent (re-affirmation would be prudent), s/he should immediately recuse him/herself so as to “avoid the unnecessary use of scarce court time in protracted proceeding focused on the impartiality issue”⁸⁵⁷.

The end result of *L.N.*, at least until the New Rules become law, even considering the option to give a Binding JDR opinion is rather worthless, because a JDR justice can, on request of the parties, always give a non-binding decision in an ordinary JDR, and they can agree to accept it as a settlement or a binding result, if they wish to do so - in each case by consent agreement.

The answer, to the initial question as to whether judges should be involved in Binding JDRs is “absolutely” as a matter of access to justice policy, provided all the judicial conduct cautions are maintained. However, otherwise, it is “No” - not in the direct sense at least, as a matter of law - until the New Rules come into force. The only way, effectively, that a Binding JDR can be effective in the interim, is, if a Binding JDR opinion is expressed by the JDR justice and the parties agree that it will be binding on them - the JDR justice will not even need to know if they agree before or after the JDR, except that s/he can, apparently, under *L.N.* sign a judgment or order “reflecting the settlement agreement”. Indeed, this is expressly recognized, where the majority say that it is permissible for the JDR justice:

... to provide the parties with the benefit of his or her opinion which the litigants may agree will bind them and will form the basis of a consent order. Should the parties so elect, they will no doubt appreciate that the JDR judge's pronouncement

⁸⁵⁷ *L.N.*, *supra* note 19, at paras. 64 (dissent).

remains part of the JDR process and will not be appealable.⁸⁵⁸

In effect, it thus becomes a non-appealable consent order or judgment.

In this context, I believe that, consistent with *Abernethy*⁸⁵⁹ and not inconsistent with *L.N.*, it should not be considered inappropriate judicial conduct to express such a non-binding opinion (what I have called a Binding JDR opinion) which the parties can accept if they wish. This is the only way that *Abernethy* and *L.N.* can be reconciled and the only way that the Court can effectively provide any type of “Binding JDR” to meet the access to justice services Albertans demand - indeed, want to have its capacity expanded (see the Survey).

What else does *L.N.* tell us relevant to JDRs. It deals with a number of judicial conduct issues, and some other provisions: “[c]onfidentiality is the foundation for frank and transparent discourse at JDRs” (para. 10 and Guideline 8); *impartiality* is a fundamental important qualification of a judge and the core attribute of the judiciary (paras. 17-18, 23, and in the dissent, in paras. 62 and 74-5); a judge should recuse him/herself on his/her own motion if there may be a *reasonable apprehension of bias* (paras. 20 and 24 (referencing *White v. White*, [2003] A.J. No. 1501, 2003 ABCA 358); there is a duty to be *fair* (paras. 21-2); consent to an action or waiver of a right otherwise existing, must be clearly, expressly and unequivocally “made freely and with full knowledge” and information (paras. 27-9); the role of a JDR justice “is very different than that of an adjudicating judge” - unlike the former, the later does not negotiate, caucus, become privy to offers of settlement prior to final adjudication, render confidential opinions or know of a JDR justices confidential opinion (para. 31); and “what happens in a JDR stays in

⁸⁵⁸ *Ibid*, at paras. 35-7.

⁸⁵⁹ *Abernethy* (C.A.), *supra* note 197.

the JDR' (save, of course, for revelation for disciplinary purposes of abusive or unprofessional conduct on the part of the participants)", such that the "principle of *confidentiality* is [not] allowed to erode" (para. 40)⁸⁶⁰.

b. JUDICIAL CONDUCT ISSUES WHEN DOING A BINDING JDR

As the previous section painfully demonstrates, there are significant judicial conduct issues that arise during Binding JDRs. For example, should there be as open a disclosure to the judge or caucusing with the judge? As alluded to *supra*, I believe that cautions on these (and potentially other) issues relevant to Binding JDRs should be given to the parties (and counsel) - preferably, both in writing prior to the Binding JDR, and orally at the commencement of it. However, subject to those cautions, I believe the judge should proceed as normal as possible to try and help the parties reach a settlement - the *real* purpose of the first part of the Binding JDR exercise, the dynamic pressure being that if it is not reached, a binding result may be forced.

If one or more issues does not settle, then there are procedures that must be follow under the rational of *L.N.*, and in due course, under the New Rules, in both cases together with the application of proper and careful judicial conduct, that will permit Binding JDRs to be effective to provide the access to justice that the parties and their counsel demand.

⁸⁶⁰ *L.N.*, *supra* note 19, at paras. as noted (emphasis added throughout). One thing that is clearly not party of the JDR Program, as a matter of policy, is the suggestion (at para. 36) that "[s]urely, the JDR regime is flexible enough to allow the JDR judge to hear viva voce testimony from witnesses..." That is a trial, not a JDR. The only evidence before a JDR judge will be affidavits and documents filed as evidence - similar to a summary trial, but never with witnesses. To do otherwise takes away from the whole purpose of a Binding JDR and returns to merely an adjudication.

7. CONCLUSIONS AND RECOMMENDATIONS

Here I have, perhaps, only scratched the surface of what judicial conduct issues are currently known to (at least hypothetically) exist. There are, however, those potential additional problems that have not even yet appeared on the radar screens of our judicial JDR experience. The standards of judicial conduct in this area thus need to keep pace with this experience, as the AJS noted:

The development of such standards should not be a one-time effort. Rather, as new settlement techniques, ethical issues, and moral dilemmas become known and addressed, standards should be continually updated and refined in order to provide judges with the maximum possible guidance for the settlement of civil suits.⁸⁶¹

The concerns raised however are not, in my view, such as to “cut and run”, and abolish or severely restrict judicial dispute resolution brought to Albertans through the JDR Program. Nor is there need for undue formality. Rather, the best response is to, at most, add to the judicial conduct guidance that exists generally for the judiciary, and specifically in the Guidelines and New Rules, only those recommendations that are not already articulated in a JDR context. Nevertheless, a document listing and describing all those principles, in a JDR context, amended as new principles are considered may be prudent for the Court’s JDR Committee to consider, along with guidance that I understand is currently being considered by the Canadian Judicial Council. Beyond that, it is, I believe, a matter for more and continuing judicial education and training on all judicial dispute resolution considerations, including, judicial conduct.

The bottom line is that, if the Court is going to continue to advance true access to justice, as the Survey shows it is now providing and Albertans

⁸⁶¹ AJS, “Editorial”, *supra* note 711, at 48.

demand in a increasing way, the Court must continue to show its leadership, and its excellent JDR justices must be vigilant to continue to provide this valuable JDR Program in a way that is consistent only with the highest standards of excellence, including that of judicial conduct.

VIII. FUTURE ROLE OF THE COURT IN JDR

A. SERVICES TO BE MAINTAINED

In reviewing the history of ADR back to Anglo-Saxon times as a “dispute processing continuum”, and noting its “Janus-like” quality⁸⁶², Sanchez asserts that “a central challenge facing present participants in the ADR movement is to preserve the integrity of that continuum into the future”⁸⁶³.

In looking at it through the Survey results, and having considered it in the context of literature on the subject, I have concluded that the Court’s JDR Program provides a valuable dispute resolution service to the public in Alberta, improves access to justice, and is, in general, positive to the administration of justice. I recommend that it be maintained.

⁸⁶² See *supra*, note 186 for a discussion on the general ancient nature of ADR type dispute resolution.

⁸⁶³ Sanchez, *supra* note 36 at 671, referencing:
- her own “Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today” (1996) 11 *Ohio State Journal on Dispute Resolution* 1; and
- Frank E.A. Sander and Jeffrey Z. Rubin, “The Janus Quality of Negotiation: Dealmaking and Dispute Settlement” (1988) 4 *Negotiation J.*109. She explained (at 671, footnote 2) that the “inter-related nature of dispute resolution and deal-making negotiation has been dubbed the ‘Janus’ quality of negotiation - after the Greek God of doorways, whose twin heads are seen carved at the top of stone archways, facing in opposite directions”. How appropriate for the multidoor courthouse!

Similarly, I recommend that the current JDR services being performed - mini-trials, judicial facilitative or evaluative mediations (or a hybrid⁸⁶⁴), and Binding JDRs be continued. I will add a note on each.

There is not much controversy about mini-trials other than to make sure all participants understand whether they are “pure” in the sense that the JDR justice provides his/her non-binding decision and leaves the room, or whether there is an expectation that s/he will stay to assist the parties and their counsel try to resolve their dispute - this needs to be clarified in each case.

As to judicial mediation, which some of my colleagues continue to call “judicial settlement conferences”, it is clear that JDR justices are, in fact, providing facilitative or evaluative mediation, or a hybrid of each, and should continue to do so, as the parties request, in consultation with the JDR justice.

As to Binding JDRs, while some JDR justices will not do them or don’t like them⁸⁶⁵, they are demanded by the parties and their lawyers, and they

⁸⁶⁴ The users in Alberta, in a JDR context appear to like the hybrid model, although it appears that what is delivered is more evaluative and rights based than merely facilitative and interest based. Brazil argues against such hybrids: Brazil, “Now”, *supra* note 11 at 507 and 92. However, hybrids seem to meet the demands of users in Alberta. Additionally, Brazil (also at 507-8/92-3) recommends that JDR services not all blend into mediation, but keep their key features, because it is necessary to “...offer an array of procedures so that litigants will have an opportunity to pick a process that best meets the needs of their particular situation. One size does not fit all.”). As applicable to our Court, it would include those currently conducted. Brazil also encouraged ENE which I believe is distinctive, but I do not recommend our Court offer it due to incompatibility with the Court’s JDR Program goals discussed *infra*.

⁸⁶⁵ Agrios, *supra* note 12 at 38-9, and 51 (item 6)(see also the Edmonton “Protocol” (Agrios, *supra* note 12 at 69, item 8)), in spite of being the summary judgment justice in *Albernethy*, which approved Binding JDRs in principle, is against them in principle (not on a judicial conduct basis, although he points out ALRI’s opposition), arguing (correctly) that they were “created by lawyers”. In the

provide a valuable service. Despite the current controversy (discussed *supra*), they should be maintained - however, they require great care and diligence, as just discussed *supra*. A “Binding JDR”, while an apparent oxymoron in terminology, has come to mean a summary way for the parties, by express, informed, written consent, to obtain a binding result at the end of a JDR that does not settle, without a full trial before another justice. While there are currently legal challenges, perhaps to be remedied by the New Rules, they should remain, currently through the mechanism of a non-binding opinion (similar to a mini-trial or evaluative mediation opinion) by the JDR justice, at the end of an unsuccessful (in whole or part) JDR, which the parties have agreed (or can agree) to accept as binding on them by contract, not judicial authority, thus achieving a “Binding JDR”.

Based on the Survey results, and the literature review, I recommend that the presumption should be the right in any civil case, by consent of the parties, to have access to the JDR Program. While the Court should reserve the right not to participate in a JDR that is not in the public interest, or to vet a proceeding to determine the acceptability of the JDR mechanism (and screen it out if appropriate), there should be no general presumptions against a JDR for any case or litigant. To the extent that there are issues that recommend against a JDR as a dispute resolution mechanism in any particular case, or there is a lack of consent when some form of alternative dispute resolution before trial is required, absent waiver, those will have to be decided on a case-by-case basis.

These and ancillary recommendations are summarized in Appendix 8.

alternative, he advocates summary trials, which I have indicated are an appropriate substitute in some instances. However, he misses the positive nature of the friction to settle that they generate - see Goss, “An Introduction”, *supra* note 29 at 16-9.

B. POTENTIAL NEW OFFERINGS

One area for a potential future role is the concept, as described (*supra*) and in the literature, of “early neutral evaluation” (ENE).

Brazil noted that an Early Assessment Program in Missouri showed that lawyers “significantly ... believed that ... [it] ‘helped parties determine whether [the] case could be resolved through [a] method other than formal litigation’”. The program also:

... contributed by (1) encouraging parties to be more realistic about their respective positions..., (2) allowing the parties to become more involved in the resolution of the case than they otherwise would have..., (3) allowing counsel to better understand and evaluate the other side's position..., (4) promoting early definition of the issues..., (5) permitting counsel to identify the strengths and weaknesses of their clients' cases..., and (6) improving communication between opposing counsel... Most of these kinds of contributions tend to improve, from the litigants's perspective, the quality of justice...⁸⁶⁶.

However, he later⁸⁶⁷ cautioned against “pressure on ... evaluators to convert ENE into what becomes, essentially, an evaluative mediation”, because, in effect, it would diminish the unique features that make ENE distinctive.

The report on the evaluation of the Ontario trial court’s mandatory adr centre recommended “early referral to ADR [to] save time and costs for the parties”.⁸⁶⁸ There is, in my view, considerable merit to early intervention, as

⁸⁶⁶ Brazil, “25 Years After”, *supra* note 14 at 104.

⁸⁶⁷ *Ibid*, at 144, referencing Lela P. Love and Kimberlee K. Kovach, “ADR” An Eclectic Array of Processes, Rather Than One Eclectic Process” [2000] J. Disp. Resol. 295, at 296-7.

⁸⁶⁸ Bussin, *supra* note 5 at 468.

my “quickest to the goal line” analogy, *infra*, suggests, and it would be useful (perhaps, indeed, important to access to justice in certain cases) for litigants to have such a service available.

I have often said that this is an area ripe for pursuit, via the right justice model, where there is no serious factual problem. Such a service is often useful to prevent the expenditure of large sums of money in litigating cases where, early in the litigation, the underlying facts are known or are not much in issue (e.g. much family law, where there is adequate disclosure and no one is hiding assets⁸⁶⁹; employment law - primarily dismissal cases; and some contract law). It is usually not too helpful when there are unknown facts or causation, or the nature of the damages is not yet ascertainable (e.g. many personal injury cases). In these latter cases, case management, a function of which is often seen as a component of ENE, may be useful instead of ENE.

Danielson reports⁸⁷⁰ that some ENEs have been “trialed in Edmonton with disappointing results”, but follow-up suggests that, whereas only a small number were done (on specific request, and, generally, under the approval of the Chief Justice) and there were often very good “results” - that is, the matters were settled - there was not any great demand being shown.

⁸⁶⁹ See Phyllis E. Bernard, “Teaching Ethical, Holistic Client Representation in Family ADR” (2001) 47 *Loyola Law Review* 163, which focuses on both domestic violence situations and an Oklahoma mediation program, called “Early Settlement”.

⁸⁷⁰ Danielson, *supra* note 4 Appendix F, at 6. Agrios, *supra* note 12 at 49, promotes it, and there is validity to the substance of many. However, his comments, subject to the issue of who should be performing this service. In the absence of case flow management, and leaving the substance to case management for cases where that is required, it is my view that this not, at this time, a role for the Court, as discussed *infra*.

I say via the “right justice model” because there is a serious issue as to whether JDR is the appropriate model. One sound argument against ENE as part of the JDR Program is that, because JDR is intended to deal only with the 5% or less of cases that are otherwise destined to trial⁸⁷¹, JDR should not deal with any of the remaining 95% that settle before trial without judicial intervention, except in exceptional cases. Put in other words, the *raison d’être* for the JDR Program is to improve access to the Court’s primary role, resolving disputes, namely by adjudication by trial, and, because of the 95% settlement rate in such matters, a Court role in dealing with 95% would not be consistent with the Court’s goals. All that it would do would be to provide court “expertise”, with little or no cost to the litigants, which is not a goal of the JDR Program. If it were the Court’s goal, it would JDR every case.

There is another extremely important reason for the recommendation against ENE becoming a part of the Court’s JDR Program, without the positive and active support of Alberta Justice, and that relates to resources. The current JDR Program has been provided with little, if any, additional judicial resources. Rather, justices are diverted from trials to JDR, with the settlements from JDR reducing the total trial time, thus not only reducing the trial backlog, but also reducing the need for as many trial justices - providing a better overall result with the same judicial resources. However, if we move judicial resources just to address the earlier settlement of the 95% discussed *supra*, that does not result in fewer trials because those 95% aren’t going to go to trial anyway, and therefore there are no judicial resources to be

⁸⁷¹ See discussion by Sander *et al* on the 95% v. 5%: Sander *et al*, “Judicial (Mis)use”, *supra* note 579 at 888 and 891. While he argues that “we should be interested in ways in which the 95% of the cases can be settled even earlier and cheaper and more satisfactorily”, a principle with which I agree, I am not certain that is currently the mandate of the Court. Although it may be within the purview of Alberta Justice, which may, some day, ask the Court to include it in its mandate, it is not so at this time.

available to be taken from trials for this purpose. The only way this service could be provided would be for Alberta Justice to determine that it was so important that the Court's justices do this ENE work that specific justice year equivalents be added to the current judicial complement of the Court. Thus, as Brazil cautions - very applicable to Agrios' recommendations to the Court getting into ENE - "we must discipline ourselves to abjure the temptations that beset unbridled enthusiasts".⁸⁷²

I have suggested herein, and have recommended to Alberta Justice officials, that the "right justice model" might be a reconfiguration of Alberta Justice's Court-Annexed Mediation program (CAMP) (now offered, as a pilot project in Edmonton and Lethbridge only, but with extremely limited success). An ENE program requires expertise (in procedure and/or subject matter) and, as I have also suggested, perhaps lawyers (in active service or retired, with mediation skills), or retired judges in some cases, could provide that expertise - some perhaps even on a *pro bono* basis.⁸⁷³ The suggestion remains with Alberta Justice (without any response) as at the date of release of this Evaluation Report. Alternatively, perhaps the private legal and mediation sector could provide such a service - maybe some even do now, but of which I am unaware. So, without resolving the "right model" issue, I will discuss the substance of the issue.

As to the substance, there is also some suggestion, that ENE should not be restricted to cases where disclosure is not a serious issue, and should be offered because of its case management aspects, a subject within the

⁸⁷² Brazil, "25 Years After", *supra* note 14 at 148.

⁸⁷³ *Ibid* at 114 notes that in his jurisdiction "[o]ver the course of my court's efforts to develop our ADR program, we have made a moving discovery about the depth of the reservoir of *pro bono* resources in the legal community". In conjunction with *Pro Bono Alberta*, it is time that Alberta Justice mined for a similar discovery.

mandate of the Court. In this vein, in discussing corporate and institutional clients, Macfarlane noted that:

The sensitivity of institutional and corporate clients to rising legal costs has led to demands for less costly and more efficient methods of dispute resolution and, specifically, to an increased appetite for early reporting, strategic settlement planning, and early dispute resolution.⁸⁷⁴

It seems to me that those are primarily client/lawyer issues (accessing the private sector if appropriate), and, if necessary or appropriate within the court system, case management issues where our Court has a proper role, but not necessarily ENE before our Court, where the justification for it taking a role is not clear. However, it may be (perhaps, in some areas such as family law where access to justice is a real issue, should be?) a goal of Alberta Justice, for a service, external to the Court, that litigating parties might access directly or on referral from the Court. I believe that there are ways in the private system, or CAMP as discussed, to accomplish this.

Thus, the answer as to whether ENE is, or should be, a service regularly offered by the Court's JDR Program seems clear. After consideration, my view is that, while the logic of an ENE service within the administration of justice is without dispute, it should not be a general JDR Program offering of the Court at this time. While, with approval of the Chief Justices, or their designate, there may be some special circumstances where

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Macfarlane, *supra* note 25 at 133, referencing her article "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) 2 *Journal of Dispute Resolution* 241, at 293-4.

See also: Carrie Menkel-Meadow, "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 *UCLA L. Rev.* 485.

it is authorized on a case-by-case basis⁸⁷⁵, it should not be a general JDR Program offering.

There are no other potential services that have come to my attention that, in my view, merit consideration for the JDR Program.

C. ATTITUDE AND TIMING IN OFFERING JDR

1. WHEN & HOW OPTIMUM - “QUICKEST/CLOSEST TO THE GOAL LINE”

This is an issue that requires analysis of: 1) what the access to justice goal should be for the administration of Civil Justice; and 2) how the Court’s mandate fits into the goal.

a. ACCESS TO JUSTICE GOAL

I have often said (before I read Chief Justice Burger’s earlier comments, or read Macfarlane’s book⁸⁷⁶) that if I were to return to the private practice of litigation law tomorrow I would create as my motto, or “*modus operandi*”, a phrase similar to “Quickest and closest to the goal line as possible”.⁸⁷⁷ Using the football analogy, it means that I would try to get my

⁸⁷⁵ Where authorized and conducted, there should be a specific (anonymous) evaluation done of each one, under methodology approved by the JDRC, for future programming consideration.

⁸⁷⁶ Hollett *et al*, *supra* note 335 at 345, discussed *supra* at note 708. Macfarlane, *supra* note 25.

⁸⁷⁷ Referencing ENE, Agrios, *supra* note 12 at 49, dubbed it “Early is better”. Goss, “An Introduction”, *supra* note 29 at 3, addressed the same concept while emphasizing the retention of the traditional adjudication system:

The ADR movement does not advocate the abandonment of strategic decision making, it simply adds one more question to the equation: ‘How can I do the best, the quickest, the cheapest?’ It does not advocate abandoning or replacing the judicial dispute

clients' disputes resolved as quickly and as best possible - not necessarily perfect justice, but rather expedient and practical justice - in other words, the best possible justice on a cost benefit analysis, where "cost" is not just money. Macfarlane recognized this in her most recent book when, in the Preface, she said:

At the heart of this new model is a concept I call conflict resolution advocacy. The new lawyer's advocacy role is focused on developing the best possible outcome - often in the form of a settlement - for her client⁸⁷⁸

She later noted⁸⁷⁹:

The huge cost of protracted litigation and the delays in assessing judicial hearings increase a sense of profound disconnect between lawyers and attainable, expeditious conflict resolution.

... There is an urgent need for lawyers to modify and evolve their professional role consistent with changes in their professional environment. The most important of these changes are widespread public dissatisfaction with the delays and costs⁸⁸⁰ associated with traditional legal processes, and the disappearance of full trials in all but a fraction of cases - the so-called "vanishing trial"⁸⁸¹.

resolution system, it simply means understanding the alternatives to litigation, the advantages and disadvantages, and considering how they can be most effectively utilized.

⁸⁷⁸ Macfarlane, *supra* note 25 at xii.

⁸⁷⁹ *Ibid*, at 1-2.

⁸⁸⁰ For example, Macfarlane reported at 8, referencing Ministry of the Attorney General, *Ontario Civil Justice Review: First Report*, March 1995, <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/cost.asp>, at chapter 11, that in Ontario in 1994, a three day trial cost \$38,000, and that it is "closer to \$50,000 today".

⁸⁸¹ As noted *supra*, a growing familiar term, see Donalee Moulton, "Vanishing trials: Out-of-court settlements on the rise" (2008) Oct. 17 *Lawyers Weekly* 22, referencing Macfarlane. Additionally (relevant to the last footnote), as referenced therein Dean Philip Bryden, Dean of Law at University of New Brunswick (to become Dean of Law at the University of Alberta in mid 2009), offers the view that "there has been an escalation in the cost of litigation that has outstripped the rate

...

... To be effective and successful in practice, the lawyers of the twenty-first century must find ways to meet their clients' best aspirations - the achievement of effective, appropriate and sustainable outcomes within a reasonable time frame rather than years tied up in legal procedures, draining their resources, and chasing an apparition of vindication and victory.⁸⁸²

Still later⁸⁸³, I turn her question into a statement to assert that, in my belief, "good lawyers [are] those who see themselves as conflict resolvers, providing efficient, realistic, principled, and humane dispute resolution with constructive and practical results". Finally, she was much more direct in a comment that I have used in part *supra* on the timeliness and cost of negotiation:

... the difference between the original [early] offer of settlement and the final [much later] agreement is often negligible, especially when legal costs are factored in. While lawyers feel

of inflation, so there is probably more financial pressure on clients to settle litigation than there was a generation ago". Other comments include clients demanding "a problem solving approach".

See also, *inter alia*:

- Michael Orey, "The Vanishing Trial; As court battles become more rare, some experts fear the effects on the law" (2007) 4032 (April 30) Business Week 38;
 - Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1 Journal of Empirical Legal Studies 459;
 - Hope Viner Samborn, "The Vanishing Trial" (2002) 88 a.b.a. l. 24, as reported by Brazil, "25 Years After", *supra* note 14 at 125; and
 Janice Tibbetts, "Lawyer fees 'astronomical', Supreme Court judge says: Binnie suggests courts could exert power to curb costs" National Post (22 October 1999) A4; clarified in Ian C. Binnie, "Legal Fleecing", Letter to the Editor, National Post (23 October 1999) B9.

⁸⁸² Macfarlane, *supra* note 25 at 1-2 (see also at 8), referencing Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", (2004) 1 Journal of Empirical Legal Studies 459.
 See also Macfarlane and Manwaring, *supra* note 377, especially at 254, where an excellent example from a lawyer with a similar view is repeated from Julie Macfarlane, "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) 2 Journal of Dispute Resolution 241, at 277-8 and 294.

⁸⁸³ Macfarlane, *supra* note 25 at 19.

compelled to spend time gathering information and building a theory of the case, the eventual payoff for their clients in settlement dollars may be less than the cost of this work....

Sometimes work preceding the opening of negotiations genuinely strengthens the client's case and puts them in a superior bargaining position; in other cases it may be simply a matter of habit (for example, a reluctance to open negotiation before discoveries, whether or not that information is actually utilized in effecting a better settlement). The difficulty of appraising the usefulness of pre-settlement work is heightened by custom and practice surrounding the timing of negotiations in a legal model.⁸⁸⁴

Finally, Macfarlane had this to say, which is classic BATNA/WATNA thinking, which I heartily endorse:

... I ... argue that the central role of an advocate in the system of conflict resolution is to assist the client in continuously reassessing what he needs and wants in a light of what is possible and what the cost may be, and then to advance that goal. This role includes regularly assessing the potential for resolution, which means that the advocate must draw on the qualities of the effective negotiator, including listening to what the client really wants and prizes and what he is prepared to give up in order to achieve resolution, being firm about bottom lines, and being creative about negotiable issues. It does not mean giving up or throwing away the traditions of dedication and strength in advocacy. It means retooling these principles for a different type of engagement with the problem and the possible solutions.⁸⁸⁵

This phenomenon is also reflected in the comments of Justice Linden at the Pitblado Lectures:

⁸⁸⁴ *Ibid*, at 68-9, adding, at 70, that the time and money investment in discovery and like processes to satisfy "due diligence" before starting negotiation is not necessarily cost effective: "information deemed pertinent to this end may or may not be relevant and useful in the negotiation of a pragmatic solution".

⁸⁸⁵ *Ibid*, at 96.

... it's not so much the percentage of cases that are settled, but *when* they are settled. If you settle them after two or three months it's better than after six months or a year or two, not only because it's over with and people don't have to worry about it but because the longer it goes on, the more steps that are taken, the more costs are incurred and the more expense that will ultimately be involved.⁸⁸⁶

Sander noted the conflict for lawyers in that "solving a case by mediation or rapid arbitration, obviously ... has [negative] economic implications for lawyers", but also noted that "[i]n the long run, the most experienced lawyers say, 'Being able to settle client problems effectively is really a boon to business'".⁸⁸⁷

Brazil agrees, noting that the motivation of lawyers to provide this type of innovative legal service is

... not necessarily to make more money in any particular case, but to increase the overall volume and quality of work they attract. ... Happy clients are more likely to be happy with their lawyers. Clients who are happy with their lawyers are likely to use those same lawyers again and are likely to refer additional clients. All this means more business for the lawyer who has used ADR to the benefit of his clients.⁸⁸⁸

He later added a comment that relates to this discussion, but is equally important to the realization that pursuing ADR is not abandoning a possible return to litigation, a fact that I have tried to address *supra* relating to the BATNA/WATNA analysis. He said:

By agreeing to participate in mediation, neither lawyer nor client agrees to give up anything. Rather, lawyer and client merely agree to try using an additional process tool to search for what is best for the client. Mediations are designed to help parties

⁸⁸⁶ Justice Linden, at the Pitblado Lectures, *supra* note 10 at 93 [emphasis added].

⁸⁸⁷ Sander, "Future", *supra* note 25 at 6.

⁸⁸⁸ Brazil, "25 Years After", *supra* note 14 at 133.

understand more clearly what their own underlying interests are and to help parties use their own squarely identified values to prioritize those interests. A good lawyer, a lawyer who wants to energetically do as much for his client as the circumstances permit, embraces the use of tools to help him and his client more reliably and comprehensively understand both their own situation and their options for going forward.⁸⁸⁹

Indeed, in part, this realization of the costs of protracted litigation was one of the motivations that caused Chief Justice Moore and Associate Chief Justice Miller to have the foresight, and to take the risk, in creating the JDR Program. Getting a matter to trial was increasingly expensive⁸⁹⁰, and there was a large backlog (delay in access to justice) in waiting trials. Landerkin and Pirie note the obvious when they state that, often, with a settlement of a case “[a]n enormous amount of court time, money and human costs are saved”.⁸⁹¹ While the latter was not the complete driving force, availability of timely trial dates has vastly increased such that, for most of the last 12+ years the wait for a trial date is not at all unreasonable. Indeed, during much of that time and still, the time to get a JDR is often longer than the time to get a trial.⁸⁹² There is a need for both the judiciary and lawyers to realize that perfect justice is not something that the parties or the system can always afford, and that there is a great benefit for early resolution even at a “discount” - although trial remains there for those who wish to spend the resources of time and money to achieve a final result. For the rest of us, JDR provides an appropriate, and more timely, alternative to adjudication.

⁸⁸⁹ *Ibid*, at 134.

⁸⁹⁰ Macfarlane, *supra* note 25 at 97.

⁸⁹¹ Landerkin & Pirie, *supra* note 25 at 250.

⁸⁹² See Appendix 6, Table 6.1 - WAIT TIMES. Unfortunately the data is partially unclear in proving what experience justices of the Court know to be the case.

I also believe that the “quickest and closest to the goal line” philosophy is consistent with the intent of the New Rules - more cost effective and efficient resolution of disputes through a form of alternative dispute resolution if possible, and trial, if not.

b. THE COURT’S MANDATE AND TIMING IN THE JDR PROGRAM

However, what does this mean in the context of the evaluation of the JDR Program? Well, it means pressure for more and earlier JDR, raises the issue of whether supplying the same is compatible with the mandate and purpose of the JDR Program. The issue of demand has been discussed *supra*. The remaining (and inter-related) issue is the timing of JDRs.

Currently there is no general restriction on when a party can request a JDR, though there remains a judicial discretion to decline to do one that is not “ripe” for settlement, or has some other problem antithetical to a JDR. Whereas some mandatory mediation programs require mediation before discovery, the New Rules will only require it, unless waived, before a trial date is set.

Without getting into the debate here as to when is the best time, as a matter of “ripeness”, for the parties to try to negotiate a settlement (it is likely to differ in each case)⁸⁹³, I recommend that, perhaps with some exceptions, JDRs should not be used until the stage identified by the New Rules - that is, just before trial.

⁸⁹³

See Appendix 6, Table 6.4. - PEAK PERFORMANCE.

This deals with the aforementioned reality that 95% of cases will settle without such judicial intervention (which sets the basis for the purpose of the JDR Program), but also the opposing trend that counsel are less likely to negotiate (there is anecdotal evidence referenced herein to support this as noted *supra*) if they are required (or even have the opportunity) to go to mediation.

In the result, I believe that if the parties wish to settle at a significant time prior to trial (which, generally, I recommend as a matter of general litigation/settlement strategy - again, see “quickest...” *supra*), they should do so by negotiation, or by private mediation, or by an Alberta Justice sponsored CAMP “notice to mediate” program, not a JDR. The first two are voluntary and by consent. The third could also be voluntary and by consent or, alternatively, expanding the pilot project on the unilateral motion of one party seeking to force the other side to a mediation. Again, I have recommended this to Alberta Justice officials, through a universal province-wide reconfiguration of Alberta Justice’s current pilot CAMP program. That does not mean that CAMP should not also be available as a consensual program just prior to trial, rather than the JDR Program, if the parties so wish, but only that should be the focus of the two programs - CAMP before trial readiness and JDR near the point of trial readiness.

Another, unrelated timing issue relates to the optimum time to spend in a JDR, which also raises the issue of the “efficient use of scarce judicial time”.⁸⁹⁴ Obviously, the less time, the less process, the less cost, and less use of judicial resources. What about the success and the intangible benefits of the JDR process itself? These elements would be materialized by restricted JDR hearing times.

⁸⁹⁴ Landerkin & Pirie, *supra* note 25 at 261.

Often provincial court programs in family and small claims in various jurisdictions use units of half day or 1 hour (or even less). The Court's JDR program works on one day units and it seems very workable - expanded to several continuous days, if projected to be needed in advance, or truncated to less than a day if appropriate - or if settlement is achieved quicker than a day. Anything shorter would, in my view, most often be too hurried to develop the right level of "trust" among the lawyer, parties and Justice to ensure a productive settlement process. If a quicker ENE type process were to be implemented (discussed *supra*), ½ day sessions might be appropriate. However, I doubt that much good could be accomplished, except in the simplest case, in much less time. Indeed, when I have done a couple of half day JDRs they were rushed and went late.

Thus, without wanting to prescribe specific limits, I recommend that one day JDR be the norm for scheduling absent special circumstances, although the JDR Coordinator should feel free to depart from that upon the request of the parties or counsel, with the concurrence of the JDR justice, as appropriate.

2. FUTURE PROCESS FACTORS AND WARNINGS

Goss endorses the hypothesis that judicial involvement in settlement often means that the parties and counsel will not negotiate until they get to the JDR.⁸⁹⁵ Brazil calls this an aspect of "program rigidification" where,

⁸⁹⁵ Goss, "An Introduction", *supra* note 29 at 21, relying on, *inter alia*:
- D. Stockwood, "The Private Court", in P. Emond, ed., *Commercial Dispute Resolution* (Aurora: Canada Law Book Inc., 1989);
- Spencer, "Congestion in the Courts, Trial & Error: The British Columbia Experience" *Annual Meeting Papers of the Canadian Bar Association* (Ottawa: Canadian Bar Association, 1989), c.1.01, at c.1.05; and
- Galanter, *supra* note 591 at 262.

... the possibility that the way we institutionalize ADR programs could encourage, both in parties and counsel, dependency, complacency, and passivity about ADR (in particular) and settlement (in general). We need to design into our systems incentives and prods that will discourage litigants from simply sitting back and waiting for the ADR service that the court offers....⁸⁹⁶

Not wanting to set up straw-persons or anticipate problems that have not arisen to this point in time, process problems experienced or anticipated in other jurisdictions, some of which are starting to appear in Alberta, need to be contemplated and prevented or ameliorated. The work of Brazil and Landerkin and Pirie are prime in this area. Accordingly, I will deal, on a rather cursory basis with some of these potential future process issues.

Public JDRs

One broad problem identified is public pressure causing the judiciary to start to worry about “stepping down from the [public] bench” into private negotiations, or causing demand for public JDRs. I have addressed this, in part, in response to Smith, and do not believe that the Court should take it seriously. However, there is nothing stopping JDR justices doing JDRs in a courtroom or other “appropriate judicial venue”, although that would, in my view, surely dampen the demand for JDRs, and would pose significant confidentiality issues. We have in Alberta, especially in Calgary (and are developing them in other judicial centres) JDR suites (mediation and break-out rooms) that provide appropriate decorum and utility, although they are private. There is no way to use them for “public” mediation, if “public” mediation is required for “public openness”⁸⁹⁷ contrary to the wishes of the

⁸⁹⁶ Brazil, “25 Years After”, *supra* note 14 at 145.

⁸⁹⁷ Smith, *supra* note 13 at 6-7, relying on Judith Resnik, “Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes are at

parties, thus making JDR a less valuable service to them, when they can get truly “private” mediation outside the courthouse. In the result, any “public mediations” would have to be in a courtroom.

Again, I believe that this should no more be an issue than doing pre-trial conferences in private. Perhaps a way to avoid, or lessen, any yet unidentified external public demand (note that the internal users are not demanding it - indeed to the contrary) for “public JDRs”, there could be “protocols” developed which would “duly honour the office of judge” in a mediation, and avoid any perceived or feigned problem. I believe that the presiding JDR justices have, and can, adequately deal with this on a case-by-case basis, and I know of no problems. Otherwise, if a response is necessary, it may be found in the next section.

The bottom line is, I do not recommend JDRs in public unless the parties demand them by consent, or a court of competent jurisdiction so orders.

Risk”, (2006) Chicago-Kent Law Review 81, at 110, and other sources, says that “[o]penness operates to police the decision makers” and later elaborates on this in some detail, including the comment from *Re Therrien*, [2001] 2 S.C.R. 3, at para. 151, that “a person who appears before a judge is entitled to have justice done ... and that justice be seen to be done by the general public”. However, while such an “entitlement” for the person appearing - especially where compelled to appear - in an adjudication is essential to our system of justice, in JDR, the parties consent - indeed (see survey qualitative comments in Appendices 4 and 5), seek - that their negotiations take place in private. If they consent to a closed forum for the negotiation of their disputes, and don’t seek a public forum, why should the public be concerned? If they do not wish to consent, there is a public adjudication process available to them. Indeed, if they wished to negotiate in public, or if they are compelled by rules (such as the New Rules, unless waived) to have some form of dispute resolution process before getting a trial, then they could make application to have it done in a public courtroom, as was the case for mini-trials, before specially designed JDR facilities were available. Indeed, a justice, exercising his/her judicial independence, who strongly believes in the need, could conduct his/her JDRs in public, but then others would see what, if any, parties would take up such a justice on this type of “requirement”, and any “lightening” of their JDR docket, could be off-set by trial assignments. However, I believe it is a matter for determination in an individual case.

JDRs on the Record

If, relating to the discussion in the last section, public process issues become a factor (they now are not), perhaps one remedy would be to mediate with a record. This would provide some apparent substitute for a “publically open process” and, at the same time provide some party “privacy”, if it were to be found really necessary. However, I don’t believe it is really necessary and accordingly I don’t recommend it, unless there are SRL.

SRL, and other issues, also raise the need or advisability of doing JDRs on the record, albeit on an “in camera” and restricted record - which, in itself, raises publication ban related issues.

Again, as in the last section, any need for recording, except for SRL, would come from an external source and raises an unnecessary atmosphere of challenge. However, if required, I doubt any of my colleagues would seriously object, doing a JDR on the record and, for good reasons, might even request it.

Physically there is absolutely no problem in recording JDRs, subject to the public expenditure of building the FTR recording system into each mediation room and hiring staff (or training the judiciary) to operate them - most justices use portable FTR recording systems now for SRL.

As noted, the caveat for any recording would have to be, subject to publication ban issues (beyond the scope of this Evaluation Report) that the recording or transcript would only be available on the order of the presiding JDR justice, or the Chief Justices, or their designate, for reviewing conduct issues, the matters of substance being the subject of confidentiality protection.

Internal Threats to the JDR Program - Justices

Some of these concerns are the subject of Brazil's comments. In introducing them, he said

...there is a danger that ... we will fail to keep clearly in mind the values that are most important to us as public courts in a democratic society. Out of eagerness to serve, or in response to pressures from dockets ... we might unintentionally construct or administer our ADR programs in ways that threaten those values....

As courts, our most precious asset is the public's trust. Every program we sponsor or sanction must be designed to inspire and sustain the public's respect and confidence.

The public believes that, as courts, our core responsibility is to do justice. The public also believes that the aspect of justice for which we are primarily responsible is process fairness, process integrity. It follows that the characteristic of our ADR programs about which we must be most sensitive is fairness, especially process fairness. This means that in program design and administration are paramount concerns must be with process integrity and quality control.

Over the next several years we will face several threats to these values.⁸⁹⁸

Three years later, after analyzing available data, Brazil, reported, on the macro level, that in "days of perceptions of fairness", "[o]verwhelming majorities of lawyers and parties endorse the fundamental fairness of ADR processes in all the studies I have read". He noted that this was important for more than just the element of fairness - "... public confidence in the judicial

⁸⁹⁸ Brazil, "Continuing", *supra* note 14 at 23 *et seq*, referencing his earlier article, "Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns" (1999) 14 Ohio St. J. On Disp. Resol. 715.

system turns so much on perceptions of fairness of the process..” and that “... most surveys reveal widespread user satisfaction with court connected ADR programs.” The Survey results herein confirm the same perception of fairness, with, I suggest, the same resulting public confidence in the justice system achieved through the Court under traditional adjudication - I might suggest even more so in light of users flight to JDR.

Some of the aforementioned threats relate to the issues of judicial conduct addressed *supra*. Brazil identified threats relevant to the Court’s JDR Program to include (with my comments): “sacrifice quality for quantity - to cut quality corners in pursuit of volume”⁸⁹⁹ - addressed in part *supra* regarding maintaining the one day JDR hearing schedule; maintenance of confidentiality of substance - the release of any substantive information before settlement or adjudication of a case; avoiding undue pressure to get a settlement at all cost - the coercion issue, in part; avoiding perceptions of improper motives for a JDR program - e.g. to give judges an easier schedule; “guard against the ‘litigization’ of ADR” - that is, as to the judicial side, permitting the worst of adversarial practices to creep into the process, raising the requirement of the maintenance of party and lawyer good faith in the process (good faith will be addressed specifically, *infra*); “pressure from proceduralists ... to elaborate and formalize ADR proceedings, even to record them”, which “would essentially convert ADR back into traditional litigation” - note that even I have been tempted to fall into this trap in the recording context, but, over and above that I have tried to make certain that the recommendations in this Evaluation Report do not create unnecessary procedures; any inappropriate blurring of distinctive ADR processes (on which more, *infra*); blurring public and private ADR (also, on which more,

⁸⁹⁹ Note the concern on this subject by Sander: Sander *et al*, “Judicial (Mis)use”, *supra* note 579 at 887.

infra); and expecting too much from ADR or judging it “by criteria that fail to reflect the full range of values that ADR can advance”.⁹⁰⁰

As to blurring distinctive ADR processes, a combination of facilitative and evaluative mediation in the form of a hybrid facilitative/evaluative mediation is the most common to JDR - “not substantially different from the approach used in many judicially hosted settlement conferences”. Indeed, there is already some of that now in the JDR Program, but, I believe, for good, not harmful, purposes, and with the request or concurrence of the parties. The latter is the real point - to allow the parties (as the New Rules promote) to design, with the concurrence of the JDR justice, the dispute resolution mechanism (or a combination of them) that they believe will be successful, and for the JDR justice deliver that model, not something else. This, however, requires the knowledge by counsel and the JDR justice of the advantages and limitations of each distinctive process⁹⁰¹, which requires education and/or experience on both sides.

As to the blurring of public and private dispute resolution processes, by using private mediators to conduct court settlement processes, Brazil argues that “[t]he future of ADR will be healthiest if it is supported by vigorous and partly independent development in both spheres”, because each provides for unique benefits to the public. As the JDR Program uses judicial mediators, rather than private or staff mediators annexed to the Court, that is not a real risk. As to the arguments of some against public systems adopting private methodologies, there is, I believe, no ownership of methodology. Moreover, Brazil rightly notes that “because of the centrality of process integrity to their

⁹⁰⁰ Brazil, “Continuing”, *supra* note 14 at 23 -39 - on the latter point see a full discussion at 36-38.

⁹⁰¹ *Ibid.*, at 34-5.

mission, public courts are uniquely positioned to make important contributions to the development of ADR processes that are both sophisticated procedurally and well-grounded ethically”.⁹⁰²

In his 2002-3 article, Brazil refocused on five internal threats: a “generalized ‘good faith’ requirement”; “degeneration of process differentiation”; “program rigidification” - discussed *supra*; “overestimating ADR’s contribution”; and “underestimating the importance of what we are trying to do”.⁹⁰³ The second and third have been discussed, *supra*. However, I would add one note as to “program rigidification” (to which the fourth factor of “overestimating” is closely aligned), namely that, as Brazil identifies⁹⁰⁴, one of the concerns is that the availability of ADR will lead the parties and the courts there without really determining whether that is the appropriate course - the alternative is to make hard decisions as to the usefulness of ADR in some cases, and where it is wanting to reject it in favour of adjudication. We need only to look at the satisfaction of the lawyer and client users, as measured by the Survey, to avoid any “underestimate” of the “contribution” of the JDR Program. Accordingly, I need only address the first, which I shall, *infra*.

External Threats - Parties or Counsel

As parties get more familiar with JDR it may be only a matter of time until practices by parties and/or their counsel, in an attempt to get an advantage in the process, may jeopardize the value of the process itself. Indeed, I believe we are starting to see some of these problems in our JDR Program - the simplest of which is using valuable JDR time for a case where

⁹⁰² *Ibid*, at 35-6.

⁹⁰³ Brazil, “25 Years After”, *supra* note 14 at 142-9.

⁹⁰⁴ *Ibid*, at 146.

a settlement is clearly possible with negotiation alone. More serious is the problem of litigization discussed *supra* (from a judicial perspective) and addressed *infra* (relative to a the issue of good faith, from a party/counsel perspective). These and other potential “external” problems must be avoided or dealt with in a direct fashion.

Good Faith Requirement?

As to “litigization”, referenced *supra*, the aggressive adversarial practices by parties or counsel, which JDR justices must not permit, include (but are not limited to): posturing; feigned emotions; specious arguments; concealing or delaying relevant information; obscuring or hiding weaknesses; misleading statements about the existence and strength of available evidence; injecting hostility or friction into the process; “remaining rigidly attached to positions not sincerely held”; and needlessly protracting the proceedings for no useful - indeed, perhaps improper - purposes. Brazil says the danger of these types of behaviors increase as one moves from facilitative to evaluative mediation processes.⁹⁰⁵

These, and other types, of misconduct raise the issue of the whether the design of a dispute resolution system should contain a requirement of “good faith”, and what a mediator should do about bad faith. Brazil does not recommend a formal declaration of a requirement of “good faith” due to the possibility that it will take the focus away from the process and its goals, and focus on conduct. Additionally, there are definitional issues as to what is and is not “good faith”.⁹⁰⁶ Three years later, he noted that bad faith is not a significant problem, and, with detailed reasoning, argued that combating it too

⁹⁰⁵ Brazil, “Continuing”, *supra* note 14 at 29, and 33-4.

⁹⁰⁶ *Ibid.*

forcefully would be counter-productive - “the problems that imposing such a requirement and trying seriously to enforce it would generate are considerable”.⁹⁰⁷

However, I believe that while there is now an implicit requirement of good faith by parties and counsel (for which a good judicial opening at a JDR will remind all parties of such expectation), without permitting the JDR to focus on it, there must also be an explicit requirement, although, perhaps, not emphasized. Moreover, and in any event, the most important point is that JDR justices should during the JDR, again without focusing on it, demand actual good faith in the process, and, but only in the extreme cases, use cost consequences and other penalties to enforce that requirement. Related to this, at least one U.S. case has made clear that the requirement of confidentiality which deals with the substance of the discussions at an ADR process (for good reasons which Brazil identified), does not preclude disclosure of bad - especially extreme - conduct.⁹⁰⁸

⁹⁰⁷ Brazil, “25 Years After”, *supra* note 14 at 142, with the addition that they provide a “deeper treatment of considerations that should inform this debate”:
 - John Lande, “Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs (then to be released, since released as (2002) 50 UCLA L. Rev. 69) - “suggesting less risky means to achieve some of the [same] ends...”; and
 - Kimberlee K. Kovach, “Good Faith in Mediation - Requested, Recommended, or Required? A New Ethic” (1997) 38 S. Tex. L. Rev. 575 - “offering considered support for imposing such a requirement”.

⁹⁰⁸ Brazil, “Continuing”, *supra* note 14 at 29-33, referencing *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.* (2000) 78 Cal. App. 4th 653 (2d Dist.), reh’g denied, Mar. 21, 2000.
 See also these sources he identified at footnote 56:
 - Kimberlee K. Kovach, “Good Faith in Mediation - Requested, Recommended or Required? A New Ethic” (1997) 38 S. Tex. L. Rev. 575;
 - Kimberlee K. Kovach, “Lawyer Ethics in Mediation: Time for a Requirement of Good Faith” (1997), Winter Disp. Resol. Mag. 9; and
 - Edward G. Sherman, “‘Good Faith’ Participation in Mediation: Aspirational, Not Mandatory” (1997), Winter Disp. Resol. Mag. 14.
 Menkel-Meadow refers to this as “manipulate the mediation” where lawyers and clients have “learned to misuse some forms of ADR for less-than-honest purposes”, for which solutions should be sought: Carrie Menkel-Meadow,

D. IMPENDING MANDATORY MEDIATION

Because, pursuant to section 92(14) of the *Constitution Act, 1867*, “each province possesses power to prescribe the procedure in civil matters in the provincial superior courts”, this Court has jurisdiction to participate in mandatory mediation, as a matter of law, with a specific enactment, such as proposed under the New Rules. And, as a matter of policy, the ability to waive it merely delays access to justice, but does not deny it. Thus, “the requirement of mandatory mediation does not appear to infringe the constitutional values associated with the provincial superior courts”.⁹⁰⁹

While constitutionally permissible, whether or not mandatory mediation is a good thing from a policy point of view has been the subject of some debate.

There are some who raise the “dangers of mandatory mediation”.⁹¹⁰ Even this year, Menkel-Meadow has argued against it⁹¹¹, because it removes,

“Maintaining ADR Integrity” (2009) 27 *Alternatives to the High Cost of Litigation* 6, at 8-9.

Sander refers to the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality (2008) (available at www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf) as a study to pursue solutions: Sander, “Keep Building ADR”, *supra* note 170 at 9. See also: John Bickerman, “The future of mediation” (2007) 13.4 *Dispute Resolution Magazine* 2.

⁹⁰⁹ Barry, *supra* note 11 at 5.

⁹¹⁰ Danielson, *supra* note 4 at 24, footnote 67, pointing to Patricia Hughes, “Mandatory Mediation: Opportunity or Subversion?” (2001) 19 *Windsor Y.B. Access to Justice* 161-202, who, having reviewed such systems, argued that requirements of mandatory mediation “undermine the value of mediation as a distinctive method of dispute resolution”, especially when there is no, or limited, right to select the mediator - however, there will continue to be a substantial right to continue to select the judicial mediator under the JDR Program. See also Sander *et al*, “Judicial (Mis)use”, *supra* note 579 - Allen taking the negative.

⁹¹¹ Carrie Menkel-Meadow, “Maintaining ADR Integrity” (2009) 27 *Alternatives to the*

in her view, the highly relevant impact of the voluntariness quality from ADR. However, Macfarlane has suggested⁹¹² that the requirement of mandatory mediation may be positive because it may lead clients to have a greater role - and perhaps a happy one - when their lawyers, or the other side, don't want to pursue voluntary ADR. She elaborated:

The advent of mandatory mediation programming in the courts has created a growing group of personal clients who are asking questions about the traditional parameters of the lawyer-client relationship. Mandatory mediation means that clients who have no knowledge or experience of mediation are finding themselves attending sessions with the mediator, along with their lawyers.... Studies have consistently demonstrated that the vast majority of clients welcome the chance for mediation and see it as a valuable opportunity whether or not settlement follows. Further, there is no significant difference in satisfaction levels, which remain consistently high, between clients mandated into mediation and those who chose the process voluntarily.⁹¹³

Mandatory mediation is on its way to Alberta under the New Rules (NR 4.16 and 8.4 - Appendix 7), although cases for which a trial date have been set prior to implementation are proposed to be exempted by NR 14.3⁹¹⁴.

Danielson addressed the judicial attitude towards mandatory mediation and the impact on the JDR Program:

High Cost of Litigation 6, at 7-8.

⁹¹² Macfarlane, *supra* note 25 at 135.

⁹¹³ *Ibid.*, at 136, referencing Roselle L. Wissler in "The Effectiveness of Court-Connected Dispute Resolution in Civil Cases" (2004) 22 Conflict Resolution Quarterly 55, at 69 and "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research" (2002) 17 Ohio State Journal of Dispute Resolution 641, at 682.

⁹¹⁴ This will be for "categorical referral" which is prescribed by statute without human intervention, except possible waiver. This is different from systems of "discretionary referral", where someone (usually a judge) directs someone to mediation: Sander *et al*, "Judicial (Mis)use", *supra* note 579 at 885-6.

It is the opinion of many Justices that a mandatory JDR (or similar process) before getting a trial date will lower the overall success rate. Other Justices support such a mandatory program. Many of the cases that would be forced through a mandatory JDR Program are cases that are stalemated and would, under the current voluntary system, bypass JDR and go straight to trial. Having such cases go through a mandatory JDR would inevitably lower JDR settlement rates. *Advanced training in understanding the barriers to settlement and breaking impasses should be provided to Justices, as the new Rules will require them to deal with a higher level of resistant litigants than previously in the participant driven program.* With increased skills, some of these cases will settle. Studies of other mandatory court-annexed programs have demonstrated success.⁹¹⁵

Additionally, I note that many of my colleagues are very much concerned about the impact the mandatory mediation program will have on increasing the demand for JDR, a subject I will return to momentarily.

Sander supported the success aspect noting that “[l]imited available data suggest, somewhat counter-intuitively, that the results in terms of settlements are more or less the same regardless of whether the parties opted for mediation or were ordered into it”.⁹¹⁶ He also argued⁹¹⁷ that it is not an oxymoron, “because I believe that there is a clear distinction between coercion *into* mediation and coercion *in* mediation” - obviously, suggesting that only the latter is improper.

⁹¹⁵ Danielson, *supra* note 4 at 75 [emphasis added].

⁹¹⁶ Sander, “Ohio Symposium”, *supra* note 38 at 708.

⁹¹⁷ Sander *et al*, “Judicial (Mis)use”, *supra* note 579 at 886.

It is my view that mandatory mediation will not have a significant long term effect on JDR demand or their success. I come to these conclusions for several reasons.

As to demand, first, it will not affect any trials scheduled at the moment the New Rules come into effect - which, however, might create some pre-implementation pressure prior thereto for the assignment of trial dates, and pre-trial conferences which are the prerequisite thereto. Second, many of the cases that are scheduled for trial will have had a JDR or other dispute resolution process in any event of the New Rules, and therefore will not be adversely affected by the New Rules. Third, some cases that have not had JDRs may well be candidates for waivers. Fourth, many family law files do not have formal trials, but have most of the issues resolved in regular or special motions courts, and/or by desk divorces. Fifth, JDR is just one of the methods of mandatory dispute resolution - private mediation and CAMP (Alberta Justice is intending to revise and broaden the scope of its current pilot project) are also available. Sixth, as an adjunct to the last point, for complex trials, the parties may wish an expert private mediator - e.g., in the construction or resource area. Seventh, even to the extent that there is some more demand, it will not be all at once, but spread out over time - that is, the New Rules are not going to force all actions to go to either to trial or JDR the minute they are implemented. There may be other reasons. Therefore, I conclude that mandatory mediation will not mean that the sky is falling on the JDR Program, so any judicial "chicken little's" out there need not worry.

As to success, there are several reasons to assume no major impact from mandatory mediation in my view. First, I truly believe that those who are not entitled to a waiver, will take the dispute resolution process seriously and try to effect a settlement. Second, even if they come "kicking and screaming", they will be "smitten" - a corollary of the principle that "if you build it, they will

come”.⁹¹⁸ Moreover, even if forced, the parties and their lawyers will likely come to the realization that a chance of a reasonable settlement may be a better risk than an uncertain trial, and less expensive. Third, as Macfarlane suggests, there may be a new trend where clients (or, alternatively, the lawyers) welcome the process, that some lawyers may have been counseling against, or lawyers (or, the clients) have been otherwise avoiding - but when required to do so, see the first and second points *supra*. Fourth, JDR justices, while continuing to do perform their diligent work, using professional, but non-coercive judicial mediation settlement skills, will be mindful that some legislated compulsion exists, and compensate for that. Fifth, the literature suggests this result where it has happened elsewhere.⁹¹⁹

Notwithstanding my views, the Court, through JDR justices, the JDRC, and the Court’s professional JDR Coordinators will closely monitor the demand and reaction, and take any appropriate steps.

As to other aspects of mandatory mediation, as this is not the focus of this Evaluation Report, I shall leave it to others to pursue, but all Albertans, and the Court, will have to live under its regime with the New Rules and adjust accordingly.

⁹¹⁸ Agrios, *supra* note 12 at 8.

⁹¹⁹ For example, see Brazil, “What Lawyers Want” *supra* note 238 at 85, where it was reported that almost 75% of lawyer respondents endorsed mandatory settlement conferences hosted by a judge, especially an evaluative, as opposed to a merely facilitative, process .

E. RELATIONSHIP TO COURT-ANNEXED MEDIATION AND PRIVATE MEDIATION PROGRAMS

As noted *supra*, the definition I use means that the court-annexed mediation program (CAMP) is not conducted involving the judiciary as neutrals - i.e., they are not JDRs.

Yet some confusion may exist. Smith addressed “court-connected mediation” without being specific as to whether it included judicial neutrals, intimating that it referenced a model often used in the U.S., where courts do not use judicial mediators, but do use private or staff mediators “annexed to the court” to conduct mediations. In referring to Lande, in this regard, she quoted him saying that “*courts want mediation results also to be consistent with the Courts’ mission of promoting truth and justice*. This promotes respect for the courts’ authority...”. She then went on to add:

The discussion in the literature on court-connected mediation discloses a thoughtful analysis of how non-judicial, court-linked mediators ought to be limited in their process to ensure proper adherence to goals of courts. I suggest it is time for the judiciary to conduct a similar inquiry.⁹²⁰

I am not sure that the intent of the point is to address it to court-annexed mediation as it is addressed to judicial mediation *supra*. In any event, I wish to pick up on the reference to “promoting truth and justice”. There is no dispute about “promoting justice”, but the purpose of each of court-annexed, or court-connected, mediation, or JDR is not, in my view about the “truth”, except in a very narrow sense. While the process and result should be fair, and should not be “untruthful” (as in “illegal”), again, truth is

⁹²⁰ Smith, *supra* note 13 at 20, referencing John Lande, “Dispute Settlement: From the Role of an Adjudicator to That of a Manager” (2002) 50 UCLA Law Review 69 [emphasis in the original].

not the focus - it is not promoting “public truth”, but rather “private truth”. That is, the truth that is sought is a result that the parties are prepared to live with to resolve their dispute - it is “their truth”, not some higher result. Thus, I don’t know what “similar inquiry” is sought to be conducted, although I have addressed most of such issues *supra*.

As to the reference to “process”, pointing to Resnik, Smith suggested that litigants “prefer trial-like procedures”, and then appeared to compare “trial-like procedures” to court-connected mediation in the context of “process fairness”. Relying on Macfarlane, she noted that “process in mediation is defined by the participants”, and then added, relying on Brazil, that “court-connected ADR must uphold the values of the public courts in a democracy, and to do that the parties must receive process fairness”. It is not disputed that, whatever the process, there must be fairness. She states that “[f]ormal litigation gives satisfaction to litigants ... because they perceive the process to be institutionally fair, which even court-connected ADR cannot deliver”. However, that is about a judicial adjudication (which she acknowledges has a perception of institutional fairness), whereas, *in Alberta, court-connected dispute resolution is not performed by judicial mediators, although JDR is judicially performed*. Two points appear to result: first, if this is the point being made, I know of no reason why there would be any suggestion that a judicially performed JDR would not have process fairness; and, second, aside from JDR, there is no dispute resolution process that is associated with the judiciary or controlled in any way by the Court, although the pilot Alberta Justice CAMP model is (perhaps loosely) called “court-annexed”.

Returning to JDRs, on a point that is, perhaps, more pertinent to discussions *supra*, she maintains that: “[p]rocess fairness in private sector mediation requires a whole subset of skills for which judges are not trained, such as the management of power imbalances and emotional problems” and

that there is judicial “concern about judges attempting to act as mediators facing psychological issues for which they are untrained”.⁹²¹ That is, in my view, a matter of training, not a matter of prohibition, because there is nothing to suggest that all private mediators have such training, or that JDR judges have not, or should not, attain such training to the degree necessary to properly carry out JDRs - indeed, to the extent that she is accurate, such training should be provided.

The most pertinent court-annexed program is the Edmonton and Lethbridge pilot project Court-Annexed Mediation Project (CAMP) of Alberta Justice. Unfortunately, it has had limited success - it is an “ADR program that looks substantial on paper, e.g., in local rules and program descriptions, but that delivers service to appreciably fewer cases than one would expect”.⁹²² It is in the process of being revamped in a direction that is not completely known at the date of this Evaluation Report, but it is hoped will be complementary to the JDR Program and have features as recommended herein. I leave debate on the inter-relationship between this soon-to-be revamped CAMP program and JDR to be considered by others - including the JDRC - as it develops.

⁹²¹ Smith, *supra* note 13 at 20-1, referencing, *inter alia*:
- Judith Resnik, “Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement” (2002) 1 Journal of Dispute Resolution 155;
- Julie Macfarlane, “Why Do People Settle?” (2001) 46 McGill Law Journal 663;
- Danielson, *supra* note 4;
- Brazil, “Continuing”, *supra* note 14; and
- Agrios, *supra* note 12.
However, note that Brazil cautions ENE evaluators not to get “distracted by worrying about psychological nuances”: Brazil, “Handbook, 2008”, *supra* note 60 at 22.

⁹²² Brazil, “Continuing”, *supra* note 14 at 13 and Brazil, “25 Years After”, *supra* note 14 at 115.

F. MAINTAINING THE STANDARDS

Otis and Reiter observed that:

... judicial mediation as a process is markedly different from adjudication. The roles of the different actors, the communicational dynamics, the *ethical constraints and pitfalls*, even the goals sought differ dramatically. These differences point out some of the normative challenges posed by judicial mediation to the traditional, and still dominant, way of viewing the law and its role in society.... Each step in the [judicial mediation] process brings up issues that illustrate some of the challenges and some of the potential for judicial mediation.

...

... *ethical issues arise throughout the process*, and they present particular problems for the different actors who are called upon to play unfamiliar and often shifting roles during a mediation session. For judges in particular, mediation moves them out of their familiar adjudicative role and into closer proximity to the parties than is ordinarily the case. *This has important ethical implications.....*⁹²³

Having spent some considerable time, *supra*, focusing on judicial conduct in a JDR context, and, remembering the valid admonitions and keeping the principled messages in mind, I will now look specifically at some of those challenges in the process, and make some recommendations.

The discussion on judicial conduct in a JDR context started considering the paradigm shift and the limitations of existing codes and principles, namely that:

Rules and guidelines for mediation can help remedy this defect [these limitations], though care must be taken to avoid the assumption that the tried-and-true principles will continue to serve well when applied in new areas. There is a crucial

⁹²³

Otis and Reiter, at 371 and 392 [emphasis added]. See also discussion at 392-4.

difference between judicial mediation and adjudication.... This leads to several areas of ethical concern, each of which requires rethinking or re-adapting existing ethical principles.⁹²⁴

Furthermore, “[c]larification of the ethical principles engaged by mediation is an ongoing challenge and one that does not admit of easy answers”.⁹²⁵

Nevertheless, it is essential to recognize that the majority, if not all, of the major judicial conduct principles specific to JDR are already included in the JDR Guidelines⁹²⁶ - consent to JDR and its procedures (Guidelines 2 and 5), confidentiality (Guidelines 8-10), express and informed consent for opinion and Binding JDR (Guidelines 5 and 9), and caucusing (Guideline 10). These principles will be specifically mandated and enacted by regulation in NR 4.18-4.21 in the New Rules (Appendix 7). Other basic judicial conduct principles - such as judicial independence, impartiality, fairness, etc. - are already enshrined as part of the judicial standard of conduct applicable to all judicial functions, not just JDR, as a matter of common law, and need not be legislated. While simple new “guidelines for judicial conduct” may be restated as “mission statement” to the bar and the public (most preferably through a JDR Program Pamphlet, as recommended herein), and for the constant reminder of the Court’s judiciary, the principles are already in place. It is only their faithful adherence - indeed, vigilance - that is necessary.

⁹²⁴ Otis and Reiter, at 393-4 and 401.

⁹²⁵ *Ibid.*

⁹²⁶ Guidelines, *supra* note 190, and Appendix 7.

Agrios⁹²⁷ addressed the subject of judicial conduct in this context. From his research and experience, he recommended:

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.'⁹²⁸

I concur with the substance of his recommendations just quoted and the more extensive recommendation in his Appendix 4⁹²⁹, with two exceptions. The first is the *absolute* exclusion of any future involvement in a case by a JDR justice who conducted a JDR in that case, but my exception would only relate to a Binding JDR opinion or decision with express, informed consent (as discussed *supra* and stipulated further *infra*). The second exception is adopting ENE at this time. I will include at the end of this Evaluation Report

⁹²⁷ Agrios, *supra* note 12 at 53, calls it "irreverent ... adding my particular sense of whimsey".

⁹²⁸ Agrios, *supra* note 12 at 66, item 2 [emphasis added].

⁹²⁹ *Ibid.*, at 66-7, Appendix 4.

recommendations on such a “policy statement” and other matters, including and beyond the Agrios recommendations.

As to the recommendations made at the end of my colleague, Smith’s paper, many don’t have my support for the reasons argued *supra* and/or articulated (briefly) *infra*. I will address them only briefly, and then make my own recommendations.

Labeling

While there is no problem in using the term “judicial settlement conference” as a broad description of what JDR justices do, the proposed label “Judicial Settlement Conference” adds nothing to, and detracts from, the well known label, “Judicial Dispute Resolution”, the Court has mandated justices for 12 plus years to use, which I recommend we keep, to the exclusion of the other.

Subject Matter to be Settled

I agree with the sentiment that we should be settling the rights raised in the litigation, or action, or law suit, commenced before the Court. It is also permissible, however, in my view, to include identified “interests” causally connected therewith, but not unrelated disputes or interests. If an example is necessary, the litigation over a construction contract for extras, may also deal with the interests (not part of the pleadings) regarding the quality of workmanship, but it should not relate to other contractual claims on other projects (not yet litigated) on other projects or contract, or a tort action over damage to property in an unrelated incident. Therefore, I recommend that JDR deal with rights raised in litigated claims, and related interests only, where identified.

Caucusing - Justice Seen to Be Done

Caucusing or not should be determined by the agreement of the parties, not imposed by the JDR justice. However, recognizing judicial independence, individual justices should have a right, with notice of the type recommended herein - an individual JDR Justice Profile - to make clear that they work only in joint sessions, not caucusing or, alternatively, caucusing when they, and not the parties, choose (provided the users consent, as opposed to choose). Users can "vote with their feet".

Training

I agree that, like Quebec and British Columbia, there should be a minimum standard of training - and/or experience - set for all justices of the Court, before a justice undertakes a JDR.

As to the training component, it should be the equivalent of a minimum of the introductory National Judicial Institute dispute resolution seminar. Such a consistent minimum content and style should be present, but individual value added education and/or skills should be welcomed - indeed, encouraged. The Court's recently created JDR Committee (JDRC), in conjunction with the Court's Continuing Education Committee should set the appropriate pedagogical training curriculum, including the prospect of "within the Court" training⁹³⁰ (possibly in conjunction with NJI) and mentoring.

⁹³⁰ To my knowledge, the only training within the Court that has been done, until recently was the April 1996 training done by now Provincial Court Judge Nancy Flatters and our Court's Agrios (assisted by other justices of the Court), just before the JDR Program started formally and in earnest in the fall of 1996. Recently, in November 2008, judicial ethics and conduct training, mostly borrowed from the NJI Vancouver Conference (NJI Vancouver Conference, *supra* note 755) was given to all justices of the Court at its annual Continuing Education seminar (NJI Calgary Conference, *supra* note 755).

The training should include, at a minimum, basic principles of conflict theory, styles of conflict resolution, appropriate judicial conduct standards and practices and procedures (while permitting a liberal amount of judicial independence).

Screening Policy

In my view, no regimented systematic screening of certain cases on a policy basis should be undertaken - at least not at this time. The rationale and method for doing this should develop as other areas of legal precedent - on a case-by-case basis, especially after seeing the inevitable waiver cases under the New Rules. Only if there are clear and cogent, binding, or authoritative, judicial precedents established should any form of policy be considered around them, provided that it may be appropriate for the JDRC to consider providing advisory guidelines to facilitate the potential considerations leading to such precedents.

Two types of cases mentioned need to be addressed. Criminal law cases are not part of the JDR Program, which currently relates to only civil cases, and accordingly they do not merit consideration at this time. Cases for which settlements often result by other mechanisms in other judicial proceedings (such as class actions) will, by the nature of the procedures related to those cases, be the subject of appropriate notice for acceptance by those affected, without independent judicial intervention.

Public Education on the JDR Program

I agree that the Court should provide information - through the JDR Program Pamphlet recommended herein - on the range of dispute resolution

options available - completely in the context of JDR, as well as in more broadly approved Alberta Justice sponsored court-annexed options, and the existence of private mediation. The JDRC should work out the details of the first and the details of the latter two will be for their proponents.

Rules

The 12 Guidelines for JDR adopted in 1996 at the start of the formal JDR Program should continue until the imposition of New Rules NR 4.17-4.21, based thereon, provided that NR 4.18 makes it clear that the proposed mechanism by the parties must have the concurrence of the JDR justice⁹³¹. Otherwise, in my view, no formal rules are necessary regarding judges being “in control of the process”. Rather, I believe that is the purpose of the education set out supra).

Nevertheless, certain administrative practices for the JDR Program are recommended which may merit a Notice to the Profession and or a Practice Note. There are two primary recommendations that have external ramifications in that regard. Individual justices are encouraged to provide by appropriate public notice through the Court - specifically through the JDR Justice Profile recommended herein (a sample is provided in Appendix 8, Table 8.1) - their individual JDR practices and practice limitations. Additionally, I recommend that a JDR Booking Confirmation form be mandated (a sample is provided in Appendix 8, Table 8.2) for completion by, and a condition subsequent to, counsel and/or parties booking a JDR. One additional administrative practice that is purely internal, but will result in receipt thereof by the public, is the mandatory use of JDR Instruction Letters (a sample of which is provided in Appendix 8, Table 8.3).

⁹³¹

Guidelines, *supra* note 190 and Appendix 7.

Therefore, with the exceptions of these administrative practices, and any other administrative steps that may need to be taken to carry out my recommendations at the end of this Evaluation Report (and repeated on Appendix 8), I don't believe any other quasi rules regarding the JDR Program are necessary. In my view, except in so far as specific steps may be required that the JDRC. The JDRC should nevertheless have the right to propose any Practice Note, or Notice to the Profession, for consideration by the Court's Chief Justices and Council.

Judicial Settlement

No recommendations of the type identified by Smith - emphasizing the role of the Court, or any limits to settlement (*supra* - generally suggesting a need for Court "approval" of settlements in accord with the rules of law) are required or appropriate, in my view, for the reasons set out, and with any exceptions listed, *supra*. However, any JDR justice is at liberty to exercise his/her individual judgments in any specific case as to whether any settlement or process is, in their view, contrary to the role of the Court or their participation within it, and to act accordingly.

Specific Recommendations from this Evaluation Report

Based upon: the applicable Survey data, and its analysis; the relevant literature identified herein; and the discussion and analysis of same throughout this Evaluation Report, including the recommendations of Agios and Smith (with my comments) as to judicial conduct⁹³²; valid

⁹³² Smith, *supra* note 13; Agrios, *supra* note 12, generally, and specifically at Appendix #4, at 66-7; and Parness, *supra* note 590 at 1891-6, and 1908. The latter reference makes the point that the wheel of judicial conduct rules should not be re-created, but modeled on prudent guidelines used elsewhere, and I have taken that advice to borrow extensively from Agrios.

recommendations from other justices and sources; and, relying on my own experience; I make the recommendations summarized at the end of this Evaluation Report, and repeated in Appendix 8 hereto⁹³³. These recommendations are for the approval of the Council of the Court on the further recommendation of the JDRC. After approval their resulting manifestations should be made available to the bar and the public as appropriate. I make the further recommendation that, indeed these recommendations themselves be constantly reviewed and revised, on the recommendation of the JDRC to Council, as circumstances make appropriate. These recommendations, and this process for change - albeit not revolutionary or extensive - are consistent, in my view, with the requirement of the maintenance of appropriate principles and standards, and the ability to respond to legitimate concerns about actual or potential changes in practice or judicial conduct that might otherwise affect those principles and standards, that stand behind the judicial role in the administration of justice⁹³⁴, consistent with the rule of law.

The Survey results as analyzed in this Evaluation Report demonstrate that the Court's JDR Program has met and continues to meet a standard of excellence. I believe that if these recommendations are implemented, the JDR Program will continue to maintain, and, indeed, improve on, that excellence.

⁹³³ I make this list, because, it should be patently clear that I have not just sat down and come up with these recommendations - they all derive from these sources, and a tracing of the Survey data and the contents of this Evaluation Report should confirm that conclusion.

⁹³⁴ Although more broadly cast, see: Robert P. Burns, "The Purpose of Legal Ethics and the Primacy of Practice" (1997-98) 39 William and Mary Law Review 327, at 327.

The recommendations include, whether formally stated at the end of this Evaluation Report, those that flow from the remaining topics that follow.

1. TRAINING AND EDUCATION

In this Evaluation Report, I recommend that except for necessary experience and/or training be a prerequisite for a justice of the Court to undertake a JDR as a JDR justice. As a base, it should be noted that this not revolutionary - the United States ADR Act of 1998 defines ADR neutrals, including judges, as those who “have been trained to serve as neutrals in [ADR] processes”⁹³⁵.

Sander has noted that the skills of an adjudicative judge “making decisions according to set rules and established precedent” are not the skills that mediators require - “[b]y contrast, mediators need to be good listeners and to be open to a broad range of possible solutions, with a view to helping the parties to arrive at an acceptable, custom-made settlement of their case”⁹³⁶. However, more recently he noted that there is no “correlation between training and quality performance” in mediation and that “exposing a person to even outstanding training provides no assurance of high-quality performance by the trainee”, with “prior mediation experience” being the

⁹³⁵ Niemic *et al*, *supra* note 17 at 2-3, referencing the United States *Alternative Dispute Resolution Act of 1998*, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651-658 (Supp. 1998)), at 653(b).

⁹³⁶ Sander, “Amendment” *supra* note 729 at 22, as quoted by Cratsley, *supra* note 52 at 576.
A decade later Sander noted that *most mediator accreditation programs require only 30-40 hours of training*, but that such a minimum requirement “rests on shaky legs”: Sander, “Keep Building ADR”, *supra* note 170 at 9.
Perhaps this suggests that a training standard needs to be set for training on an introductory basis, with continuing education training within five year time frames - the latter so that JDR justices can keep up to date with the changing JDR environment.

“most promising basis for predicting success” - suggesting that *mediation is both a science and an art*.⁹³⁷

Danielson, in introducing the topic of “Training”, stated that “[m]ost professional organizations have a minimum training requirement in order to gain entry. In the ... Court... , however, training to conduct a JDR is not mandatory.” However, I believe it should be. So do my colleagues, according to her analysis:

... many ... Justices would like to see improvements in the training opportunities for their role in conducting JDR's. At some point, the Court may have to address whether to create a mandatory JDR training program for Justices, or leave training as it is – that is, up to the individual Justice.

... Several Justices indicate that training should be mandatory prior to doing JDR's.⁹³⁸

⁹³⁷

Sander, “Ohio Symposium”, *supra* note 38 at 707.

Bowling and Hoffman add that

...our complexity as human beings makes it impossible to prescribe a single correct way to be a mediator. ... A variety of styles, techniques, and methods of mediation have proven to be effective, in large part because so much depends on hard-to-define, and therefore hard-to-prescribe, personal elements. *Mediators need to find an individual style that is congruent with their personal qualities and plays to their strengths, rather than imitating the styles of others.*

...

Information and technique can carry one only so far. *The next task after knowledge and skills are acquired* is developing a sense of identity with the role and the responsibility of being a mediator....:

Bowling & Hoffmann, *supra* note 9 at 2 and 4 [emphasis added].

⁹³⁸

Danielson, *supra* note 4 at 31-7 (see also interview at Appendix F, at 2-3), with reliance on Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (John Wiley & Sons, Inc., San Francisco, CA, 1999), at 451-3 (note that there is a later edition in 2003), and referencing the Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications (emphasis added). She also referenced:

- Roy J. Lewicki, “Teaching Negotiation and Dispute Resolution in Colleges of Business: The State of Practice and Challenges for the Future”, Raymond A. Friedman, “From Theory to Practice: Critical Choices for ‘Mutual Gains’ Training”, and

In support of this view, note that the Edmonton Family and Youth division of *Provincial Court made training mandatory from the beginning*.⁹³⁹

Danielson concluded her discussion with additional comments noting that the majority of the Court justices believe that JDR training is required:

The belief that JDR training for Justices was inadequate, restricting opportunities for flexibility of approach on the ADR continuum, was neither confirmed, nor denied. What was determined, however, was that the *majority of Justices believe that the JDR training provided to Justices, particularly new Justices, needs to be improved*.⁹⁴⁰

...

It is the writer's opinion that there needs to be more consistent training for Alberta Court of Queen's Bench Justices in the fields of mediation and negotiation techniques. Specifically, training in facilitative techniques would be of significant value to Justices. Justices would benefit by more fully understanding the different approaches to mediation and the techniques involved, even if they chose not to implement them within their own JDR setting. This would including include training for new Justices prior to conducting the first JDR, as well as ongoing training for sitting justices.⁹⁴¹

Robert Rosenthal, "Interpersonal Expectancies, Nonverbal Communication, and Research on Negotiating", all in Michael Wheeler, ed., *Teaching Negotiation: Ideas and Innovations* (Program on Negotiation at Harvard Law School, Cambridge, MA, 2000), at 178-80, 123 and 151 respectively.

See also:

- Sheila Heen and John Richardson, "I See a Pattern Here and the Pattern is You: Personality and Dispute Resolution", in Michael L. Moffitt and Robert C. Bordone, ed. *The Handbook of Dispute Resolution*, at 35-51; and
- Kenneth Cloke, "What are the Personal Qualities of the Mediator", in Bowling & Hoffmann, *supra* note 9 at 49-56.

939 Goss, "Judicial", *supra* note 68 at 515.

940 Goss, "Judicial", *supra* note 68 at 515.

941 Danielson, *supra* note 4 at 70 [original emphasis removed and new emphasis added].

Therefore, the standards should be not only for initial, but also continuing education and training.

Danielson looked at the training level of the Court as at 2007⁹⁴². At that time, of the respondents, 60% had some training, but 37% had no training⁹⁴³, before being assigned their first JDR. In my view, that is a 37-40% deficiency. Moreover, it is not clear from her survey how many have added to, shored up, or, indeed taken any, formal dispute resolution training or education beyond on the job training gained through merely the experience of conducting JDRs. She again noted that “Many Justices recommended that some form of training should be given prior to conducting JDR’s” - I was one of those. She also noted that “[o]ngoing training was also strongly endorsed”⁹⁴⁴.

National Judicial Institute training was recognized by Danielson as the normative primary source for both initial and subsequent training. Also there was much support among my colleagues for the judge shadowing (or mentoring⁹⁴⁵) by inexperienced justices with more experienced JDR justices as part of initial training. Mentoring with several JDR justices with different styles would be very instructive, and a good motivator for newer justices.

⁹⁴² *Ibid*, at 9 - 11 [emphasis added].

⁹⁴³ This compares to Cratsley’s comment (Cratsley, *supra* note 52, at 576), that in 1999 in Massachusetts, almost 85% of the judges responding to Peter Agnes’s study, had no formal training as a mediator - instead relying on “a combination of personal settlement techniques, tested over time, and procedures from ADR like ‘caucusing’ from mediation”, referencing: Peter Agnes, “Results of Attorney/Judge Survey for the Flaschner Judicial Institute Conference on Judges and the Settlement of Cases” (May 1999) (unpublished survey, on file with Cratsley), at 4.

⁹⁴⁴ Danielson, *supra* note 4 at 9.

⁹⁴⁵ *Ibid* at 71, based on comments from justices.
See also Sander, “Keep Building ADR”, *supra* note 170 at 9, referencing the CPR Institute’s National Task Force on Alternatives in ADR, and Russ Bleemer, “Who Else Will Step Up? A Mentor Plan Seeks to Spread ADR Diversity” (2008) 26 Alternatives to the High Cost of Litigation 9.

Danielson led this back to an all important connection to judicial conduct:

The judiciary, as a group in general, falls into the rare category of the 'authoritative mediator' for which to date 'there are no formal codes of conduct,' or established training protocols. 'Authority refers to a widely recognized right or legitimate power to exercise influence or make a decision.' *Lack of guidelines for Justices can lead to eclectic and inconsistent approaches within the JDR Program. ... Pressure will emerge, from within and outside the judiciary, to develop a consistent training regimen for all Justices in the program.*⁹⁴⁶

Surprisingly, but tellingly, users - clients, but predominantly lawyers -, commented on this, as the Survey qualitative comments *supra* reflect. That they did comment on it would tend to support a conclusion that it was clearly evident. This should be sufficient motivation for the Court, through the JDRC to put in place a more formal education plan, and encourage JDR justices to participate, so that our dedicated JDR justices can provide the service the public expects. I know this will also be motivation for all of us who do JDR work on a weekly basis.

In rounding out her recommendations, Danielson added very astute concluding comments:

Responding to the requests for training would allow the Justices to become more adaptable by being fully trained and proficient in a variety of styles and techniques. Once an arsenal of different mediation and negotiation approaches is learned, a Justice can maneuver along the ADR continuum as necessary

⁹⁴⁶

Danielson, *supra* note 4 at 34 [emphasis added], relying on Donald T. Saposnek, "Style and the Family Mediator", and Daniel Bowling, "What are the Personal Qualities of the Mediator", both in Bowling & Hoffmann, *supra* note 9 at 245 and 55 respectively.

within the JDR setting, providing participants in the JDR process a greater opportunity for resolution of their dispute.⁹⁴⁷

Finally, she also advocated “the establishment of an annual province-wide JDR review session, based on the current Edmonton Judicial District annual JDR review”⁹⁴⁸. This is already in the works, with the Court, in April 2009, creating a specific, separate internal committee - the JDR Committee (JDRC) - to apply this innovative idea province wide and make recommendations to the Court on JDR procedures and practices. Its first task will likely be to review and make recommendations to Council flowing from recommendations made in this Evaluation Report and current discussion at the Canadian Judicial Council to deal with judicial conduct guidelines in the JDR context.

In looking specifically at “skill levels”, Landerkin and Pirie, in introducing the topic asserted that JDR “tasks demand a set of skills” and then asked “[a]re judges equipped to *competently practice*. JDR?”⁹⁴⁹ [Emphasis in the original.] In seeking an answer, they looked at some depth into the skills that judges are expected to possess, without more, to do their adjudication role and concluded that “tapping into this judicial resource in the context of a settlement conference, mini-trial or other interaction focused on dispute resolution seems to be an important and unique benefit associated with JDR” and then added that, having regard to past training and experience

⁹⁴⁷ Danielson, *supra* note 4 at 35.
As noted *supra*, the ADR continuum in dispute resolution theory goes from minimal outside influence to maximum court control - individual self control, to advice, to negotiation, to facilitation, to mediation, to trial, with some other, more unusual options in between.

⁹⁴⁸ Danielson, *supra* note 4 at 71.

⁹⁴⁹ Landerkin & Pirie, *supra* note 25 at 293 [emphasis in the original].

“[i]n addition, some judges will have more specific ADR skills”.⁹⁵⁰

In looking specifically at competency, Landerkin and Pirie examined two phenomena - attitude and training:

However, despite the competencies common to judicial appointments and the positive presence or "gravitas"⁹⁵¹ judges can bring to the settlement process, some judges may be poorly suited for the JDR role. Part of the mis-match may be attitudinal....

Judicial dispute resolution may also be problematic if the judge lacks the necessary skills to engage in JDR activities.⁹⁵²

I would add the - perhaps obvious - point that a lacking in skills will surely be due to a lack of training and/or experience. Thus, it follows, in my view, that to be a competent JDR justice, one needs all the inherent skills one expects of a competent adjudicative judge, plus a positive attitude to the

⁹⁵⁰ *Ibid*, at 293.

⁹⁵¹ Picking up on the positive qualities of “presence” and “gravitas”, Bowling and Hoffman had this to say: “a mediator’s ‘presence’ is more a function of who the mediator is than what he or she does; it has a profound impact on the mediation process.”: Bowling & Hoffmann, *supra* note 9 at 6.
Justices of our Court must never forget the positive aspects of this phenomena, but like any aspect of reputation, how easily it can be lost to the everlasting detriment of a justice personally and the institutional judiciary s/he represents.

⁹⁵² Landerkin & Pirie, *supra* note 25 at 293-4.
Danielson, *supra* note 4 at 37, pointed out that they also said (Hugh F. Landerkin and Andrew Pirie, “Abstract and Biographies; Workshop, Judicial Dispute Resolution 2001: A Space Odyssey or Modern Reality Check?”, *Asia Pacific Mediation Forum*, <http://www.inisa.edu.au>):

The challenge today is to bring justice to everyone’s door. No person should be disenfranchised from this goal, for economic, time, or other human reasons. We hypothesize that judges can profit from training in ADR: the theory, the practice, the skill. Judges have a lifetime of skill sets on which to build: they are good listeners, analysts, and decision-makers.

They have experience in problem-solving, negotiation, and dealing with conflicted people, businesses, and organizations. Further training in the area of conflict analysis, management, and dispute resolution can only make judges and the court system better.

sound aspects of JDR, and experience and/or training in the specific skills necessary to lead a JDR. If a positive attitude is lacking, even added skills will not make for the best JDR justice. Thus, two things follow, in my view.

First, JDR is here to stay, so existing justices and their Chief Justices should ensure that they have or immediately obtain a positive attitude towards JDR⁹⁵³ - because it is “part of the job” and no one, whether the public, or the justice him/herself, wants a justice to be anything less than positive towards, and effective in, achieving the requirements of their judicial tasks, including JDR. It also means that those who seek judicial office should not apply unless they have, or are willing to obtain, a positive attitude to do an excellent job in both judicial adjudication and JDR.

Second, it means that no judge should be doing JDRs until s/he has the training and/or experience to do a very competent job at JDR⁹⁵⁴. Excellence in JDR skills is not demanded at the beginning, and will improve with training, mentoring and experience, but it should be the goal that is sought, and achieved, as soon as possible after appointment to the Court.

⁹⁵³ Otis & Reiter, *supra* note 7 at 367 say that “[t]he key is changing the judicial mindset; the judge-mediator’s training must address this explicitly, because there is no place for an adjudicator in a mediation session” and to avoid the “natural reflex” of adjudication and needing to make a decision - or even expressing an opinion if one is not requested - and accordingly, the need to “shift gears between adjudication and mediation”, requiring court supervision of ongoing judicial training.

I believe that a full read of the Agrios book (Agrios, *supra* note 12) will demonstrate how hard it is to change that attitude. As noted *supra*, however, apparently, judicial mediators in the Quebec Court of Appeal do not provide even non-binding opinions or evaluative mediation - see implied and express statements at 367 and 369 respectively. Agrios asserts, at 3, that Quebec trial justices do.

⁹⁵⁴ This is the standard in the Quebec Court of Appeal: Otis & Reiter, *supra* note 7 at 367.

Accordingly, because the role of a judge as an adjudicator and as one who facilitates settlement discussions is so different, and require different skills sets, there should be training for the latter, perhaps except for those for whom extensive experienced has eclipsed training⁹⁵⁵, although I doubt it. But, not only is that my view, it is the view of experts in the field.⁹⁵⁶

Justices to our Court are often being appointed at a relatively young age, and if they have not had exposure to dispute resolution in their practice, or have not taken continuing education in the field, it is unlikely they will have the pre-requisite training or experience on arriving at the Court, because it appears that it is doubtful that they will have received any training in their law school education. Macfarlane, in her book, has been critical of law school education which does not, in her view, focus on dispute resolution enough - “[l]aw school focuses on conflict resolution exclusively via adjudication using the study of appellate judgments”, and only focuses on “legal educators ... understand[ing] their role as limited to learning about the law rather than learning to practice law”. Without going into her further expansion of the issue beyond the scope of this Evaluation Report, she disagrees with this notion, and in response indicates that this needs to change:

First, it seems fair to assume that for legal education to stay relevant, changes in legal practice must resonate in the academy. After all, professional education generally assumes some form of measurable relationship between success in education and competence in practice.⁹⁵⁷

⁹⁵⁵ Landerkin & Pirie, *supra* note 25 at 266, note that “[a]necdotal evidence suggests judges with backgrounds or experience in mediation prior to their appointments will be the ones most comfortable in assuming this role”.

⁹⁵⁶ Alfini, “Risk”, *supra* note 107 and Sander, “Amendment”, *supra* note 729, as reported in Ravindra, *supra* note 715 at 300; and Allan Sharp and Janine Higgins in Macfarlane, “Rethinking” *supra* note 220 at 349-58, and 359-69.

⁹⁵⁷ Macfarlane, *supra* note 25 at 224-32.

Judicial training can consist of reading basic texts and comprehensive articles⁹⁵⁸, attending seminars and educational training sessions, and mentoring (sitting and observing JDRs conducted by colleagues who have achieved some degree of excellence in performing JDRs). Such training should not only be about the skills and the “craft”, but should also deal adequately and periodically (as a “refresher” and addressing new issues) with judicial conduct issues, such as those discussed *supra*.

Specifically as to judicial training, Otis and Reiter, referencing the National Judicial Institute training (together with Professor Roberge of the Université de Sherbrooke), with support from Landerkin and Pirie, made it

⁹⁵⁸ While not exhaustive, a good list of reading material to start with (focusing on the theory more than the craft - see *infra*), would include many that I have heavily relied upon and others, only some of which are listed below (alphabetic order):

- Adams, *supra* note 594;
- Agrios, *supra* note 12;
- Robert A. Baruch Bush and Joseph Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. (San Francisco, CA: Jossey-Bass Publishers, 1994)(Michael Fogel advises me that these authors “take an approach that holds more promise for those with ongoing relationships);
- Fisher et al, “Getting to Yes”, *supra* note 115 (very popular in the mediation community);
- Joseph Folger and Robert A. Baruch Bush, eds. *Designing Mediation: Approaches to Training and Practice within a Transformative Framework*. (New York: The Institute for the Study of Conflict Transformation, 2001);
- Goldberg, Sander and Rogers, *supra* note 32 (2nd. ed. - also has a 1995 supplement. Also, I understand that other more recent editions have been published, including the 5th ed. (Austin: Asper Publishers, 2007), but I have not reviewed any edition since the 1995 supplement)(I in my mind, the “bible” for dispute resolution);
- Goss, “An Introduction”, *supra* note 29;
- Landerkin & Pirie, *supra* note 25 ;
- Macfarlane, *supra* note 25;
- Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, (3d rev. ed.) (San Francisco: John Wiley & Sons. Inc., 2003);

and

- Mnookin, Robert H., Peppet, Scott R., and Tulumello, Andrew S. *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge, MA: Belknap Press, 2000.

However, if you want to get into the subject deeper, there are many more texts to review - one of many is Bowling & Hoffmann, *supra* note 9, especially chapters one (by the authors) and two (by Kenneth Cloke).

clear that it is not just training in the craft but in the problems (read as “conduct” and “caution” - see *supra*): “Judges must of course be trained to mediate and, more specifically, to negotiate the particular challenges of judicial mediation”.⁹⁵⁹ Similarly, the AJS not only addressed standards for appropriate judicial conduct for JDRs, but also addressed the matter of training and education: “More judicial education on the subject of settlement ethics is also needed. While “how to” programs for judges are important, equally crucial are the ethical issues attendant to judicial settlement.”⁹⁶⁰

While this need for training in many aspects of dispute resolution were recognized by the AJS around the time that our Court was starting its JDR program as a serious, wide spread service (with a training session organized by Ms. Flatters (before she became a Provincial Court Judge), as noted *supra*), there has been no focus on the subject of judicial training in dispute resolution in Alberta. Reliance has correctly been placed on the very valuable NJI “how to do it” seminars hosted annually by Agrios⁹⁶¹, Michael Fogel (who Agrios correctly identifies as “an icon in the mediation world”) and others, since about 1997⁹⁶², and others, including Roberge more recently.⁹⁶³ While

⁹⁵⁹ Otis and Reiter, at 367, relying on Landerkin & Pirie, *supra* note 25.

⁹⁶⁰ AJS, “Editorial”, *supra* note 711, at 48.

⁹⁶¹ Agrios, *supra* note 12 at 10, stressed the importance of education:
 ... education of both lawyers and Judges (and clients) will be key both to the ongoing progress of the process as well as to the quality of the process and its outcomes. JDR and ADR in general must become part of the steady diet of law school courses and C.L.E. programs.

⁹⁶² Agrios, *supra* note 12 at 46.
 There have been a couple of other, “one off” seminars that I have attended - at Royal Roads in 2003 (*infra*) and a complex case dispute resolution by NJI 2005 - National Judicial Institute, “*Managing and Resolving Multi-Party Cases*”, in Vancouver.

⁹⁶³ There many more regular and periodic trainers (judicial, academic, or dispute resolution experts) in judicial education, a number of whom provided excellent training at the NJI Vancouver Conference, *supra* note 755, but I do not have a

there has been a lot of corridor discussions in courthouses in Alberta (certainly behind judicial security, and, I suspect, on the other side of it), and certain matters have been briefly raised in other “how to” training sessions, the only courses Canada wide and within Alberta that have specifically focused on the subject in the context of judicial conduct relevant to JDRs (along with non-JDR related judicial conduct issues) were three recent ones: National Judicial Institute, “Judicial Ethics” Conference: Montreal, September 10-12, 2008 (the “Montreal Conference”), NJI Vancouver Conference, *supra* note 755, and, NJI Calgary Conference, *supra* note 755.

General dispute resolution training (but not keyed to judges) is also available from a number of universities and other bodies, including: Harvard⁹⁶⁴; Royal Roads University⁹⁶⁵; Legal Education Society of Alberta (LESA)⁹⁶⁶; Canadian Bar Association; Alberta Arbitration and Mediation Society⁹⁶⁷; and others, some commercially available. There are better sources of judicial training in the United States.

full list and there is no purpose in naming them all, as I don't wish to leave any out - therefore, I name some only with whom I am most familiar.

⁹⁶⁴ I, and at least two other of our justices, one since elevated and retired, have taken this training.

⁹⁶⁵ Landerkin & Pirie, *supra* note 25 at 281 (footnote 113) inform that “The Peace and Conflict Studies Division, Royal Road University (www.royalroads.ca) has offered a curriculum in JDR from basic to advanced courses”, and Royal Roads hosted a high level seminar in 2003 that I (and Justice Paperny) attended.

⁹⁶⁶ For a seminar by LESA early in the life of the JDR Program see: Legal Education Society of Alberta, *Dispute Resolution Tools for Lawyers: Outside the Courts and Inside the Courts* (Calgary: Legal Education Society of Alberta, 1997).

LESA also holds, almost every year, an intensive family law mediation seminar, hosted by excellent trainers, Dr. Fong and Ms. Blocksom, Q.C., that I have taken.

⁹⁶⁷ While I have not taken any courses from AAMS since appointment (I completed the last one the week before my appointment in 1991), they have, at least, introductory courses on arbitration and mediation, and an advance course in the latter, which they (at least used to) offer periodically.

On training generally, there are a number of excellent books and articles in the literature. Otis and Reiter, referenced Sharp and Higgins⁹⁶⁸. Judge Cratsley, noted that Judge Baer “has written a detailed description of this approach to the mediation of cases in his docket”.⁹⁶⁹ Additionally, Cratsley references others⁹⁷⁰, summarized the techniques to include: caucusing, with lawyers, lawyers and clients, and clients only (the last is, as I have expressed *supra*, is very dangerous if the party has counsel and I specifically recommend against it); confidentiality promises;

⁹⁶⁸ Otis and Reiter, at 367, referencing Alan Sharp, “The Training of Potential Mediators” and Janine Higgins, “Mediation: The Training Component”, both in Macfarlane, “Rethinking” *supra* note 220 at 349 and 359 respectively.

⁹⁶⁹ Cratsley, *supra* note 52 at 571, footnote 7, referencing Baer, *supra* note 52 at 136-45.
 However, from a read of Baer, I would caution against an adoption of all of his methods. They represent a sort of “this is the way I do judicial settlements down here”, and while he may be successful, and while he may acknowledge the judicial conduct issues some of his methods raise, he seems to dismiss them as misplaced or not applicable to him. Instead one gets the impression is that he has not really distinguished between adjudication and mediation, and his idea of settlement seems to be sort of “my way or the doorway”. There are numerous references and examples that, I believe, support this view, which are too detailed for this Evaluation Report, although an analysis of them, as I have done would make for a one stop shopping centre to discuss judicial conduct .
 He does make reference, however, to a feature that distinguishes much of he U.S. judicial system from that carried on in this Court in terms of case assignment, which is more prone to the threats of judicial conduct issues in the U.S., in my view - specifically the “individual docket system” and our “master calendar” system (both terms taken from Joseph F. Weis, Jr., “Are Courts Obsolete?” (1991-2) 67 Notre Dame L. Rev. 1385, at 1390).

⁹⁷⁰ Cratsley, *supra* note 52 at 573, referencing:
 - Peter W. Agnes, Jr., “Some Observations and Suggestions Regarding the Settlement Activities of Massachusetts Trial Judges” (1997) 31 Suffolk U. L. Rev. 263;
 - Judith Resnick, “Managerial Judges” (1982) 96 Harv. L. Rev. 376;
 - Hogan, *supra* note 8;
 - Leroy J. Tornquist, “The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry” (1989) 25 Willamette L. Rev. 743;
 - Marc Galanter, “A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States” (1985) 12 J. L. & Soc’y 1; Jonathan M. Hyman & Milton Heumann, “Minitrials and Matchmakers: Styles of Conducting Settlement Conferences” (1996) 80 Judicature 123; and
 - Patrick Longan, “Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators” (1994) 73 Neb. L. Rev. 712, at 733-45.

“[e]xploration of non-financial terms of settlement, often involving apologies, reinstatement, resumption of a terminated relationship and other behavioral solutions”.⁹⁷¹

Education on the specific issues is difficult to address in, and is too detailed for, this Evaluation Report because of the many variables. As AJS noted, “[t]hese variations must be addressed and incorporated into judicial education seminars and fully discussed by the judges” who will be asked to follow standards of judicial conduct in the course of performing JDRs⁹⁷².

What level of training and/or experience is sufficient before a justice starts doing JDRs? There is no easy answer to that, but a good starting point would be the “qualifications needed by individuals working in the ADR field, particularly mediators”, and, where pre-requisite experience in mediation is lacking from the background, I suggest at least three days of mentoring (sitting in with three different JDR justices with a reputation of some level of excellence), as mentioned *supra*.⁹⁷³ The attributes and skills pre-requisite to doing a JDR are the subject of debate and no lists are complete, but some examples are available.

One such list, provided by Boule and Kelly, as recounted by Landerkin and Pirie, demonstrates such value that I believe it is worthy of repetition here (with modification to the punctuation and some built in comments)

⁹⁷¹ Cratsley, *supra* note 52 at 573-4.

⁹⁷² AJS, “Editorial”, *supra* note 711, at 48.

⁹⁷³ Landerkin & Pirie, *supra* note 25 at 294, following up with the requirements, by way of example, of the “roster-mediator” in British Columbia, which, in addition to the education that a judge would be expected to have, include *the high standard of 80 hours of “core education” (much of which I believe could be achieved - say ½ - by reading the sources mentioned supra - much of the rest relating to the “skills” or “craft”) and 20 hours annually of “continuing education”* [emphasis added].

provides an excellent example. It identified eleven mediator functions: “develop trust and confidence; establish a framework for cooperative decision making; analyze the conflict and design appropriate interventions; promote constructive communication and modeling; facilitate negotiation and problem solving; educate the parties; empower the parties; impose [reasonable] pressure to settle; promote reality; advise and evaluate; [and] terminate the mediation” - hopefully, with a fair settlement.

Four areas of skills and techniques were also listed. The first included “organizational skills and techniques, such as: supervising arrivals and departures; arranging seating; improving the emotional climate; presenting material visually; [and] facilitation skills and techniques, such as converting concerns to issues, dealing with emotion, [and] managing the process.

The second featured negotiation skills and techniques, such as: emphasizing common ground; increasing the issues; making and responding to offers; linking one negotiation issue with another; brainstorming; [and] dealing with deadlocks.

The third was comprised of communication skills and techniques, such as: developing appropriate verbal communication; listening effectively; reframing; reading and understanding non-verbal communication; questioning; paraphrasing; [and] summarizing.

The last demonstrated how to avoid “mediator traps”, such as: being inadequately prepared; losing control of the process; losing impartiality; ignoring emotions; moving too quickly into solutions; [and] being too directive.

It is beyond the scope of this Evaluation Report to explain or elaborate on these - their sources and validity will come from reading and courses on JDR skills.⁹⁷⁴

Smith in addressing “risks inherent” in judicial mediation raises, in addition to other matters that I have addressed in this Evaluation Report, that “judges have no training to handle the emotional and power issues”.⁹⁷⁵ While there is surely no desire for judges to become psychologists, it may well be that once basic skills have been taught (including teaching how to watch for such issues), that taking some more detailed instruction on such issues would be helpful - if you will, instruction on the more “value added” features of judicial mediation, other than the “nuts and bolts”. I could see good use in the National Judicial Institute doing a program on “Mediation Knowledge and Skills beyond the Basics”, for judicial mediators who need to advance their skills.

a. THEORY

Thus, subject to the self-education and continuing legal education programs and experience gained prior to appointment, few judges have any formal training in dispute resolution upon becoming a judge. In my view, prior to undertaking JDRs, a judge must have the prior experience and/or theoretical and skills (“craft”) training to conduct a JDR. While such training is not available on demand, as noted, NJI offers a number of periodic training

⁹⁷⁴ L. Boule and K. Kelly, *Mediation Principles, Process, Practice* (Toronto: Butterworths, 1998), at 136 and 164-196 respectively, as set out in Landerkin & Pirie, *supra* note 25 at 294-5.

⁹⁷⁵ Smith, *supra* note 13 at 23.

programs, as do other institutions. In my view such programs and mentoring are a necessity, absent equivalent prior training or experience before a judge undertakes a JDR.

While the proper educational curriculum appropriate to judicial mediation is not part of this Evaluation Report, there are a few points, and some further references, on theory and craft that may be helpful for a development of such a curriculum and further enhanced education.

The reference *supra* to Boule and Kelly⁹⁷⁶ starts the discussion on the theoretical steps to doing mediation. Generally speaking, the methodology of the mediator during the mediation is to “gain the trust of the parties, open the lines of communication, contain the emotions that affect the dispute and work towards a solution”⁹⁷⁷. Mediation “systems” have developed a number of steps, differently described, but similar in purpose, to carry this out.

Landerkin points out that the late John M. Haynes’

... generic model of the mediation process is ...: (1) recognizing the problem; (2) choosing the arena; (3) selecting the mediator; (4) fact-finding; (5) defining the problem; (6) developing options; (7) redefining position; (8) bargaining; and (9) drafting the agreement⁹⁷⁸.

⁹⁷⁶ *Supra*, note 974.

⁹⁷⁷ Landerkin, “Custody”, *supra* note 23 at 664.
Note that he raised emotion in reference to family mediation, but it is often evident in many kinds of mediation, and a well trained and perceptive mediator can make its “controlled expression” (my term) a source for resolution of a dispute - sometimes the frustration, hurt and anger (and many other emotional adjectives) of one party is not understood or appreciated by the other. Allowing some controlled venting of the victim (actual or alleged) can be very therapeutic in itself because the other side has to listen, and an expression of recognition and apology by the recipient of the venting (discussed elsewhere herein) goes a long way to resolving the dispute.

⁹⁷⁸ Landerkin, “Custody”, *supra* note 23 at 671, referencing J. Haynes, *The Fundamentals of Family Mediation* (Albany: State University of New York Press,

A few observations on this list may be helpful. Note that the mediation proper would start as part of item 4 - although most of item 4, I believe, should be accomplished in the JDR Program before our Court in the Pre-JDR and filed JDR brief components. Full disclosure of relevant information between the parties is a very clear prerequisite. Defining the “real” problem is often more than what might appear obvious about the dispute - it may be a deeper cause or interest, with often conflicting points of view, as Landerkin describes⁹⁷⁹. In the 6th step, if there are interests, and not just rights or a “zero sum game”, this can be used to identify those interests and brainstorm for potential options to meet the interests. While step 7 talks about “positions”, the mediator should seek to change them to “interests” and “needs”. Even in a zero sum game, each party usually has a desire to avoid a trial and to get away from the cost and strife and stress of the dispute - a “what do you really need or are prepared to pay to get this behind you” admonition (or “saving the farm”), often moves the parties from fixation on “winning the lottery”. Landerkin says that step 8 is the place for Fisher and Ury’s BATNA and WATNA⁹⁸⁰.

However, Landerkin emphasizes, and every good mediator should recognize that, it is not only the substance and result (successful settlement), but also the process, that is important. He put it this way:

1994) at 1, and then expanding, at 671-5, the discussion as to what is entailed in each step (beyond the Scope of this Evaluation Report).

⁹⁷⁹ Landerkin Evaluation Report, at 672, again referencing Haynes, at 4

⁹⁸⁰ Landerkin Evaluation Report, at 673, referencing Fisher et al, “Getting to Yes”, *supra* note 115, explaining the substance behind these acronyms, referencing J. Haynes, *The Fundamentals of Family Mediation* (Albany: State University of New York Press, 1994), at 161.

Fisher and Brown note that ‘in every situation we have two kinds of concerns: the way we handle the situation, process, and the results, substance. Process and substance are distinct but related; one affects the other.’...This brings one to consider both procedural justice along with substantive (or distributive) justice. Social psychologists Alan Lind and Tim Tyler looked at subjective procedural justice for it “concerns the capacity of each procedure to enhance the fairness judgments of those who encounter procedures.” Their research on procedural justice recognized that by judiciously designed choices you could not only enhance the quality of the relationship of the parties but also enhance the satisfaction with the outcome.

The way to effect this result is clear. Give the parties voice by letting them tell their story in their own way and in their own time, listen to them and hear what they have to say (two distinctly different tasks) and validate their voices in your reasoning to obtain a necessary decision. If this is done, they sense that they are full participants in the process and they will use this participation as a proxy to determine the fairness of judgments. Although they have no personal knowledge of the objective, distributive outcome available, if in fact they have been treated fairly in the process they will be satisfied with the outcome, regardless if it is in their favor or not.⁹⁸¹

I believe that this is very significant and in accord with the Survey results, as it appears that, if the parties thought the process was fair, they so rated it, regardless of the outcome - see the qualitative analysis *supra*.

Landerkin, also makes the point that it is important early on in selecting the dispute resolution process (or in the proposed JDR justice agreeing to the proposed - necessitating that it be done at the Pre-JDR or in the submissions before the JDR) to determine the type of conflict typology that is involved. He says that Moore “creates a typology of five kinds of

⁹⁸¹ Landerkin, “Custody”, *supra* note 23 at 5, referencing: Fisher et al, “Getting to Yes”, *supra* note 115 at 16; and F. Lind & T. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988), at 20.

conflicts: Data, Interests, Relationships, Values, and Structures”, which he says “leads one to a consideration of the available and appropriate intervention processes for a given conflict situation”. He goes on to clarify that he is talking of the appropriate continuum process from self-control to adjudication discussed *supra*, with mediation being broken into the “facilitative, evaluative, transactional, transformative, therapeutic, jurisprudential, or a combination of these”⁹⁸² .

Morris points out:

A staged model emphasizing face-to-face mediation is common involving: introduction and commitment to process; identification of issues and generation of an agenda; exploration of the parties positions for underlying interests; design or solutions; and formal agreement.⁹⁸³

Singer describes the steps as follows, and then develops them more fully: initial contacts between the mediator and the parties; entry of the mediator into the dispute and setting of ground rules to guide the process; gathering information about the dispute, identifying the issues to be resolved, and agreeing on an agenda;⁹⁸⁴ creating options for settling issues; evaluating

⁹⁸² Landerkin, “Custody”, *supra* note 23 at 6-7, referencing C. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (San Francisco: Jossey-Bass, 1996), at 60 (note that there are later editions in 1999 and 2003). A further discussion of these additional types of mediation is beyond the scope of this Evaluation Report.

⁹⁸³ Morris, *supra* note 17 at 3. Macfarlane, *supra* note 25 at 149 additionally makes it clear that face-to-face meetings involving the client, not the lawyers alone, is significant:

When clients participate in negotiation or mediation, the role of their agents in filtering and framing information is diminished. A settlement proposal can be presented directly to a client, instead of the agent presenting it to the client following the meeting. The client can consider the proposal on the spot, ask questions, or press for further enhancements rather than managing this follow-up via their counsel. Face-to-face communication between the parties is often critical to gaining sufficient momentum and trust to enable an interim, or “trial”, solution.

⁹⁸⁴ Most of these steps should be accomplished in the JDR Program before the JDR,

options for settlement and comparing them to the parties' alternatives to agreement; and reaching full or partial agreement on the substance of the dispute, together with whatever plan is needed for implementation and monitoring, or concluding that agreement, at least at present, is impossible.⁹⁸⁵

Otis and Reiter make reference to the template of 6 steps followed by the Quebec Court of Appeal, based on the skills training for Quebec judicial mediators based, in turn, on the "STAR Approach to Facilitated Conflict Resolution' developed by the Straus Institute for Dispute Resolution at the Pepperdine University School of Law and adapted to the particular requirements of judicial mediation"⁹⁸⁶. While the development and details of this as a training issue, beyond the scope of this Evaluation Report, briefly stated, the taxonomy for judicial mediation include:

1. Conflict - recognizing and understanding the nature and characterization of the type and roots of the conflict, to help resolve the underlying cause, not necessarily just the symptoms or most recent manifestation - most relevant when there is a relationship prior to the dispute⁹⁸⁷;

if the proposed recommendations here are followed.

⁹⁸⁵ Singer, *supra* note 43 at 22-3.

⁹⁸⁶ Otis & Reiter, *supra* note 7 at 371, and generally at 371-92, referencing "Advanced Median Practice: An Interactive Training Program", Straus Inst. for Dispute Resolution, Pepperdine Univ. Sch. Of Law," (1994)(unpublished teaching materials).

⁹⁸⁷ Otis & Reiter, *supra* note 7 at 371-6, referencing, *inter alia*:
 - Gregory Tillett, *Resolving Conflict: A Practical Approach* (South Melbourne: Sydney University Press, 1991), at 4 (distinguishing between disputes and conflicts);
 - Laurence Boulle, *Mediation-Skills and Techniques* (Chatswood, NSW: Butterworths, 2001)[Boulle], at 65-71 (diagnosis leading to the most effective way to conduct the mediation);
 - Carrie Menkel-Meadow, "From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context" (2004) 54 J. Legal Educ. 7, at 7-29; and
 - Adams, *supra* note 594 at 200-12.

One can put understanding to this concept by imaging the mediation model of the Israeli - Egyptian conflict a few decades ago to understand the difference

2. Consent - absent a mandatory nature, mediation is based on a consensual foundation, the “idea of control of the process by the parties”, which must be maintained by not turning the process into an exercise of judicial authority or adjudication⁹⁸⁸ without, again, the express consent of the parties, as well as consent to aspects of the process, such as caucusing⁹⁸⁹;
3. Opening - after arranging the “spatial configuration”⁹⁹⁰, a “plenary” session of all participants, to relate [repeat] understanding of the mediation process, and set down [confirm] the terms and scope of the mediation - addressing the mediative, non-adjudicative role of the mediator, confidentiality - generally, and in relation to any future adjudication, and general process, including plenary and caucus sessions; meeting between the judicial mediator and the

between the nature of the underlying conflict, as compared to individual flare-ups, and the mediated resolution combining security and land ownership and control. As to parties controlling the process, the authors later (footnote 130) state: “As a consent-based procedure, the parties determine the scope of the issues to be mediated, in consultation with the judge-mediator, of course”, referencing Henry J. Brown and Arthur L. Marriott, *ADR Principles and Practice*, 2nd, ed. (London: Sweet & Maxwell, 1999).

⁹⁸⁸ Note, as I mentioned, *supra*, Agrios’ book (Agrios, *supra* note 12), and how hard it is for some to get away from the judicial urge to make the decision for the parties.

⁹⁸⁹ Otis & Reiter, *supra* note 7 at 376-9, referencing, *inter alia*:
 - Lon L. Fuller, “Mediation-Its Forms and Functions” (1970) 44 S. Cal. L. Rev. 305, at 315; and
 - John Lande, “Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs” (2002) 50 UCLA L. Rev. 69.

⁹⁹⁰ Discussed by Otis & Reiter late in the mediation section (at 382-3), referencing:
 - Boulle, *supra* note 987 at 30-2;
 - Jonathan M. Hyman, “Swimming in the Deep End: Dealing with Justice in Mediation” (2004) 6 Cardozo J. Conflict Resol. 19, at 22; and
 - Edward Brunet, “Judicial Mediation and Signaling” (2003) 3 Nev. L.J. 232, at 235.

lawyers in caucus⁹⁹¹; and “characterize and frame the issues to be negotiated”⁹⁹²;

4. Communication and Negotiation - facilitating the transition of the proceedings from an adjudicative type hostile environment to a mediation cooperative, problem solving, mode - that is, from “communication to negotiation, from narrative to dialogue, from lecture to conversation”, paying attention to communication issues such as those impacted by culture and emotions, and dealing with impasse⁹⁹³;

⁹⁹¹ Otis and Reiter, at 381, refer to part of the opening, following the plenary session, as involving a meeting between the judicial mediator and lawyers to “work out ground rules and a timetable”, clarify issues, determine the “most fruitful [way] to proceed, and to allow the judicial mediator to get a “feel for the case and the dynamics between the parties”. While, I believe that it is often useful for the JDR justice to meet with the lawyers alone in caucus, when some unexpected issue arises, all of what the authors discuss on this point, I believe, should be done - and, in my experience, is done - before the JDR commences, usually at the Pre-JDR.

⁹⁹² Otis & Reiter, *supra* note 7 at 379-83, referencing, *inter alia*:
 - Adams, *supra* note 594 at 178-83, and at 72-4;
 - Michael Wheeler, “Anxious Moments: Openings in Negotiation” (2004) 20 Neg. J. 153;
 - Jack M. Sabatino, “ADR as ‘Litigation Lite’: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution” (1998) 47 Emory L.J. 1289 (1998);
 - Nancy A. Welsh, “Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice” [2002] J. Disp. Resol. 179; and
 - Laura E. Little, “Characterization and Legal Discourse” (1996), 46 *J. Legal Educ.* 372.

However, I believe needing to be addressed earlier in the session, and, in any event of the timing, in joint session. Differing from adjudication where the focus is on the judicial decision maker, here the parties (with the advice of their counsel) are the decision makers and should address (and convince) each other in joint session, such that the focus is not on the judicial mediator.

⁹⁹³ Otis & Reiter, *supra* note 7 at 384-8, referencing, *inter alia*:
 - Adams, *supra* note 594 at 183-8, 213-2, 207 and 179;
 - Gary Smith, “Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not” (1998) 36 Osgoode Hall L.J. 847;
 - Boule, *supra* note 987 at 115-41, especially at 126-8;
 - Sara Cobb, “Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice” (2001) 28 Fordham Urb. L.J. 1017, at 1028;
 - Cheryl Picard *et al*, *The Art and Science of Mediation* (Toronto: Emond Montgomery, 2004), at 232-33;
 - Christopher W. Moore, *The Mediation Process: Practical Strategies for*

5. Decision - allowing the lawyers to document any settlement agreement reached, without the judicial mediator's assistance, but the judicial mediator making certain that it reflects the agreement reached, that the parties understand it, and that, if it impacts future relations, that they are committed to living by it⁹⁹⁴; and

Resolving Conflict, (3d rev. ed.) (San Francisco: John Wiley & Sons. Inc., 2003), at 175-7; and

- Morgan Brigg, "Mediation, Power, and Cultural Difference" (2003), 20 *Conflict Resol. Q.* 287.

See the Otis and Reiter bibliography (infra) on cultural and emotional issues.

On impasse, Otis and Reiter, at 387-8, reference:

- Boulle, *supra* note 987 at 175-7; and

- Lawrence Susskind and Jeffrey Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (New York: Basic Books, 1987).

For an excellent article on methods of breaking impasses and how to go about them, see also: Morton Denlow, "Breaking Impasses in Settlement Conferences: Five Techniques for Resolution" (2000) 39 *Judges J.* 4. The five methods (some more profound than they look) are: Creating a Range; Recommending a Specific Number; Splitting the Difference; Clarifying Objective Facts; and Setting Firm [Time] Deadlines.

While not all are necessarily directed to "impasse", as opposed to techniques used to avoid, or before, impasse: see two dozen techniques offered by Agrios, *supra* note 12 at 27 - 31, as part of the "craft" available for use as a JDR justice.

994

Otis & Reiter, *supra* note 7 at 388-90, referencing, *inter alia*:

- Adams, *supra* note 594 at 196; and

- Cinnie Noble, L. Leslie Dizgun and D. Paul Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Emond Montgomery Publications, Toronto, ON, 1998), at 114-7.

Assuming a fairly negotiated agreement with legal advice, while leaving the drafting of the agreement to the lawyers is alright for private mediations, I recommend a more hands-on approach to judicial mediation, to make sure that the enforceable substance of it is drafted and executed (pending possible more elaborate written agreements to follow). I believe that the JDR justice must do this to ensure that the litigation that is the basis for the JDR is effectively settled, not that it remains, along with a new piece of litigation suing on the settlement. I also believe that the JDR justice's experience may be helpful in making certain that in agreeing to the substance that the parties do not miss some consequential or follow-up issue - such as tax consequences, tax withholding, or other matter that relates to enforcement, that might cause the "agreement to unravel" - on this point, see Ansley B. Barton, "Mediation Windfalls: Value Beyond Settlement? The Perspectives of Georgia Magistrate Court Judges" (2005) 22 *Conflict Resolution Quarterly* 419.

As to the potential of suits to enforce settlement, this is specifically important under the New Rules because oral evidence of a settlement is specifically not admissible under proposed rule 4.21, and therefore a written memorandum is necessary. Moreover, it is my usual practice, even with such a memorandum, to have the parties authorize me (in advance of the JDR - usually in the letter of

6. Closure - not “simply wishing the parties well”, but rather reviewing the *process* with the parties, and bringing out the “educative or teaching function of the process”, to demonstrate to the parties how they can take what they learned in the mediative process to avoid and resolve disputes in the future⁹⁹⁵.

instructions as a prerequisite to conducting the JDR, or at the commencement of the JDR), as the JDR justice, to convert the memorandum of agreement reached into a formal Court order or judgment, on the motion of either party or the Court itself. This, unfortunately happens, in my experience, too often, when one party, notwithstanding a freely and fairly negotiated agreement with legal advice, later gets “settler’s remorse”, dismisses his/her lawyer and refuses to endorse the subsequent documentation necessary to finalize the agreement reached. By the JDR justice taking this position, the parties not only conclusively resolve their dispute, without creating another one, and the Court is satisfied that its role has not been in vein, even when a settlement is reached. I recommend that this be a prerequisite feature of agreeing to conduct JDRs in the future.

995

Otis & Reiter, *supra* note 7 at 390-2, referencing, *inter alia*: Bruce J. Winick & David B. Wexler, eds., in *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham, N.C.: Carolina Academic Press, 2003), cf. Christopher L. Eisgruber, “Is the Supreme Court an Educative Institution?”, (1992) 67 N.Y.U. L. Rev. 961.

While it is beyond the scope of this Evaluation Report, to delve into it in great detail, this is one of the areas where I disagree with Otis and Reiter. While I will leave the details of the debate for another day, I do not believe that the Court, in doing judicial mediation, is being asked to be pedagogical to the parties and their lawyers - although it appears that others share their view - see Landerkin, “Custody”, *supra* note 23 at 658, referencing F.E.A. Sander, “Varieties of Dispute Processing”, in R. Tomasic & M. Feeley, *Neighbourhood Justice: Assessment of an Emerging Idea* (New York: Longman Inc., 1982), at 27-30. See also, to the same effect, Sander, “Ohio Symposium”, *supra* note 38 at 709, saying “a skillful mediator in a continuing relationship case seeks to teach the parties how to handle future disputes more effectively by themselves”. I would close by congratulating the parties in reaching a resolution of the dispute (and, hopefully, the conflict, if it is broader than the dispute), if I think it is a reasonable resolution for all parties saying so (but not saying so, if I believe it to be less than optimum for one or more parties - see discussion under “Judicial Conduct”, *supra*), and remind them (in a not too stern way - perhaps with a good humoured “wink”) that the Court will expect them to implement their agreement and to follow it. Other than expressing a general view that it is hoped that, through the process, they have learned something about how to avoid, and/or resolve, disputes, I would provide no lessons. If feed back on the process is sought on a regular basis, a questionnaire can be prepared asking them (presumably anonymously as to the parties and the JDR Justice) to complete it and forward it to the Chief Justice.

Indeed, the NJI has recently gone further and advocated a very specific model for judicial dispute resolution⁹⁹⁶. It is consistent with the literature as to the steps to a successful mediation. Macfarlane described the process thus, from the lawyer's perspective:

Lawyers who are experienced in settlement advocacy identify a number of discrete negotiation skills – implicating both cognitive and emotional abilities and qualities – that enable them to be most effective. These include preparing an effective opening statement in negotiation or mediation, which adopts a firm yet not overly positional tone; matching the appropriate informal process to the case; displaying confidence and openness; and thinking outside the “box” of conventional, legal solutions in developing creative problem-solving skills. One frequently voiced observation is the importance of being able to conceptualize and understand the dispute from the perspective of the other side. Critical to being able to persuade the other side to settle on your client's best terms – the goal of conflict resolution advocacy – is an understanding of what the other side needs in order to be able to settle.

The belief that the clients' best interests can only be achieved if the interests of the other side are taken into account is the central premise of the principled bargaining approach popularized by Roger Fisher and Bill Ury⁹⁹⁷.

⁹⁹⁶ The NJI Model contains the following steps, for which further elaboration was provided at the NJI Vancouver Conference, *supra* note 755, and is beyond the scope of this Evaluation Report (the elaboration goes to the specifics of training and craft):

1. Discovery and Preparation;
2. Opening of Proceeding and Consent;
3. Relating the Events;
4. Negotiation; and
5. Agreement and Closing of Proceedings.

It is expected that NJI will encourage the standardize use of these steps in judicial mediation.

⁹⁹⁷ Macfarlane, *supra* note 25 at 113, referencing Fisher et al, “Getting to Yes”, *supra* note 115. Note that here, the term “principled” is used in a generic sense, not the sense in which I use, as described *supra*, meaning the range of possible trial outcomes (thus, the “risks”) in a rights-based analysis.

However, based on responses from some of my colleagues, Danielson recommended a quicker start under the JDR Program:

There was a general consensus by Justices in the survey on which issues need to be discussed with the parties at the outset of a JDR. However, it is the writer's opinion that there are enough minor differences between Justices in this regard that *it may be useful to have a consistent practice across the province, or at a minimum, further dialogue among the Justices. One Justice wrote in the survey that many of these issues can be handled via a written document signed in advance of the JDR. This concept is worthy of consideration.*⁹⁹⁸

I have some definite views on this, some of which I have touched on *supra*. First, while experienced JDR justices and lawyers, and even occasional institutional litigants (or their representatives) may be familiar/bored with opening remarks at a JDR, the proper approach needs to recognize the knowledge of the lowest common denominator at the JDR - often the one-shotter, and the opening should focus on that person. Second, while recognizing judicial independence and individual styles, I believe it would be useful for the JDRC to develop a sample standard opening (with analogy to jury instructions) with a view to providing general consistency to the JDR Program - important because it should touch, in a relative standard way, on the key points that relate to judicial (and lawyer and party) conduct and procedure during the JDR. I will provide some recommendations to the JDR at an appropriate time, as I do not feel it appropriate to set them out in this Evaluation Report.

With these principles in mind, before undertaking a JDR, a new justice (unless, due to experience, is waived immediately into the process) should read a number of relevant publications⁹⁹⁹, and then take an NJI or equivalent

⁹⁹⁸ Danielson, *supra* note 4 at 74 [emphasis added.].

⁹⁹⁹ I have included some of those "should read" references as to theory *supra* in note

introductory dispute resolution course. Thereafter, continuing reading is important, along with increasingly more advanced courses.

Moreover, it may be that, after some years of experience with the issues, and with a greater realization of the need to ensure continued judicial educational competence and currency with dispute resolution judicial ethics or conduct, the NJI might be asked by the Court, in conjunction with other courts (although they are not necessarily at the same level of participation), to develop a form of standard of minimum judicial training standard for assessing, teaching and maintaining knowledge of methodology, skills and conduct in dispute resolution for the balance of the 21st century. This was done in Ontario for new lawyer licencing¹⁰⁰⁰, and, with appropriate modifications, the professional legal educators involved there, or others, might assist in developing such standards. The JDRC is encouraged to start these discussions within the next few years.

b. BASICS OF THE CRAFT

The reading lists on the theory *supra* and on the craft *infra*¹⁰⁰¹, and an introductory NJI course will get a new justice into both the theory and the “craft”. The rest is up to that justice.

958 and as to craft *infra* in note 1008. However, in addition to what references are included in the Bibliography *infra* and within the text of this Evaluation Report (secondary sources have not generally been included in the Bibliography), I have attached (as Appendix 9), a preliminary Further Reading list which records a number of articles and texts of which I became aware, or which dealt with a specific matter for future reference, but not ones that was directly related to, or for which time did not permit assessment for, this Evaluation Report. It is thus a form of “starters” list for additional consultation as appropriate - a much bigger list could be generated. However, I don’t represent that all of the material is “should read”.

¹⁰⁰⁰ See Manwaring, *supra* note 377.

¹⁰⁰¹ Again, see *supra* note 958 and *infra* note 1008.

In identifying the educational needs of the judiciary, as well as their attitudes to judicial role in settlements, Macfarlane observed:

When asked to identify areas of new skills and practice in which they felt the need for more skills development, 45 percent of judicial respondents stated that enhanced settlement conferencing skills was a personal priority for them.¹⁰⁰²

In discussing the specifics of the judicial role in getting clients to participate more in mediation, Macfarlane said: “Judges themselves are identifying the development of new skills in order to manage these fora as a new priority for judicial education”¹⁰⁰³.

However, in this education process, it is important to appreciate the difference between the theory or science and the art - or craft - of mediation. Danielson, relying on Saposnek, put it this way:

... Saposnek draws a distinction between the art of mediation and the science of mediation. ‘The science of mediation is grounded in the body of systemized knowledge regarding interpersonal conflict that describes the structure, methodology and logic of the practice, and the predictability of people in conflict.’ From learning the science of mediation first, the mediator establishes a set of principles and steps to formulate a systemic basis for one’s personal practice. The art of mediation is ‘the intangible, spontaneous, flowing, unpredictable, intuitive aspects of the expertise. Art does not follow the rules of logic but operates more on intuition and feeling.’ The more experienced a mediator becomes, the more likely the preferred style will evolve beyond technique and become unique to each individual mediator.¹⁰⁰⁴

¹⁰⁰² Macfarlane, *supra* note 25 at 234.

¹⁰⁰³ *Ibid*, *supra* note 25 at 74, footnote 29, referencing B. McAdoo, “All Rise, the Court Is in Session: What Judges Say About Court-Connected Mediation” (2007) 22 Ohio State Journal on Dispute Resolution 377, especially at 397-402.

¹⁰⁰⁴ Danielson, *supra* note 4 at 34, relying on Donald T. Saposnek, “Style and the Family Mediator”, in Bowling & Hoffmann, *supra* note 9 at 245-6. See also the craft related to arbitration that may provide techniques able to be modified to mediation: D.G. Baizley and P.C. Suche “Final Offer Arbitration” at 58-

While the purpose of this Evaluation Report is not to teach the art or craft of mediation, or any other JDR method, the skills required of a mediator, whether judicial or otherwise, are quite similar. I believe that it is important to recognize them, as I believe Singer does in this list, which she introduces by saying:

An impartial umpire may be able to get negotiations back on track in any number of ways [- by: ...] soothing ruffled feelings; acting as a neutral discussion leader and ensuring that all the parties have ample opportunity to speak; helping to distinguish interests from positions; working with the parties to devise creative solutions for meeting their needs; earning enough of the parties' trust that they will share confidential information about their interests and alternatives; communicating selective information back and forth, often translating it from negative to positive language; serving as an agent of reality, helping the parties to be more realistic about their alternatives to agreement; keeping negotiations going when the parties are ready to give up; [and] acting as a scapegoat when things go wrong.¹⁰⁰⁵

Landerkin notes that Haynes had identified a number of strategies to assist in mediation, which are called “normalizing” (that is, as in “your problem is similar to other that have been solved - so there are solutions”), “mutualizing” (as in, “it is not your problem - singular, but your problem - plural”); and “future focusing”. The later’s focus is that, while the dispute and problem in the past is what brings the parties to mediation and the causes need to be understood - indeed, vented (providing a form of “therapeutic value”, with appropriate time limits), it is important, once heard and understood, it is necessary to focus on the future, with an attitude that you can’t change the past but you can provide for the future¹⁰⁰⁶.

60 of the Pitblado Lectures.

¹⁰⁰⁵ Singer, *supra* note 43 at 20.

¹⁰⁰⁶ Landerkin Evaluation Report, at 674-5, referencing J. Haynes, *The Fundamentals*

Brazil¹⁰⁰⁷ gives an interesting example of a very difficult, high stakes, case - where there was so much liability risk, the potential damage swings were wild, the transaction costs (leading up to trial) were huge, the agony was personal and lengthy, the publicity gnawing, external parties were involved and the “uncertainties legion” - that it was, counter intuitively, ripe for mediation. His “tell you how to do it” approach gives many insights into the “craft” from the perspective of client, lawyer and judge.

After a proper education base, with continual reading, and experience, the JDR justice will develop a mediation expertise that approaches excellence, without any need for improvement - but, wait, and be ready, because there is always a new challenge, in a new case around the corner.

Both from the perspective of the lawyer using the services of a mediator and a mediator, there a number of craft related books for consultation¹⁰⁰⁸.

of Family Mediation (Albany: State University of New York Press, 1994), at 9-16 (content within the parenthesis is mine).

¹⁰⁰⁷ Wayne D. Brazil, “ADR in a civil action: what could have been.” (2007), 13 *Dispute Resolution Magazine* 25.

¹⁰⁰⁸ See (again alphabetical):
 - Adams, *supra* note 594;
 - Agrios, *supra* note 12;
 - Genevieve A. Chornenki & Christine E. Hart. *Bypass Court, A Dispute Resolution Handbook*, 2d ed. (Toronto: Butterworths, 2001);
 - John Michael Haynes, Gretchen L. Haynes and Larry Sun Fong. *Mediation: Positive Conflict Management* (Albany: State University of New York Press, 2004);
 - Macfarlane, “Rethinking” *supra* note 220;
 - Cinnie Noble, L. Leslie Dizgun and D. Paul Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Emond Montgomery Publications, Toronto, ON, 1998);
 - Andrew J Pirie. *Alternative Dispute Resolution: Skills, Science and the Law* (Victoria: Irwin Law, 2000);
 - Allan J. Stitt, *Mediating Commercial Disputes*. (Aurora: Canada Law Book, 2003).;
 - Deborah Lynn Zutter, *Preparing for Mediation: A Dispute Resolution Guide*, 2nd

c. PITFALLS TO AVOID

This could be a very broad topic centering on a number of small or large issues¹⁰⁰⁹, but I wish only to focus on a couple of significant issues here.

i. SELF-REPRESENTED LITIGANTS

One could write a whole thesis on the proper appellation for parties who are not represented by lawyers, but I will leave that for another day and merely refer to them as self-represented litigants or SRL (singular or plural)¹⁰¹⁰.

Macfarlane, in discussing the current status of lawyer-client relationships, stated the obvious when she observed:

In the twenty-first century, deference of clients to professionals seems to be eroding. There are more tools for self-help and

ed. (Vancouver: Abundance Solutions, 2007); and
- undoubtedly many others.

¹⁰⁰⁹ In Brazil, "Handbook, 2008", *supra* note 60 at 83-5, Brazil provides a checklist of "pitfalls and reminders" for an individual ENE session (remember many of these apply to JDR processes other than ENE, some times with the necessary modifications), including: make sure the lawyers and parties know the procedure - if in doubt, explain it to them; caucusing must only be with consent, and not usually done in an ENE before the evaluation (according to the literature on ENE, joint sessions are specifically so as to allow all parties to hear what each has to say); explain the rules - including on confidentiality; invite client active participation; have specific rules for presentations; avoid coercion to settle (or the appearance of it); techniques for negotiations; and role of "case development planning".

¹⁰¹⁰ In the US literature such persons are sometimes referenced as "unrepresented litigants" or "*pro se*" litigants", or the equivalent. They are, however, not "unrepresented", but mere are not represented by counsel (sometimes the acronym "NRC" is used, or "self-represented litigants"). I shall use the latter term or the acronym "SRL".

access to knowledge that support a stronger culture of self-empowerment among consumers.¹⁰¹¹

Later, she noted that the SRL phenomena was one motivating the judiciary:

All of these procedural innovations are beginning to have a significant impact on the way some judges understand their role... Other important factors have also contributed to this evolving sense of identity for our judiciary. One is the widespread recognition that faith in justice systems is declining, along with access, as many who would use the courts find they cannot afford a lawyer, or simply prefer self-help for a range of reasons.¹⁰¹²

While much of Macfarlane's discussion and advice relates to the growing sophistication of clients and their less likelihood of merely accepting lawyers' advice without question, this is also relevant to the increasing participation of SRL in litigation and JDRs. This relates to who chose to be self-represented, or are required to do so for economic reasons (too well-off for legal aid, but too poor to afford legal services or those who have already spent their limit on legal services without a solution to their problem).

Indeed, SRL are a growing - and often troublesome - management issue - generally¹⁰¹³, and for JDRs¹⁰¹⁴.

¹⁰¹¹ Macfarlane, *supra* note 25 at 206.

¹⁰¹² *Ibid*, at 234, referencing M. Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about Our Allegedly Contentious and Litigious Society" (1983) 31(1) University of California Los Angeles Law Review 4.

¹⁰¹³ See the article by former justice of the Court, the Honourable Marguerite Trussler, "A Judicial View of Self-Represented Litigation" (2002) 19 Canadian Family Law Quarterly 547, referenced by Agrios at 40.

¹⁰¹⁴ See also:
- Jonathan D. Canter, "The Employment Arbitrator and the *Pro Se* Party", (2002) 57 Dispute Resolution Journal 51 - albeit in an arbitration context, and thus more akin to a trial adjudication; and

There are a number of studies of SRL and their interaction with the ADR or JDR systems of dispute resolution. Many of these deal with civil cases in limited monetary jurisdiction, or small claims, courts. While the procedures for adjudication there are more simple and less “legalistic” than in our Court, there is greater research there which provides experience that is relevant to dealing with SRL in our JDR Program. One such study (which identifies others) was that performed by Ansley B. Barton¹⁰¹⁵. Barton concluded, from a small sample study, that judicial mediation involving SRL does provide added value even if the dispute is not resolved. The benefits identified in this study (and others referenced) included (with my comments): improvement of relationships between the parties; educational opportunities to allow the parties to handle future disputes more constructively (although note, *supra*, my bias against much judicial energy being spent on this aspect of mediation); a high degree of satisfaction in being able to tell their story to the judge informally - they feel that they were heard (the survey, especially client’s survey qualitative comments, confirmed this even when represented); they get an opportunity to understand the position and perspective of the other side, and thus the relative strengths of the respective cases; the possibility of remedies through settlement that are not available in adjudication (because of jurisdictional, enforcement or other issues); but, most importantly for our purpose, for cases that don’t settle, the possibility that the process will lead to settlement between mediation and trial (judicial education and encouragement for continued dialogue may be helpful in this process); and, if no settlement, often with the narrowing of the issues, they

- Anne-Marie Langan, “Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario (2005) 30 Queen’s L. J. 825 - although the focus is more on adjudication, than mediation.

¹⁰¹⁵ Ansley B. Barton, “Mediation Windfalls: Value Beyond Settlement? The Perspectives of Georgia Magistrate Court Judges” (2005), 22 Conflict Resolution Quarterly 419.

are better ability to focus on the issues at trial, without so much emotion or tension/anxiety, and a better expectation as to the trial process and procedure. There are many other issues relevant to dispute resolution and the SRL recognized by Barton, that are beyond the scope of this Evaluation Report, including: *pro bono* services, stream-lined self-serve legal forms, interactive computer kiosks (like Alberta's LinC program), "unbundling" of legal services (currently being studied by the Law Society of Alberta), courthouse advisors (like Calgary Legal Guidance Duty Counsel programs in family law motions court), and others, all of which I will leave for analysis at another time and place.

Whatever the solutions to the growing number of SRL, I believe they are here to stay and we will have to treat them fairly and find strategies to deal with the problems they present. The tone is perhaps best set by ALRI in its Consultation Memorandum¹⁰¹⁶, which, in very general terms, indicates that they are not entitled to special treatment because they are SRL, but their presence may mean that the JDR justice has to take extra precautions to ensure that there is not a tilting of the playing field against them by the other side.

With this background, lets look at several issues. First, the JDR justice must assess and determine if the SRL is prepared, in good faith, to negotiate a settlement, or has some improper purpose in mind¹⁰¹⁷. There may well be good faith, and poverty only, but on occasion the reason the person is SRL is

¹⁰¹⁶ Alberta Law Reform Institute, Rules of Court Project, "Self-Represented Litigants", Consultation Memorandum No. 12.18 (Edmonton: Alberta Law Reform Institute, 2005).

¹⁰¹⁷ Agrios, *supra* note 12 at 39-41, agrees (items 2 and 4 at 40). At 40-1 and 51 (item 7), he adds the suggestion that it may be appropriate to recommend to SRL that they retain a lawyer for the sole purpose of the JDR - unbundling, as discussed *supra*.

that s/he is completely unreasonable, and cannot maintain (or does not wish to maintain) counsel because of that. If sincerity is not present, JDR justices should not do the JDR but, perhaps, suggest a summary trial instead.

Second, if the JDR does proceed, one major problem, not present with counsel, is that SRL are not “officers of the court” with all that entails. Additionally, they may misunderstand or misinterpret a number of things that counsel would consider normal JDR practice. These issues are usually dealt with in a courtroom and on the record with the necessary procedural and recording protections, but that is not the norm for JDRs. However, I believe that, for SRL, recording must become the norm¹⁰¹⁸, as a prerequisite to doing a JDR involving SRL. Portable FTR recording systems are available from Court Services, and a JDR justice should, in a timely way, see that one is present, together with an operator, or, if the JDR justice is prepared to do so, take the training and operate it him/herself for the whole time that the SRL is in the JDR. There must be a direction, however, understood by all, including the SRL, that recording does not affect the confidentiality of the substance of the discussions, and that a recording or transcript will only be available for issue of conduct and propriety, and only on the order of the JDR justice or the Chief Justices.

Third, a related issue pertains to caucusing. Caucusing should be more sparingly used for SRL, but when done, it must always be with the caucus being recorded under the aforementioned rules.

Fourth, there is an issue of informed consent on any undertakings required of a SRL as to procedure, or for a settlement, or a Binding JDR. For

¹⁰¹⁸ Agrios, *supra* note 12 at 40 agrees, but would also hold them in a courtroom. I do not believe the latter is required in most cases, but I believe it an individual decision for each JDR justice, in general, or as circumstances recommend.

the former, the details should be considered in advance and the necessary letters or forms prepared for the SRL to execute with independent legal advice before the JDR takes place. For the latter, as referenced *supra*, the JDR justice must ensure that the SRL understands and expressly consents to the settlement and is given the right (recorded) to seek independent advice before accepting an offer, or conditionally accept an offer subject to such advice (counsel on the other side are most often prepared to consent to a reasonable time to do this, because they wish to have an enforceable settlement).

Fifth, see the substance of other procedural issues *infra* that often pertain to SRL, as well as those represented on the SRL above.

Sixth, as the Edmonton “Protocol” suggests¹⁰¹⁹ - “approach such sessions with extreme caution”.

**ii. VULNERABLE PEOPLE, POWER
IMBALANCES, ABUSIVE CONDUCT,
SECURITY AND PSYCHOLOGY**

Vulnerable people and power imbalances are a huge issue in litigation - and JDRs.

While there are too many considerations to be addressed in the Evaluation Report, some brief considerations can be raised, and sources provided for further research.

¹⁰¹⁹ Agrios, *supra* note 12 at 69, item 13.

These issues most often arise in violent or abusive family law situations and require great care. In my view these cases should not be rejected out of hand, if some good can come while protecting the alleged victim of the alleged abuser. Therefore, I believe there are a series of steps to consider in these situations. First, in my view, JDR should not even be considered if there are any outstanding criminal charges or family security investigations underway. Second, if the first issue is clearer, it needs to be determined whether the alleged abuser is willing to negotiate a settlement of the substantive issues or wishes merely to use the process as a source for further abuse. The latter is a show stopper, but otherwise it will be relevant if the alleged abuser has counsel - if not, or if there is any doubt, rejection to an adjudication - perhaps a summary trial - is appropriate. Third, if the JDR is to proceed, one must consider security and comfort issues - presence of a Court Sheriff, or caucus shuttle only mediation if necessary. Fourth, if security issues can be handled, the assessments of power imbalance is a follow up consideration, and a vulnerable allegedly abused person should never attend such processes without independent, preferably strong, counsel. If either of these issues cannot be handled by a Sheriff, caucusing or in some other fashion, then the JDR should be refused. Moreover, a JDR justice must be aware of power imbalances and abusive conduct or threats of same, and must not tolerate any, matters with are often, but not necessarily related to the previous subject.¹⁰²⁰ If all these matters can be allayed, then, perhaps, a useful purpose would be served by a JDR.

There is a vast amount of literature on dispute resolution involving vulnerable people in a family law context, and some that focus on domestic violence.¹⁰²¹

¹⁰²⁰ See Imbrogno, *ibid.*

¹⁰²¹ Macfarlane, *supra* note 25 at 162-3, talks about this in the context of family

While I have touched on security somewhat *supra* in this section, but I want to return to it briefly. Occasionally, even without SRL, or vulnerable people, or specifically concerning power imbalances or abusive conduct, there are security issues, or concerns about parties about security issues. Most frequently they will not be a problem if each party is represented, but if there are any concerns with SRL (or counsel represented parties) actual, potential, or mere uncomfortableness, do not hesitate to request a Sheriff to attend the JDR within or outside the mediation room.

cases, in connection with BATNA (best alternative to a negotiated agreement).

See also:

- Phyllis E. Bernard, "Teaching Ethical, Holistic Client Representation in Family ADR" (2001) 47 Loyola Law Review 163, which focuses on domestic violence situations;
- Phyllis Goldfarb , in Andrea Barnes, ed. *ADR and Cases of Domestic Violence: The Handbook of Women, Psychology, and the Law* (San Francisco: Jossey-Bass, 2005), as reviewed by Fazzi, Cindy (2006) 60 Dispute Resolution Journal 85, where Goldfarb, in a "chapter devoted to legal intervention for battered women", discusses mediation in this context, including caucus only mediation;
- Goss, "An Introduction", *supra* note 29 at 10 - with sources referenced to suggest that violence or power imbalances, alternatively, should either ensure that mediation does not proceed, or should proceed with protections in place;
- Andre R. Imbrogno, "Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument of Social Oppression?" (1999) 14 Ohio State Journal on Dispute Resolution 855, dealing with both family violence and power imbalance issues; and
- Philip F. Wan, "Mediating Family Property Disputes in New Zealand" (1999) 54 Dispute Resolution Journal 79, which discusses family violence and power imbalance at 76-7.

Also occasionally, there are psychological problems or allegations of them. Treat them the same as security issues.

In either of these cases, it might be that the parties will have to be separated and caucusing agreed to (perhaps with one party's lawyer attending a joint session without his/her client), with the JDR justice doing "shuttle diplomacy".

A JDR justice must be aware of power imbalances and abusive conduct or threats of same, and must not tolerate any, matters with are often, but not necessarily related to the previous subject.¹⁰²² If either of these issues cannot be handled by a Sheriff, caucusing or in some other fashion, then the JDR should be refused.

iii. CONCLUSION

These issues require extra diligence by the JDR justice to handle and deal with appropriately, and there will be others that have not been exhausted in this Evaluation Report. Perhaps another JDR justice can pick up this issue for future development?

2. OTHER TOPICS FOR FUTURE RESEARCH

As will be apparent, I have not dealt with every topic that may be relevant to JDRs. I am not alone - Danielson noted that her study did not address issues of "power imbalance, cultural sensitivity, attribution, breaking impasse, use of lies and deception ... that a JDR Justice will have to deal with from time-to-time during a JDR".¹⁰²³

¹⁰²² See Imbrogno, *ibid.*

¹⁰²³ Danielson, *supra* note 4 at 48.

Other than definitions, I have not: debated the underlying premises of mediation; argued about the merits of mediation; or described, in detail, how to successfully mediate a dispute. I have assumed that there is a general knowledge of the rationale behind the process, that there is broad recognition of the merits, and, with some exceptions, success is an art as well as a science, practiced better with education and experience.

These and other issues are too remote in time and space to deal with in this Evaluation Report, and I leave them for research by others who wish to pursue them because of a general interest in them, or has an issue that requires a researched solution - for example, the roles of culture and ethnicity, religion and spirituality, gender, ethnicity, psychological issues, and many more, often exist as interests in a JDR that must be understood by the JDR justice if s/he is going to appropriately take them into account to help the parties solve their dispute - and, perhaps, some of the related and relevant

underlying issues.¹⁰²⁴

One can also look at JDR from the point of view of the type of case that is coming forward for resolution, as mediation styles may have to be adapted. For example (most general references include other references in footnotes or bibliography): for business JDR¹⁰²⁵; for community disputes JDR¹⁰²⁶; for consumer and employment JDR¹⁰²⁷; for environment JDR¹⁰²⁸; for

¹⁰²⁴ For example, McFarlane, at 113, 157, and 183-5 addressed the importance of culture, including the following comments:

Experienced negotiators are also sensitive to the importance of identifying and allowing for cultural differences in both the framing and the resolution of conflict, recognizing that disputants often need to relate the process and the outcome to their cultural (familial, community, organizational, ethnic) expectations and preferences.

...

... an Aboriginal band[’s] ... values and norms about fairness may be different from those of the Western legal system....

See also: Otis & Reiter, *supra* note 7 at 386, referencing:

- David Kahane, “Dispute Resolution and the Politics of Cultural Generalization” (2003) 19 Neg. J. 5;
- Douglas P. Fry, “Conflict Management in Cross-Cultural Perspective”, in *Natural Conflict Resolution* (Berkeley: University of California Press, 2000), at 334;
- Morgan Brigg, “Mediation, Power, and Cultural Difference” (2003) 20 Conflict Resol. Q. 287;
- Andrew J. Pirie, *Alternative Dispute Resolution: Skills, Science and the Law* (Toronto: Irwin Law, 2000), at 282-306;
- Cynthia A. Savage, “Culture and Mediation: A Red Herring” (1996) 5 Am. U. J. Gender & L. 269, at 272-73; and
- Kevin Avruch & P.W. Black, “Conflict Resolution in Intercultural Settings: Problems and Prospects”, in Dennis J.D. Sandole & Hugo van der Merwe, eds, *Conflict Resolution Theory and Practice: Integration and Application* (Manchester, UK: Manchester University Press, 1993), at 131.

¹⁰²⁵ See: Singer, *supra* note 43 at 57-86.

¹⁰²⁶ *Ibid*, at 111-130.

¹⁰²⁷ *Ibid*, at 87-109.

¹⁰²⁸ See: S. Glenn Sigurdson, Q.C. “Lessons from Two Canadian Environmental Disputes”, in Pitblado Lectures, *supra* note 10 at 80-5.

family law JDR, there are literally a hundred plus sources¹⁰²⁹; for mediation of estate dispute¹⁰³⁰; for public disputes JDR¹⁰³¹; many other types of JDR¹⁰³².

While I have not even done directed research on the list of possible topics or all the literature pertaining to each, some of those topics and a limited bibliography (much - perhaps most - of which I have not read) that I have gleaned in passing appear *infra* that may assist the future researcher. Indeed, a reference to almost any of the literature referenced in this Evaluation Report, the Bibliography and more specifically the training and craft references *supra* will lead to other areas of directed research¹⁰³³. As noted, I have started a Further Reading list and attached it as Appendix 9.

3. FUTURE EVALUATION

Brazil addressed in his ADR evaluation, two realities: “The two things that are clear are that we need to continue and to sophisticate our efforts to generate reliable empirical assessments and that we need to remain acutely aware of the danger of generalizing from the study of one program to others”.¹⁰³⁴

I believe that it is important that the JDR Program not sit, unevaluated

¹⁰²⁹ See: *inter alia*, Singer, *supra* note 43 at 31-56.

¹⁰³⁰ See: Deborah Lynn Zutter, “Estate disputes ideal for mediation” (1999) 18.35 *The Lawyers Weekly*.

¹⁰³¹ See: Singer, *supra* note 43 at 131-163.

¹⁰³² See: generally, the bibliographies of others listed in Further Reading (Appendix 9) *infra*.

¹⁰³³ Thanks to the many authors for references. One is Morris, *supra* note 17 at 8 - 9. See also the lists *supra* in notes 958 and 1008.

¹⁰³⁴ Brazil, “25 Years After”, *supra* note 14 at 99-100.

for another 12+ years. I believe that the JDRC, in conjunction with JDR Coordinators should develop a system of regular recording of statistics¹⁰³⁵ and, where appropriate, qualitative information for each JDR (perhaps - indeed, likely - on a basis that does not identify the parties, counsel or JDR justice - by using a control number only). This may require input from the counsel (in booking or following the JDR) and/or from the JDR justice. The sort of information that would be useful would be a consistent measure of items such as some of those included in the Survey herein¹⁰³⁶, including: type of JDR - mini-trial (pure or with added mediation), mediation (facilitative, evaluative or hybrid), Binding JDR, or other (specified); type of case - family, personal injury (motor vehicle, etc.), etc.; success (at JDR or within a specified time - say 2 months); number of trial days saved (a matter that I failed to ask); other (to be determined); including, perhaps qualitative comments by all participants on any other matter. Again, this would have to be developed, learning from, and improving on the Survey data herein, but on a much simpler and more focused basis¹⁰³⁷.

Additionally, again learning from the experience in this Evaluation Report, and improving thereon with further research and experience, the JDRC should, perhaps with a future LL. M. student (judicial or otherwise) develop a province wide, survey for a comparable year long period, say in 10 years from this Survey - 2017-8, and perform a further evaluation thereon, picking up from, and improving on this evaluation¹⁰³⁸.

¹⁰³⁵ See a similar recommendation in the Edmonton "Protocol" - Agrios, *supra* note 12 at 70, item 17.

¹⁰³⁶ See also, Brazil, "Handbook, 2008", *supra* note 60, Appendix 8.

¹⁰³⁷ See, for example, the simple evaluation methods used by the Edmonton Family and Youth division of Provincial Court in the ongoing evaluation of their JDR program: Goss, "Judicial", *supra* note 68 at 514 and 516.

¹⁰³⁸ Again see the longer evaluation performed by Edmonton Family and Youth: *ibid*.

IX. CONCLUSION AND RECOMMENDATIONS

A. CONCLUSION

Macfarlane had this to say about the role of the judiciary in influencing change:

Members of the bench wield significant influence in pressing for and then supporting professional and procedural change. Judges have demonstrated that they can play a significant role in effecting changes in legal culture. A critical element of changing attitudes towards any innovation or change is the credibility imparted to the process by the support our professional leaders, and none are more significant than members of the judiciary....¹⁰³⁹

Landerkin and Pirie, concluded their excellent article by saying:

Judges will still be required to hear cases and make binding decisions that form part of our law as precedent. Adjudication by a judge following the Rule of Law must always be a fundamental component of a free and democratic society. Complementing this classic task however is the concept of judges and courts also being conflict resolvers. The end point for many important disputes in our society can be adjudication by a judge. Yet along the way to this day in court, there can be ADR-inspired opportunities for judges to demonstrate their judicial skills by promoting settlement. Appropriate interventions to help the parties reach satisfying results in a more timely and less costly way meets the needs of the disputants themselves. The result will be more satisfaction for them. This in turn reflects well on our courts. JDR not only encourages the continued search for substantive justice but also emphasizes the quest for procedural justice.¹⁰⁴⁰

Danielson addressed the outcomes of the JDR Program specifically:

The settlement results of the Alberta JDR Program are impressive. The high rates of success support the conclusion that the current intervention methods being used by Alberta

¹⁰³⁹ Macfarlane, *supra* note 25 at 235.

¹⁰⁴⁰ Landerkin & Pirie, *supra* note 25 at 298.

*Justices are effective.*¹⁰⁴¹

Brazil, in examining the broad system of ADR addressed a number of evaluative questions which, I believe, are an instructive point from which to view the JDR Program following the analysis in this Evaluation Report. He first asked whether ADR in the pre-trial process had improved the administration of justice, with emphasis on “justice” and suggested that the answer should be reflected on:

... (1) party and lawyer feelings about fairness and about the utility of the process..., (2) the extent to which the process permits or encourages participation by parties..., (3) what the process contributes to the clarity of the parties' understanding of their situation and their options, and (4) the parties' feelings about the system of justice and our judicial institutions.¹⁰⁴²

Later he observed his environment and concluded that:

... in studies of the programs that I know best, the subjective data support, often strongly, a conclusion that the addition of ADR to court services has improved (in the all-important eyes of users) the administration of justice -- regardless of the criteria we use to define improvement.¹⁰⁴³

I believe that any knowledgeable, fair minded, observer, in viewing the Survey results herein would come to the same conclusion - namely, that the Court's JDR Program has met, or exceeded these tests.

Brazil also noted that realizing what users think of their provision of dispute resolution processes will allow courts to better understand the real importance of the role to citizens:

With an appreciation of ... subjective assessments of the

¹⁰⁴¹ Danielson, *supra* note 4 at 62 [emphasis added].

¹⁰⁴² Brazil, “25 Years After, at 98-9.

¹⁰⁴³ *Ibid*, at 100.

value and fairness of court ADR programs as a base, we are positioned to broaden our inquiry into what has been gained [from ADR]. One of the least noted but most significant gains is an evolution in the judicial institution's understanding of itself, its role, its relation to the people. Experience with ADR programs has changed, in part, some courts' self-perception and the richness of their sense of mission. It has led some courts to a clearer understanding of themselves as service institutions and to a more sophisticated appreciation of the breadth of the range of litigant values that courts processes can and should try to serve.¹⁰⁴⁴

With this realization and understanding, I believe that the Court will be even better able to serve the public, as was it's mission in establishing the JDR Program.

I believe that the Survey results, by a significant number of the members of a caring legal profession and sincere users of the JDR Program, have validated the conclusions expressed in this Evaluation Report as it relates to the very significant credible and professional, leadership role of the justices of the Court, which in turn, demonstrates that the Judicial Dispute Resolution Program of the Court of Queen's Bench of Alberta has a degree of excellence. I hope that this Evaluation Report will play a positive role in the next step - improving that excellence.

B. RECOMMENDATIONS

With the general conclusion of this Evaluation Report being stated, I turn to turn, in summary form, to the "improvements" - that is, to articulate specific recommendations for the future of the JDR Program, which I set out *infra* and have also repeated (as a separate document in Appendix 8.

¹⁰⁴⁴ Brazil, "25 Years After", *supra* note 14 at 108-9.

However, before listing the recommendations, a couple of comments are appropriate.

Much of this Evaluation Report focuses on maintenance of the high integrity of the office of justice of the Court, as we step down from the bench of adjudication to the mediation room as part of the new norm of dispute resolution in our Court. Thus, principles of judicial conduct are much a focus - not because the conduct is now bad, but because we must be aware of it and protect against it. That having been said, I see no reason to go searching for all the principles that are applicable, most or all of which have been addressed in this Evaluation Report, and proclaim a great manifesto on the subject. Most, as note *supra* are already set out in the Guidelines that our Court set, with such considerations in mind, when it, under the leadership of Chief Justice Moore and Associate Chief Justice Miller, started the JDR Program. These same provisions will, in substance, be incorporated into the New Rules. That being said, nevertheless, a document listing and describing all those principles - perhaps in the context of a Judicial Conduct Mission Statement - in a JDR context, amended as new principles are considered may be prudent for the Court's JDR Committee to consider, so as to provide continued guidance for JDR justices as they remain vigilant to provide services in the JDR Program, at the highest standards of judicial conduct excellence. Perhaps the work that I understand is currently being considered by the Canadian Judicial Council will aid in such a statement.

In addition to the recommendations specifically listed, there are smaller recommendations that appear throughout the Evaluation Report, that add to or explain the broader recommendations in the list. Moreover, I have not listed recommendations that would seem to logically follow without more. For example, I note that one of the recommendations of Macfarlane in conducting the evaluation of the Ontario trial court's mandatory ADR program was that

“ADR should continue to be provided under the auspices of the court”¹⁰⁴⁵. That conclusion equally applies here - the Court should continue the JDR Program, and, obviously, it should administer it.

There are some recommendations that came out of dispute resolution evaluations performed by others that I don't recommend, or only recommend in part, some of which I have articulated and others which I have not. For example, it is noted that, in the evaluation of the Ontario trial court's mandatory ADR program, it was recommended that the court make efforts to “ensure the better education of the legal profession on the use of, and means of participating in ADR processes” and that “efforts to ensure that clients receive information in advance of a mediation session and participate fully in that meeting”¹⁰⁴⁶. As to the first, while as relating to the former, up-to date education of the profession on ADR processes is surely in the public interest, and members of the Court should be encouraged to play a speaking (or similar) role at bar educational sessions, the function of the need for and the conduct of professional education should not be a responsibility of the Court, but rather the Law Society of Alberta (LSA), the Canadian Bar Association (CBA), the Legal Education Society of Alberta (LESA), and/or others. As to the second, I would recommend that lawyers be encouraged to provide their clients both generic information on the JDR process, and the specific information about the subject JDR, but it is, again, not the role of the Court to do so, although I do recommend that the JDRC of the Court produce (in conjunction with Alberta Justice, and, perhaps, with the advice of LESA and the CBA) a JDR Program Pamphlet setting out generic information about the JDR process and what clients should do (alone, or in conjunction with their

¹⁰⁴⁵ Bussin, *supra* note 5 at 468.

¹⁰⁴⁶ *Ibid*, at 468.

lawyer) to prepare for the JDR¹⁰⁴⁷.

So, in conclusion, I close this Evaluation Report by setting forth a summary of my recommendation.

My recommendations, that follow from and are based on the information contained in the Survey of lawyers and clients in the year ending June 2008, as reviewed and analyzed in conjunction with valid literature on the subject of dispute resolution, and for the reasons articulated in detail in this Evaluation Report, are set out below.

It is recommend that:

Program

1. The Court maintain the JDR Program, as mandated by the Court's Guidelines for Judicial Dispute Resolution of June 1996 ("Guidelines"), to be replaced by Rules 4.17 - 4.21 of the New Alberta Rules of Court ("Rules of Court").

Branding/Labeling/Name

2. The Court continue to call the Program the "Judicial Dispute Resolution Program" or "JDR Program".

¹⁰⁴⁷ An excellent example is the United States District Court. *ADR: Dispute Resolution Procedures in the Northern District of California*, online: United States District Court, Northern District of California
<<http://www.adr.cand.uscourts.gov/adr/adrdocs.nsf/0456e64e13c35663882564e600676f23/e4a1d742f8be60bd882572d400699cc7?OpenDocument>>.
See also the JDR Information Circular, "explaining JDR and the process" used by the Edmonton Family and Youth division of the Provincial Court of Alberta: Goss, "Judicial", *supra* note 68 at 514 and 520-1 (Appendix A).

Management

3. The JDR Program be managed by the Court under the recommendations of the “Judicial Dispute Resolution Committee” (“JDRC”).

JDR Services, Names and Information

4.
 - a. The Court continue to offer JDR Program services by the names “Mini-Trials”, “Judicial Mediation” (including alternatives : “Facilitative Mediation” and “Evaluative Mediation”), or a hybrids of any of them, and “Binding JDR”, potentially open to all non-criminal cases. These JDR Program be as equally available in each judicial centre throughout Alberta consistent with the general level of judicial facilities and service provided to that centre.
 - b. A JDR Program Pamphlet, focused on the information that clients need to know to access and participate in the JDR Program, be prepared by the JDRC to explain these services, the JDR process, and other relevant aspects of the JDR Program.
5. To avoid confusion with branding/labeling, and while recognizing generically the JDR Program offers settlement conference services, the Court encourage its justices not to use the term “Settlement Conference” as the name for the JDR Program.
6.
 - a. The Court do not, at this time, provide a formal “Early Neutral Evaluation (ENE)” service.

- b. The Chief Justices, or their designates, may, however, authorize an ENE in the appropriate case on request of counsel, with the caveat that a confidential process evaluation report (not identifying the case, the parties or counsel, except by a control number) from the ENE Justice be prepared and provided to the JDRC for future evaluation purposes following the ENE.
 - c. The Court, including through the JDRC, work with Alberta Justice to encourage an ENE service, not managed by the Court or staffed by its justices or staff, through a “Court-Annexed” program, using fee for service and *pro-bono* neutral experts.
 - d. The Court continue to provide the case management aspects of ENE programs through one-off (in motions court) or systematic (assigned) case management.
7. The Court, on the recommendation of the JDRC, prepare and make available to the public such information and booking and scheduling mechanisms as are appropriate to carry out the JDR Program. To that end:
- a. JDR Justices should be requested to complete and make available through the JDR Coordinator a JDR Justice Profile, setting out the JDR services that they are prepared to provide, similar in content to the sample set out in Appendix 8, Table 8.1.
 - b. Once the judicial assignment schedule for JDRs is available from time to time, all parties and their counsel should have an open and equal right to choose the JDR Justice and timing consistent with that schedule.

- c. The basic unit of scheduling for JDRs be one day or a multiple thereof as appropriate, as determined by the parties in coordination with the JDR Coordinator and JDR Justice.
 - d. A province-wide JDR Booking Confirmation form - a sample of which is started in Appendix 8, Table 8.2 - be prepared by the JDRC and JDR Coordinators to be completed and filed by the parties and/or their counsel in each case to confirm the booking and to provide all the material and relevant information appropriate for a successful JDR and for assessment of the JDR Justice in preparing such JDR, including determining whether a Pre-JDR conference is necessary.
8. In light of the technical requirements for Binding JDRs as created by recent court decisions, the JDRC make recommendations to the Court as to best practices, and, consistent therewith, take pro-active steps to make Binding JDR services more available.

Timing of JDR Services

9. a. While the timing of providing a JDR service should be largely in the hands of the parties and their counsel, as proposed under the New Alberta Rules of Court, in consultation with the proposed JDR Justice, if parties are not essentially ready (of very close to being ready) for trial at the time proposed for a JDR, as required by paragraph 3 of the Guidelines, they be required to submit reasons in the JDR Confirmation form for a JDR at the time proposed for review and consideration by the JDR Justice on behalf of the Chief Justices of the Court. The JDR Justice may exempt the proposed JDR from the timing prerequisite or defer it to a more appropriate time.

b. The timing of a JDR should be such that a minimum of a two week interval be in place between a JDR and the scheduled trial commencement, to permit the trial judge that would otherwise take that trial to be reassigned if the JDR results in a settlement.

Prerequisites to a JDR

10. a. Prerequisite to a JDR, the parties (or counsel on their behalf) must certify that: their case is substantially ready for trial, or seek an exemption under Recommendation 9a; they have either tried to negotiate a settlement and have been unsuccessful, or have exchanged bona-fide offers to settle, which have been rejected (the nature of those offers must be disclosed in the JDR brief); that they and their clients undertake to attempt to negotiate a settlement of the subject action in good faith in accordance with the policies pertaining to the JDR Program; the requirements of Recommendation 10c., if applicable have been met; and such other prerequisites as the Court may reasonably require, on the recommendation of the JDRC.

b. A proposed JDR is subject to the presumptions and requirement of Recommendation 11.

c. A Binding JDR shall only proceed on the certification (in the JDR brief) that all evidence relevant to the proceeding that the party wishes to provide has been filed in affidavit (or other permissible form) on the court file, with analogy to the non-*viva voce* evidence to be provided for a summary trial.

Judicial Approval for a JDR to Proceed

11. a. If the Prerequisites to a proposed JDR have been established, except for Binding JDRs and proposed JDRs involving self-represented litigants, there should be a *prima facie* (default) presumption of a right for the JDR to proceed.
- b. Notwithstanding a., nothing prevents the Chief Justices, or their designate, or the proposed JDR Justice, from ruling, at any time (preferably an optimum time), that a proposed JDR is not appropriate for any reason (including timing) to proceed at the proposed booking date or at all - granting a waiver in the latter case, if appropriate or required, under the Rules of Court.
- c. Further to a., by analogy to b., the Chief Justices, or their designate (normally the proposed JDR Justice), shall rule on the appropriateness to proceed to JDR in the case of Recommendation 9a., proposed Binding JDRs, or proposed JDRs involving self-represented litigants.
- d. Recognizing that the suitability of a JDR for any case will be primarily determined on the consent of the parties, or the requirement of the Rules of Court (and independent judicial discretion to rule on waivers thereunder), the JDRC is encouraged to consider, and if appropriate, prepare advisory guidelines to assist the Chief Justices, their designates, or other justices of the Court to whom an application for waiver may be made (and through such guidelines to assist the parties and their counsel) as to when and under what circumstances a waiver of a dispute resolution process (including a JDR) should be permitted under the Rules of Court, including the steps that might be

taken or conditions that might be imposed to ameliorate circumstances that might otherwise recommend waiver.

Pre-JDR Conferences

12. The proposed JDR Justice, before the JDR, may on his/her own motion direct, and must make available to the parties and their counsel the opportunity on request for, a pre-JDR conference (“Pre-JDR”), in person and/or by telephone (with preference to the latter), involving the counsel (and their clients if they wish, but on notice) to discuss the organization of, issues to be addressed at, the material for, and any other matter (including confidential information) relevant to the success of the JDR.

JDR Instruction Letter

13.
 - a. In any event of Recommendation 12, before the JDR, the proposed JDR Justice shall provide counsel with a JDR Instruction Letter setting out all of the material and relevant terms of the agreement of the parties, as concurred in by the JDR justice, relating to the parties, counsels and JDR Justice’s expectations for the JDR process.
 - b. The JDRC advise initially and from time to time on best practice as to such a JDR Instruction Letter, and a sample form thereof proposed for the consideration JDRC and JDR justices, able to be amended by the proposed JDR justice as appropriate, is attached in Appendix 8, Table 8.3.

JDR Justice Training and Education

14. a. Except for any necessity, the Chief Justices not assign any justice to conduct a JDR who does not possess the requisite training or experience to competently conduct same, and make reasonable and continuing efforts to permit - indeed, encourage - justices to obtain such judicial and personal training and education (both entry level and advanced), either within the Court (including mentoring with experienced JDR justices), or externally.
- b. The JDRC make appropriate recommendations to the Chief Justices and Council of the Court as to the standards of requisite training and experience, and, in conjunction with the Continuing Education Committee of the Court, provide, or prescribe, judicial education programs relevant to a.
- c. The JDRC is encouraged from time to time to recommend best practices for consideration by JDR justices in procedures leading up to and during the conduct of a JDR.

Recording JDR Proceedings

15. a. On the request of any party the JDR justice shall, and on the JDR justice's own motion the JDR justice may, require Alberta Justice Court Services to record, but only for conduct evaluation purposes, a JDR proceeding, provided that the electronic or transcribed record therefrom shall be sealed and not be available to any party without the order of the JDR justice or the Chief Justices or their designate.

- b. In the case of self-represented litigants, the JDR justice is encouraged to require a recording as contemplated in a.

Judicial Conduct during JDR

- 16. In conducting a JDR the JDR Justice shall be guided by the following relative to appropriate principles of judicial ethics and conduct:
 - a. at all times to conduct him/herself in accordance with the high standards expected of a justice of the court in any judicial role or function;
 - b. follow the letter and spirit (including, specifically, those provisions relating to judicial conduct) of legislated enactments, binding court decisions, and, pending implementation of the New Alberta Rules of Court, the Guidelines, all as pertaining to JDRs;
 - c. conduct a JDR in a process manner that is one of fairness in all its aspects, respectful of the parties and consistent with the confidentiality required by the process, including that prescribed by law, and ensure that justice is not sacrificed at any time for expediency;
 - d. while reasonably encouraging settlement in a prompt, efficient and fair manner, not in any way coerce the parties to settle, but rather permit the parties, based on informed express consent, to settle a dispute on any lawful basis, without any judicial intervention, except to ensure that it is by both informed and express consent;

- e. on the JDR Justice's own motion, or on request, the JDR Justice may (but is not required to) meet with a party and his/her/its counsel, or counsel alone (but not any represented party without counsel), separate from other party(ies) and their counsel, for the purpose of discussing settlement, but shall not do so without the express oral consent of all parties and counsel;
 - f. may give guidance and evaluation on, help the parties assess the risk of, and give opinions on, possible trial outcomes if the dispute were to proceed to trial;
 - g. may consider interests of the parties that are connected or relevant to, even if not within the four corners of, the dispute as litigated in the pleadings;
 - h. at all times maintain his/her impartiality, and withdraw or recuse him/herself if, at any time, s/he cannot so maintain that impartiality or concludes that there is a reasonable belief or perception by affected parties, or their counsel, of a lack of impartiality; and
 - i. while encouraged to do so only as a matter of last resort, a JDR Justice should not hesitate to withdraw if s/he cannot continue a JDR having regard to maintenance of proper judicial decorum and conduct, or the actions of the parties and/or counsel make the JDR proceeding unfair or having the potential prospect of unfairness.
17. To assist the parties in the post-JDR enforcement, pursuant to the Rules of Court, of any settlement reached by the parties at a JDR, the JDR justice should, prior to concluding the JDR, beseech the parties

and/or their counsel to, or on his/her own motion, prepare a written memorandum of the terms of the settlement.

Party and Counsel Good Faith regarding JDR

18. The JDR justice insist on good faith by parties and their counsel in conducting JDRs, and take steps to correct or punish (by costs) extreme examples of bad faith.

Rules of Court, Practice Notes and Notices to the Profession

19. The JDRC is authorized and directed to make recommendations to the Chief Justices and/or the Council of the Court, and, after acceptance thereof, to carry those recommendations through to other bodies (including the Rules of Court Committee) as necessary or appropriate, in respect of the Rules of Court, Practice Notes and Notices to the Profession, regarding the above, or any other, provisions pertaining to JDRs.

EVALUATION

20. Including the requirement in Recommendation 6.b., the JDRC take active steps to be educated as to, to develop, and to utilize, appropriate methodology and statistical mechanisms to continually, and/or periodically (not less than every 10 years), monitor and evaluate the JDR Program and its components and make recommendations to the Chief Justices and the Council of the Court that arise therefrom.

ANCILLARY RECOMMENDATIONS

21. a. such other ancillary (and sometimes minor, but important) recommendations as are contained within the Evaluation Report, whether related specifically to the JDR Program or other Court functions, but which are not specifically included in this summary, as JDRC may endorse in whole or in part.

b. recognizing that there is evidence within the Survey that the time to disposition rate is excessive in many cases (cases seem to be in the court system for an unusually long time), that targeted case management be used by the Court, through case management officers to determine the reason therefor, and to make recommendations for active case management or some form of dispute resolution - with emphasis on cases with a non-disposition rate of more than 5 years.

June 1, 2009

Justice John D. Rooke

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APPENDIX 1 - LAWYER'S SURVEY FORM
COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISPUTE RESOLUTION (JDR)

PARTICIPANTS' SURVEY - LAWYERS - 2007 - 2008

The Court of Queen's Bench of Alberta (Court), informally since the late 1980s, and on a more formalized basis since June 1996, has been conducting a program of Judicial Dispute Resolution (JDR) to assist in the settlement of civil and family litigation. The Court has some anecdotal information about what participants think of the JDR program, but no hard quantitative and qualitative information. It is time to evaluate the program and make any necessary or advisable improvements to insure the program remains relevant and of assistance to litigants.

Coincidentally with this need for evaluation, Justice John Rooke, a senior member of the Court, with a significant amount of education and experience as a JDR Justice, is scheduled to enroll in a Master of Laws course in Dispute Resolution at the Faculty of Law, University of Alberta in September 2008, and intends to do research and write a thesis on the Court's JDR Program, its successes and challenges, and to make any appropriate recommendations for improvement.

Thus, this Survey of Participants in the Court's JDR program, approved by myself and Associate Chief Justice Wittmann, is to assist in this research and review. The Survey has also received approval from the University of Alberta Arts, Sciences and Law Research Ethics Board for the conduct of research. Through this stringent process, the identity of the client, the lawyer and the JDR Justice, the fact of completion of the Survey and the information from it are all confidential - see the details in the "Limits to Survey...." below.

As a recent participant in the Court's JDR process and procedure, you will have important insights to offer that can help to improve the delivery of the Court's JDR program and services in the future. Reference is made to "process and procedure" because the Survey is only designed to evaluate the JDR process and procedure, not the merits of your litigation or the impact of JDR on it.

Therefore, I request your assistance in this Survey - to answer as many questions (both "Basic" and "Additional") as you wish and send in the results.

I thank you in advance for taking the time to help ensure that the Court's JDR Program remains relevant and helpful to litigants in the future.

September 2007

Chief Justice A.H. Wachowich

COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISPUTE RESOLUTION (JDR)
PARTICIPANTS' SURVEY - 2007 - 2008

Please take a few minutes to answer the questions in the attached **Survey** (both "**Basic**" and "**Additional**") and place it in the enclosed, stamped, self-addressed, envelope, marked "SURVEY".

If you agree to participate in a **potential future interview** (see details below) complete the **Consent** form and place it in the separate enclosed, stamped, self-addressed, envelope, marked "INTERVIEW CONSENT".

Return it/them

- (a) directly to the JDR Trial Coordinator's office where your JDR was conducted, for immediate and confidential forwarding to Justice Rooke, or
- (b) by mail directly to Justice Rooke.

Your consent to participate in this Participants' Survey is considered implicit from your completion and return of the Participants' Survey. For details as to the confidentiality of the Survey and its information - see "Limits to Survey" below.

**Limits to Survey, Confidentiality and Access to Information,
and Further Information**

Please note that this Survey is Completely Voluntary. It:

- does not:

- seek any information about the identity of the client, or the lawyer, or the Justice conducting the JDR, or allow identification of any of the three (the "control number" on the Survey does not identify any of the above and is given out randomly only to allow us a quality control measure to determine if different responders are participants in the same JDR)
- require you to participate in the Survey or any potential future Interview
- require any further follow-up from you
- require you to answer any question in the Survey you do not wish to answer

- **does:**

- ensure your participation is confidential
- invite you to complete all questions in the Survey (“**Basic**” and “**Voluntary**”) and return the completed Survey to Justice Rooke
- invite you to volunteer for a **potential future** interview, if, after all Surveys are completed, it is decided to conduct interviews.

Security, Confidentiality and Limits to Access to Information:

The Survey has received approval from the Chief Justice of the Court of Queen’s Bench and the University of Alberta Arts, Sciences and Law Research Ethics Board for the conduct of research. Through this stringent process, the completion of the Survey and the information from it is confidential.

The completed Participants’ Surveys and Interview Consent forms will be separated and maintained in a secure place by Justice Rooke. When received by Justice Rooke they will be processed either by him or only by his private administrative assistant.

All information will be aggregated on an anonymous basis and be the subject of a report and the Thesis to result therefrom. All original data containing and, in particular, any private information, will be preserved for the period dictated by the research policies of the University of Alberta, but, subject thereto, will be destroyed once the Thesis is completed and successfully defended as required.

Please note that no information from the answers to your Survey will be provided to the JDR Justice (who will not be identified by the Survey) or any other Justice of the Court of Queen’s Bench. Additionally, if Justice Rooke were to learn the identity of any client (from any source, including the Interview Consent form), he will not participate in any future judicial proceeding involving that client.

Further information is available from:

Chief Justice Wachowich
c/o (780) 422-2293

Associate Chief Justice Wittmann
c/o (430) 297-7575

Professor Wayne Renke
Acting Associate Dean (Graduate Studies & Research)
Faculty of Law, University of Alberta,
c/o (780) 492-9809

Justice John D. Rooke
c/o (403) 297-7017

- E1. What type of JDR did you participate in (choose all that apply):
- a. Negotiation or Mediation (your client and opposite party negotiated, with your assistance, with a Justice facilitating and chairing the session, but not providing any opinions)
 - b. Evaluative Mediation (the Justice not only facilitated and chaired the session, but provided, or was available to provide, opinions (on the law or evidence, or the amount of damages) and/or evaluations of the risk of success or failure at trial)
 - c. Mini-Trial (you and/or your client presented information and argument on your client's case to the JDR Justice, who gave a non-binding opinion for your guidance)
 - d. Binding JDR (a Negotiation or Mediation in which the parties agreed that the JDR Justice was to give a binding opinion or decision if the negotiation was not successful)
 - e. Other (specify) _____
- E2. Who recommended that your client agree to go to a JDR? (choose all that apply)
- Your client's recommendation
 - Lawyer's recommendation
 - Your recommendation
 - Lawyer on other side
 - A Justice's recommendation
 - Other (specify) _____
- E3. Once you started considering a JDR, what motivated your client to agree to go to a JDR? (choose all that apply)
- Less cost than trial
 - More settlement options than trial
 - Quicker than trial
 - Less risk than trial
 - Less formal and stressful than trial
 - To get a judicial opinion
 - Needed to settle rather than trial - ongoing business, community or personal relationship
 - Other (specify) _____
- E4. Did the JDR Justice have a Pre-JDR meeting or conference:
- Yes
 - No
- If "Yes":
- a. Was it at the instigation of the JDR Justice or one of the parties:
 - JDR Justice
 - One of the Parties
 - b. Was the Pre-JDR useful? (1=low; 5=high)
 1 2 3 4 5
 - c. Do you believe the benefit of the Pre-JDR could have been equally accomplished by an explicit letter from the JDR Justice requesting information?
 1 2 3 4 5

Why: _____

If "No":

- d. Was a letter requesting information provided to you?
 Yes No
 If "Yes" was it adequate?(1 = barely adequate;
 5 = highly inadequate) 1 2 3 4 5

- E5. Do you have any further comments on Pre-JDR Information that might be useful to the JDR process?

F. JDR SUCCESS

- F1. Was the JDR successful (ended the litigation), unsuccessful (did not end the litigation), or partially successful (resolved one or more issues):
 Not successful on any issue
 Successful
 on all issues
 on some issues (choose the closest)
 25% issues 50% issues 75% issues
 a. When was the JDR successful on all issues, or some issues, or significantly contributed to ultimate success?
 At the JDR
 After the JDR (choose the closest time frame)
 1 week later 1 month later 3 months later
 6 months later or more
 Other
 (specify) _____

G. JUDICIAL PARTICIPATION

- G1. Did you and/or your client caucus with the JDR Justice, separate from the other side?
 Yes No
 Why/why not? _____
 a. Was it/might it have been useful?
 Yes No
 Why/why not? _____

H. JUDICIAL QUALITIES

(Note: The purpose of this section is to use your experience, in the context of this JDR, to identify the best qualities of a JDR Justice. It is neither to identify the JDR Justice, nor to be used to provide a personal evaluation to the JDR Justice)

H1. How would you rate the JDR Justice's overall qualities in this JDR (including: preparation, knowledge, assessment of the issues, approach, style, manner, role in success, or other)?
(1 = poor and 5 = excellent)

1 2 3 4 5

Why - what was positive or negative?

H2. If you had a choice, would you choose this JDR Justice for a future JDR?

Yes No

Why?

I. OTHER

11. Overall, as to the process and procedures (not the result of your litigation), how do you rate your JDR experience in this case? (1=negative; 5=positive)

1 2 3 4 5

12. Would you recommend JDR to others or use it again if you had another dispute to resolve? (1 = definitely not; 3 = indifferent; and 5 = definitely yes)

1 2 3 4 5

What, if any changes would like to see if you used JDR again?

13. Is there anything that we didn't ask you about on which you would like to comment? Do you believe the JDR program can be improved - if so, how? Do you have any other comments?

INTERVIEWS

If it is decided to conduct **future interviews** of JDR participants (after completion of all Surveys, after June 2008), would you be willing to agree to an interview?

Yes No

If "Yes", please provide your contact information on the attached **Interview Consent** form. Separate the **Interview Consent** form from the **Survey** and provide the 2 forms in separate envelopes marked "**SURVEY**" and "**INTERVIEW CONSENT**" to Justice Rooke.

Thank you for taking the time to complete this survey of "**Basic Questions**". However, if you have the time and interest, it would be very much appreciated if you would answer some "**Additional Questions**" to provide even more assistance in evaluating the Court's JDR Program.

Justice John D. Rooke

LAWYER SURVEY - ADDITIONAL QUESTIONS

(Some questions may have more than one answer - choose all that apply.
For additional comments, add at the end.)

J. JDR TIMING & NEXT STEPS

- J1. Which of the following identifies the stage of your litigation at the time of the JDR? (choose all that apply)
- Before Examinations for Discovery
 - After Examinations for Discovery, but before Experts Hired
 - After Examination for Discovery and Expert Reports
 - When ready for trial
 - Other (specify) _____
- J2. From your total JDR experience, when in this type of case do you think that a JDR is/would have been most useful (choose all that apply)?
- Before Examinations for Discovery
 - After Examinations for Discovery, but before Experts Hired
 - After Examination for Discovery and Expert Reports
 - When ready for trial
 - Earlier than when this JDR was held
 - How much earlier - _____
 - Later than when this JDR was held
 - How much later - _____
 - Other (specify) _____
- What are the reasons for your choice(s) of answer?

- J3. Whether or not your JDR was successful, if it was not/had not been successful, what will be/would have been, the next litigation step? (choose all that apply)
- Further disclosure of documents or Examination for Discovery of parties
 - Further experts
 - Trial - within 1 month 6 month 1 year more than 1 year
 - Other (specify) _____
 - Don't know or not sure

K. COMPARISON TO OTHER JDRs

(*If you have not previously participated in other JDRs, go to section "L"*)

- K1. How did the procedure and process of this JDR compare with the previous JDR(s)? (1 = worse; 5 = better)

1 2 3 4 5

Why?

- K2. Was this JDR with the same JDR Justice as the previous JDR?
 Yes No
 If "Yes", did the JDR Justice's participation affect your answer to K1?
 Yes No
 If "Yes", how (specify):
-

L. EXTENT OF JUDICIAL PARTICIPATION

*(*Answer only L1, L2, or L3 - being the closest to the type of JDR you had*)*

- L1. Mediation and/or Evaluative Mediation - Did the JDR Justice offer any opinions (on the law, evidence, damage, or risk of success/failure at trial) on his/her own initiative?
 Yes No
 If "No", was the JDR Justice asked to give an opinion?
 Yes No
 Did the JDR Justice provide an opinion after being asked
 Yes No

OR

- L2. Mini-Trial - Did the JDR Justice participate after giving the opinion?
 Yes No
 If "No", do you wish s/he would have participated?
 Yes No

OR

- L3. Binding JDR - Was a binding opinion or decision necessary because negotiation or mediation was not successful?
 Yes No
 If "Yes", was the Binding opinion or decision necessary
 on one issue only, or
 on more than one issue, or
 on all issues, or
 other (specify)

-
- L4. Did you seek a choice of JDR Justice?
 Yes No
 If "Yes", did you get one of your choosing?
 Yes No
 IF "No", did you not seek a choice because:
 It did not matter which JDR Justice I got
 I didn't think we could request a specific JDR Justice
 Other (specify)
-

L5. Regardless of your answers to L4., as a result of your experience in the JDR just completed in this case, do you think a choice of the JDR Justice would be helpful in the future?

Yes No

Why?

M. ROLE OF JDR JUSTICE IN SUCCESS OR LACK OF SUCCESS

M1. Would you have achieved the same outcome of success/lack of success, without the JDR Justice, merely by a negotiation session with the parties and/or lawyers present?

Yes No Not Sure

Why?

M2. Did involvement of the JDR Justice significantly improve the prospects for, or the achievement of, settlement?

Yes No

If "Yes", specify the degree to which it helped: (1 = little; 5 = a lot)

1 2 3 4 5

How? (specify) _____

(*If settlement was achieved on all issues, go to section "N"*)

M3. If settlement was not achieved on all issues, did this JDR assist you to obtain further information relevant to the trial, clarify the remaining issues for trial, or assist you get ready for trial, or otherwise assist you in achieving ultimate success?

Yes No Not sure

Assisted in some other way (specify):

How did it assist? _____

N. JUDICIAL PARTICIPATION

N1. Did you and/or your client **ask** the JDR Justice to caucus with you and your lawyer, separate from the other side?

Yes No

If "Yes", did the JDR Justice agree or refuse?

Agreed Refused

If the JDR Justice refused, did s/he give a reason?

Yes No

If "Yes", what was the reason:

If "No", why did you not ask the JDR Justice to caucus with you?

- it would not have been helpful
- didn't know the option was open
- don't know/not sure
- other (specify)

- N2. Did the JDR Justice (without being requested) **offer** to caucus with you and your client?
 Yes No
- N3. Whether the JDR Justice was asked or offered, did the JDR Justice actually caucus with you and your client?
 Yes No
 If "Yes", did the JDR Justice discuss the strength and weaknesses of your case?
 Yes No In between or not sure
 If "Yes", was it helpful?
 Yes No In between or not sure
 Why? _____
 If "No", do you wish s/he would have caucused with you and your client?
 Yes No
 Why? _____
- N4. If you were to do another JDR would you wish the JDR Justice to caucus with you and your client?
 Yes No
 Why? _____

O. JUDICIAL QUALITIES

(Note: The purpose of this section is to use your experience, in the context of this JDR, to identify the best qualities of a JDR Justice. It is neither to identify the JDR Justice, nor to be used to provide a personal evaluation to the JDR Justice)

(*Rate the qualities where 1 = poor; 5 = excellent*)

- O1. In terms of **GENERAL APPROACH**, was/did the JDR Justice:
- Prepared (appeared to have read all or most relevant material)?
 1 2 3 4 5
 - Knowledgeable (or appeared to be so) on the law relevant to your dispute?
 1 2 3 4 5
 - Explain the JDR process to your client:
 Yes No
 If "Yes", was the explanation helpful? (1 = little; 5= most)
 1 2 3 4 5
 If "No", might an explanation have been helpful?
 Yes No
 - Polite, courteous and pleasant (as opposed to impolite, discourteous and gruff)?
 1 2 3 4 5
 - Accommodating and sensitive to you (and your client) telling your story to him/her and to the other side?

1 2 3 4 5

f. Frank, but fair in expressing his/her views on your risks in the dispute?

1 2 3 4 5

O2. How would you describe the JDR Justice's **SPECIFIC ROLE** in attempting to obtain a settlement in your JDR, in relation to the following descriptors?

a. Assertive (#1) or relaxed/laid back (#5)?

1 2 3 4 5

b. Not very innovative (#1) or very innovative (#5) in suggesting options or ways to reach a settlement that you and your client did not think about?

1 2 3 4 5

c. Merely left it to the parties to achieve a settlement (#1) or worked hard to achieve a settlement (#5)?

1 2 3 4 5

Exerted pressure on you to settle generally or in a specific way (1=low; 5=high)?

1 2 3 4 5

Was that appropriate?

Yes No

Why? _____

Exerted pressure on the other side to settle generally or in a specific way (1=low; 5=high)?

1 2 3 4 5

Was that appropriate?

Yes No

Why? _____

d. Highly emotional (#1), or cool and logical (#5)

1 2 3 4 5

e. Patient with the parties and their participation (1=low; 5=high)

1 2 3 4 5

f. Appeared impartial and open minded (1=low; 5=high)

1 2 3 4 5

O3. Over all, how do you measure the effectiveness of the JDR Justice (1=low; 5=high):

1 2 3 4 5

What would you say described the most significant qualities or lack of qualities of the JDR Justice bearing on his/her effectiveness?

—

—

-
- O4. Based on your (above) assessment, if you were doing another JDR, what is the rating you would give as to whether you would choose this JDR Justice (if you had a choice) for that future JDR? (1=low; 5=high)
1 2 3 4 5
- O5. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **style** in JDR proceedings, **in terms of achieving a settlement**: (1=negative; 5=positive):
- a. Aggressive
1 2 3 4 5
 - b. Assertive
1 2 3 4 5
 - c. Gently Persistent
1 2 3 4 5
 - d. Carefree (none of the above)
1 2 3 4 5
 - e. Other (specify)
-
- O6. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **involvement** in JDR proceedings, **in terms of achieving a settlement**: (1=negative; 5=positive):
- a. Control the negotiations
1 2 3 4 5
 - b. Let the parties/lawyers control the negotiations
1 2 3 4 5
 - c. Be neutral (merely offer suggestions/options others had not raised)
1 2 3 4 5
 - O6d. Other (specify)
-
- O7. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **formality** in JDR proceedings: (1=negative; 5=positive):
- a. Formal/structured
1 2 3 4 5
 - b. Informal/easy going
1 2 3 4 5
- O8. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, what **other judicial qualities** would you like to see in JDR proceedings:(specify)
-
-

P. **OTHER**

P1. Having considered these "Additional" questions, is there anything that we didn't ask you about on which you would like to comment? Do you have further believes as to whether the JDR program can be improved - if so, how? Do you have any additional comments?

Thank you again for taking the time to complete this Survey, including the "**Additional Questions**". Your answers will provide us with significant assistance in evaluating the Court's JDR Program.

Justice John D. Rooke

584
COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISPUTE RESOLUTION (JDR)
PARTICIPANTS' SURVEY - 2007 - 2008

CONSENT TO BE APPROACHED FOR AN INTERVIEW - LAWYER

I have answered a Participants' Survey on the Court's JDR Program, administered by Justice Rooke. I understand that I am to place the completed Survey in a separate envelope marked "SURVEY".

If, after the all Surveys have been completed (after June 2008), Justice Rooke decides to interview Survey participants, I have set out below my wishes on further participation and I understand that I am to place this Interview Consent form in a separate envelope marked "INTERVIEW CONSENT".

I understand that I do not have to take part in an interview and that I can withdraw from agreeing to an interview before it is conducted, and at any time after it starts, if I wish to do so.

Please check (√) one box in response to each of the following questions:

If interviews are conducted:

	<u>Yes</u>	<u>No</u>
I have completed the "Basic" Survey	<input type="checkbox"/>	<input type="checkbox"/>
I have completed the "Additional" Survey	<input type="checkbox"/>	<input type="checkbox"/>
I agree to take part in an interview.	<input type="checkbox"/>	<input type="checkbox"/>
I agree to audio-taping my interview.	<input type="checkbox"/>	<input type="checkbox"/>
I would like to have my contributions to the research acknowledged by having my name listed in the reports that result.	<input type="checkbox"/>	<input type="checkbox"/>
I agree to provide contact information so that I may be contacted for an interview, if interviews are conducted, and I understand that at the time of any contact for an interview I may then accept or decline to be actually interviewed as I wish.	<input type="checkbox"/>	<input type="checkbox"/>

Name: Please print clearly: _____

Signature: _____

Telephone: (____) ____ - ____

E-Mail: (please print clearly) _____

APPENDIX 2 - CLIENTS SURVEY FORM**COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISPUTE RESOLUTION (JDR)****PARTICIPANTS' SURVEY - CLIENTS - 2007 - 2008**

The Court of Queen's Bench of Alberta (Court), informally since the late 1980s, and on a more formalized basis since June 1996, has been conducting a program of Judicial Dispute Resolution (JDR) to assist in the settlement of civil and family litigation. The Court has some anecdotal information about what participants think of the JDR program, but no hard quantitative and qualitative information. It is time to evaluate the program and make any necessary or advisable improvements to insure the program remains relevant and of assistance to litigants.

Coincidentally with this need for evaluation, Justice John Rooke, a senior member of the Court, with a significant amount of education and experience as a JDR Justice, is scheduled to enroll in a Master of Laws course in Dispute Resolution at the Faculty of Law, University of Alberta in September 2008, and intends to do research and write a thesis on the Court's JDR Program, its successes and challenges, and to make any appropriate recommendations for improvement.

Thus, this Survey of Participants in the Court's JDR program, approved by myself and Associate Chief Justice Wittmann, is to assist in this research and review. The Survey has also received approval from the University of Alberta Arts, Sciences and Law Research Ethics Board for the conduct of research. Through this stringent process, the identity of the client, the lawyer and the JDR Justice, the fact of completion of the Survey and the information from it are all confidential - see the details in the "Limits to Survey...." below.

As a recent participant in the Court's JDR process and procedure, you will have important insights to offer that can help to improve the delivery of the Court's JDR program and services in the future. Reference is made to "process and procedure" because the Survey is only designed to evaluate the JDR process and procedure, not the merits of your litigation or the impact of JDR on it.

Therefore, I request your assistance in this Survey - to answer as many questions (both "Basic" and "Additional") as you wish and send in the results.

I thank you in advance for taking the time to help ensure that the Court's JDR Program remains relevant and helpful to litigants in the future.

September 2007

Chief Justice A.H. Wachowich

COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISPUTE RESOLUTION (JDR)
PARTICIPANTS' SURVEY - 2007 - 2008

Please take a few minutes to answer the questions in the attached **Survey** (both "**Basic**" and "**Additional**") and place it in the enclosed, stamped, self-addressed, envelope, marked "**SURVEY**".

If you agree to participate in a **potential future interview** (see details below) complete the **Consent** form and place it in the separate enclosed, stamped, self-addressed, envelope, marked "**INTERVIEW CONSENT**".

Return it/them

- (a) directly, or through your lawyer, to the JDR Trial Coordinator's office where your JDR was conducted, for immediate and confidential forwarding to Justice Rooke, or
- (b) by mail directly to Justice Rooke.

Your consent to participate in this Participants' Survey is considered implicit from your completion and return of the Participants' Survey. For details as to the confidentiality of the Survey and its information - see "Limits to Survey" below.

**Limits to Survey, Confidentiality and Access to Information,
and Further Information**

Please note that this Survey is Completely Voluntary and Confidential.

It:

- does not:

- require you to participate in the Survey or any potential future Interview
- require any further follow-up from you
- require you to answer any question in the Survey you do not wish to answer
- seek any information about the identity of the client, or the lawyer, or the Justice conducting the JDR, or allow identification of any of the three (the “control number” on the Survey does not identify any of the above and is given out randomly only to allow us a quality control measure to determine if different responders are participants in the same JDR)

- **does:**

- ensure your participation is confidential
- invite you to complete all questions in the Survey (“**Basic**” and “**Voluntary**”) and return the completed Survey to Justice Rooke
- invite you to volunteer for a **potential future** interview, if, after all Surveys are completed, it is decided to conduct interviews.

Security, Confidentiality and Limits to Access to Information:

The Survey has received approval from the Chief Justice of the Court of Queen’s Bench and the University of Alberta Arts, Sciences and Law Research Ethics Board for the conduct of research. Through this stringent process, the completion of the Survey and the information from it is confidential.

The completed Participants’ Surveys and Interview Consent forms will be separated and maintained in a secure place by Justice Rooke. When received by Justice Rooke they will be processed either by him or only by his private administrative assistant.

All information will be aggregated on an anonymous basis and be the subject of a report and the Thesis to result therefrom. All original data containing and, in particular, any private information, will be preserved for the period dictated by the research policies of the University of Alberta, but, subject thereto, will be destroyed once the Thesis is completed and successfully defended as required.

Please note that no information from the answers to your Survey will be provided to the JDR Justice (who will not be identified by the Survey) or any other Justice of the Court of Queen’s Bench. Additionally, if Justice Rooke

were to learn the identity of any client (from any source, including the Interview Consent form), he will not participate in any future judicial proceeding involving that client.

Further information is available from:

Chief Justice Wachowich
c/o (780) 422-2293

Associate Chief Justice Wittmann
c/o (430) 297-7575

Professor Wayne Renke
Acting Associate Dean (Graduate Studies & Research)
Faculty of Law, University of Alberta,
c/o (780) 492-9809
Justice John D. Rooke
c/o (403) 297-7017

D3. Have you participated in JDRs before this JDR?

Yes No

If "Yes", how many? 1 Less than 5 5 - 10 10 or more

E. TYPE OF JDR

E1. What type of JDR did you participate in (choose all that apply):

a. Negotiation or Mediation (you and opposite party negotiated with a Justice facilitating and chairing the session, but not providing any opinions)

b. Evaluative Mediation (the Justice not only facilitated and chaired the session, but provided, or was available to provide, opinions (on the law or evidence, or the amount of damages) and/or evaluations of the risk of success or failure at trial)

c. Mini-Trial (you and/or your lawyer presented information and argument on your case to the JDR Justice, who gave a non-binding opinion for your guidance)

d. Binding JDR (a Negotiation or Mediation in which the parties agreed that the JDR Justice was to give a binding opinion or decision if the negotiation was not successful)

e. Other (specify) _____

f. Not sure/don't know

E2. Who recommended that you agree to go to a JDR? (choose all that apply)

Your own recommendation

Lawyer's recommendation

Your lawyer

Lawyer on other side

A Justice's recommendation

Other (specify) _____

E3. Once you started considering a JDR, what motivated you to agree to go to a JDR? (choose all that apply)

Less cost than trial

More settlement options than trial

Quicker than trial

Less risk than trial

Less formal and stressful than trial

To get a judicial opinion

Needed to settle rather than trial - ongoing business, community or personal relationship

Other (specify) _____

F. JDR SUCCESS

F1. Was the JDR successful (ended the litigation), unsuccessful (did not end the litigation), or partially successful (resolved one or more issues):

Not successful on any issue

- Successful
 - on all issues
 - on some issues (choose the closest)
 - 25% issues 50% issues 75% issues
 - a. When was the JDR successful on all issues, or some issues, or significantly contributed to ultimate success?
 - At the JDR
 - After the JDR (choose the closest time frame)
 - 1 week later 1 month later 3 months later
 - 6 months later or more
 - Other
(specify) _____

G. JUDICIAL PARTICIPATION

- G1. Did you and/or your lawyer meet with the JDR Justice, separate from the other side (called "caucusing")?
- Yes No
- Why/why not? _____
- a. Was it/might it have been useful?
- Yes No
- Why/why not? _____

H. JUDICIAL QUALITIES

(Note: The purpose of this section is to use your experience, in the context of this JDR, to identify the best qualities of a JDR Justice. It is neither to identify the JDR Justice, nor to be used to provide a personal evaluation to the JDR Justice)

- H1. How would you rate the JDR Justice's overall qualities in this JDR (including: preparation, knowledge, assessment of the issues, approach, style, manner, role in success, or other)? (1 = poor and 5 = excellent)
- 1 2 3 4 5
- Why - what was positive or negative?
- _____
- _____

- H2. If you had a choice, would you choose this JDR Justice for a future JDR?
- Yes No
- Why?
- _____

I. OTHER

- I1. Overall, as to the process and procedures (not the result of your litigation), how do you rate your JDR experience in this case? (1=negative; 5=positive)
- 1 2 3 4 5

- 12. Would you recommend JDR to others or use it again if you had another dispute to resolve? (1 = definitely not; 3 = indifferent; 5 = definitely yes)

1 2 3 4 5

What, if any changes would like to see if you used JDR again?

- 13. Is there anything that we didn't ask you about on which you would like to comment? Do you believe the JDR program can be improved - if so, how? Do you have any other comments?

INTERVIEWS

If it is decided to conduct **future interviews** of JDR participants (after completion of all Surveys, after June 2008), would you be willing to agree to an interview?

Yes No

If "Yes", please provide your contact information on the attached **Interview Consent** form. Separate the **Interview Consent** form from the **Survey** and provide the 2 forms in separate envelopes marked "**SURVEY**" and "**INTERVIEW CONSENT**" to Justice Rooke.

Thank you for taking the time to complete this survey of "**Basic Questions**". However, if you have the time and interest, it would be very much appreciated if you would answer some "**Additional Questions**" to provide even more assistance in evaluating the Court's JDR Program.

Justice John D. Rooke

CLIENTS SURVEY - ADDITIONAL QUESTIONS

(Some questions may have more than one answer - choose all that apply.
For additional comments, add at the end.)

J. JDR TIMING & NEXT STEPS

- J1. Which of the following identifies the stage of your litigation at the time of the JDR? (choose all that apply)
- Before Examinations for Discovery
 - After Examinations for Discovery, but before Experts Hired
 - After Examination for Discovery and Expert Reports
 - When ready for trial
 - Other (specify) _____
 - Don't know or not sure
- J2. From your total JDR experience, when in this type of case do you think that a JDR is/would have been most useful (choose all that apply)?
- Before Examinations for Discovery
 - After Examinations for Discovery, but before Experts Hired
 - After Examination for Discovery and Expert Reports
 - When ready for trial
 - Earlier than when this JDR was held
 - How much earlier - _____
 - Later than when this JDR was held
 - How much later - _____
 - Other (specify) _____
 - Don't know or not sure

What are the reasons for your choice(s) of answer?

- J3. Whether or not your JDR was successful, if it was not/had not been successful, what will be/would have been, the next litigation step? (choose all that apply)
- Further disclosure of documents or Examination for Discovery of parties
 - Further experts
 - Trial - within 1 month 6 month 1 year more than 1 year
 - Other (specify) _____
 - Don't know or not sure

K. COMPARISON TO OTHER JDRs

*(*If you have not previously participated in other JDRs, go to section "L"*)*

- K1. How did the procedure and process of this JDR compare with the previous JDR(s)? (1 = worse,;5 = better)

1 2 3 4 5

Why?

- K2. Was this JDR with the same JDR Justice as the previous JDR?
 Yes No
 If "Yes", did the JDR Justice's participation affect your answer to K1?
 Yes No
 If "Yes", how (specify):
-

L. EXTENT OF JUDICIAL PARTICIPATION

(*Answer only L1, L2, or L3 - being the closest to the type of JDR you had*)

- L1. Mediation and/or Evaluative Mediation - Did the JDR Justice offer any opinions (on the law, evidence, damage, or risk of success/failure at trial) on his/her own initiative?
 Yes No
 If "No", was the JDR Justice asked to give an opinion?
 Yes No
 Did the JDR Justice provide an opinion after being asked
 Yes No

OR

- L2. Mini-Trial - Did the JDR Justice participate after giving the opinion?
 Yes No
 If "No", do you wish s/he would have participated?
 Yes No

OR

- L3. Binding JDR - Was a binding opinion or decision necessary because negotiation or mediation was not successful?
 Yes No
 If "Yes", was the Binding opinion or decision necessary
 on one issue only, or
 on more than one issue, or
 on all issues, or
 other (specify)

M. ROLE OF JDR JUSTICE IN SUCCESS OR LACK OF SUCCESS

- M1. Would you have achieved the same outcome of success/lack of success, without the JDR Justice, merely by a negotiation session with the parties and/or lawyers present?
 Yes No Not Sure
 Why?
-
-

- M2. Did involvement of the JDR Justice significantly improve the prospects

for, or the achievement of, settlement?

- Yes No

If "Yes", specify the degree to which it helped: (1 = little; 5 = a lot)

- 1 2 3 4 5

How? (specify) _____

(*If settlement was achieved on all issues, go to section "N"*)

M3. If settlement was not achieved on all issues, did this JDR assist you to obtain further information relevant to the trial, clarify the remaining issues for trial, or assist you get ready for trial, or otherwise assist you in achieving ultimate success?

- Yes No Not sure

Assisted in some other way (specify):

How did it assist? _____

N. JUDICIAL PARTICIPATION

N1. Did you and/or your lawyer **ask** the JDR Justice to meet with you and your lawyer, separate from the other side (called "caucusing")?

- Yes No

If "Yes", did the JDR Justice agree or refuse?

- Agreed Refused

If the JDR Justice refused, did s/he give a reason?

- Yes No

If "Yes", what was the reason:

If "No", why did you not ask the JDR Justice to caucus with you?

- it would not have been helpful
- didn't know the option was open
- procedure was in the hands of the lawyers
- don't know/not sure
- other (specify)

N2. Did the JDR Justice (without being requested) **offer** to caucus with you and your lawyer?

- Yes No

N3. Whether the JDR Justice was asked or offered, did the JDR Justice actually caucus with you and your lawyer?

- Yes No

If "Yes", did the JDR Justice discuss the strength and weaknesses of your case?

Yes No In between or not sure

If "Yes", was it helpful?

Yes No In between or not sure

Why? _____

If "No", do you wish s/he would have caucused with you and your lawyer?

Yes No

Why? _____

N4. If you were to do another JDR would you wish the JDR Justice to caucus with you and your lawyer?

Yes No Why? _____

O. JUDICIAL QUALITIES

(Note: The purpose of this section is to use your experience, in the context of this JDR, to identify the best qualities of a JDR Justice. It is neither to identify the JDR Justice, nor to be used to provide a personal evaluation to the JDR Justice)

(*Rate the qualities where 1 = poor; 5 = excellent*)

O1. In terms of **GENERAL APPROACH**, was/did the JDR Justice:

a. Prepared (appeared to have read all or most relevant material)?

1 2 3 4 5

b. Knowledgeable (or appeared to be so) on the law relevant to your dispute?

1 2 3 4 5

c. Explain the JDR process to you:

Yes No

If "Yes", was the explanation helpful? (1 = little; 5 = most)

1 2 3 4 5

If "No", might an explanation have been helpful?

Yes No

d. Polite, courteous and pleasant (as opposed to impolite, discourteous and gruff)?

1 2 3 4 5

e. Accommodating and sensitive to you (and your lawyer) telling your story to him/her and to the other side?

1 2 3 4 5

f. Frank, but fair in expressing his/her views on your risks in the dispute?

1 2 3 4 5

O2. How would you describe the JDR Justice's **SPECIFIC ROLE** in attempting to obtain a settlement in your JDR, in relation to the following descriptors?

a. Assertive (#1) or relaxed/laid back (#5)?

1 2 3 4 5

b. Not very innovative (#1) or very innovative (#5) in suggesting options or ways to reach a settlement that you and your lawyer did not think about?

1 2 3 4 5

c. Merely left it to the parties to achieve a settlement (#1) or worked hard to achieve a settlement (#5)?

1 2 3 4 5

Exerted pressure on you to settle generally or in a specific way (1=low; 5=high)?

1 2 3 4 5

Was that appropriate?

Yes No

Why? _____

Exerted pressure on the other side to settle generally or in a specific way (1=low; 5=high)?

1 2 3 4 5

Was that appropriate?

Yes No

Why? _____

d. Highly emotional (#1), or cool and logical (#5)

1 2 3 4 5

e. Patient with the parties and their participation (1=low; 5=high)

1 2 3 4 5

f. Appeared impartial and open minded (1=low; 5=high)

1 2 3 4 5

O3. Over all, how do you measure the effectiveness of the JDR Justice (1=low; 5=high):

1 2 3 4 5

What would you say described the most significant qualities or lack of qualities of the JDR Justice bearing on his/her effectiveness?

—

—

O4. Based on your (above) assessment, if you were doing another JDR, what is the rating you would give as to whether you would choose this JDR Justice (if you had a choice) for that future JDR? (1=low; 5=high)

1 2 3 4 5

O5. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **style** in JDR proceedings, **in terms of achieving a settlement**: (1=negative; 5=positive):

- a. Aggressive
1 2 3 4 5
- b. Assertive
1 2 3 4 5
- c. Gently Persistent
1 2 3 4 5
- d. Carefree (none of the above)
1 2 3 4 5
- e. Other (specify)

O6. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **involvement** in JDR proceedings, **in terms of achieving a settlement**: (1=negative; 5=positive):

- a. Control the negotiations
1 2 3 4 5
- b. Let the parties/lawyers control the negotiations
1 2 3 4 5
- c. Be neutral (merely offer suggestions/options others had not raised)
1 2 3 4 5
- d. Other (specify)

O7. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **formality** in JDR proceedings: (1=negative; 5=positive):

- a. Formal/structured
1 2 3 4 5
- b. Informal/easy going
1 2 3 4 5

O8. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, what **other judicial qualities** would you like to see in JDR proceedings:(specify)

P. **OTHER**

P1. Having considered these "Additional" questions, is there anything that we didn't ask you about on which you would like to comment? Do you have further believes as to whether the JDR program can be improved - if so, how? Do you have any additional comments?

Thank you again for taking the time to complete this Survey, including the “**Additional Questions**”. Your answers will provide us with significant assistance in evaluating the Court’s JDR Program.

Justice John D. Rooke

602
COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISPUTE RESOLUTION (JDR)
PARTICIPANTS' SURVEY - 2007 - 2008

CONSENT TO BE APPROACHED FOR AN INTERVIEW - CLIENT

I have answered a Participants' Survey on the Court's JDR Program, administered by Justice Rooke. I understand that I am to place the completed Survey in a separate envelope marked "SURVEY".

If, after the all Surveys have been completed (after June 2008), Justice Rooke decides to interview Survey participants, I have set out below my wishes on further participation and I understand that I am to place this Interview Consent form in a separate envelope marked "INTERVIEW CONSENT".

I understand that I do not have to take part in an interview and that I can withdraw from agreeing to an interview before it is conducted, and at any time after it starts, if I wish to do so.

Please check (√) one box in response to each of the following questions:

If interviews are conducted:

	<u>Yes</u>	<u>No</u>
I have completed the "Basic" Survey	<input type="checkbox"/>	<input type="checkbox"/>
I have completed the "Additional" Survey	<input type="checkbox"/>	<input type="checkbox"/>
I agree to take part in an interview.	<input type="checkbox"/>	<input type="checkbox"/>
I agree to audio-taping my interview.	<input type="checkbox"/>	<input type="checkbox"/>
I would like to have my contributions to the research acknowledged by having my name listed in the reports that result.	<input type="checkbox"/>	<input type="checkbox"/>
I agree to provide contact information so that I may be contacted for an interview, if interviews are conducted, and I understand that at the time of any contact for an interview I may then accept or decline to be actually interviewed as I wish.	<input type="checkbox"/>	<input type="checkbox"/>

Name: Please print clearly: _____

Signature: _____

Telephone: (____) ____ - ____

E-Mail: (please print clearly) _____

JUDICIAL DISTRICT - TOTAL RESULTS	JD #	JDR Held ¹	JDR Surveyd	Survey Out			Survey In			% Return		
				C ²	L	T	C	L	T	C	L	T
RED DEER	10	18 ³	0	0	0	0	0	0	0	0	0	0
WETASKIWIN	12	3	3	6	6	12	1	3	4	67%	50%	34%
FORT McMURRAY	13	0	-	-	-	-	-	-	-	-	-	-
ST. PAUL	14	3	2	4	4	8	1	2	3	25%	50%	38%
TOTAL	-	631	606	1528	1448	2976	193	374	567	13%	26%	19%

December 8, 2008

COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISPUTE RESOLUTION (JDR)

QB JDR PARTICIPANTS' SURVEY - 2007 - 2008

REPORT ON LAWYERS' SURVEY RESULTS

LAWYER SURVEY - "BASIC QUESTIONS"

A. AREA

A1. At which judicial centre did you participate in a JDR:

- Calgary (01) - **176 = 47 %**⁴
- Edmonton (03) - **162 = 43 %**
- Red Deer (10)⁵
- Lethbridge (06) - **18 = 5%**
- Other
 - Drumheller (02) - **1 = <1 %**
 - Grande Prairie (04) - **3 = <1 %**
 - Medicine Hat (08) - **9 = 2 %**
 - Peace River (09)⁶
 - *Wetaskiwin* (12) - **3 = <1 %**
 - Fort McMurray (13)

- St. Paul (14) - **2 = <1 %**
- TOTAL - **374 = 100 %**

B. REPRESENTATION

B1. Did the other side(s) represent themself(ves) at the JDR or have a lawyer:

- Self-Represented - **1 = <1 %**
- Lawyer Represented - **364 = 97 %**
- Some of each - **7 = 2 %**
- No answer - **1 = <1 %**
- TOTAL - **374 = 100 %**

C. TYPE OF CASE & JDR TIMING

C1. What type of case were you involved in at the JDR:

- Personal Injury - **2443 = 65 %**
 - Motor Vehicle Collision - **204 = 83 %**
 - Slip and Fall - **15 = 6 %**
 - Other (specify) - **20 = 8 %**

Examples:⁷ **Disability⁸, falling debris, malpractice, mental suffering, death (several causes), skiing, prosthetic failure, boating, commercial host, fall from or within vehicle**

- Not specified or miss-categorized - **1 = <1 %**
- TOTAL - **244 = 100 %**

- Family Law - **73 = 20 %**
 - Matrimonial Property - **59 = 80 %⁹**
 - Parenting of Child(ren) - **25 = 34 %**
 - Child or Spousal Support - **48 = 66 %**
 - Other (specify) - **11 = 15 %**

- Examples: **Constructive trust (spousal or children)/unjust enrichment or common law property, attribution of income, validity of pre-nuptial agreement, pension division**

- Not specified or miss-categorized - **1 = <1 %**

- Employment - **10 = 3 %**
- Insurance Coverage - **6 = 2 %**

Contract Dispute - **18 = 5 %**

Other - **22 = 6 %**

- Examples: **Products liability, professional negligence, property damage, fire, subrogated insurance, estate, land transfer, building contract, commercial dispute, dependents relief, oppression, specific performance, dependent adult, loss of home, oilfield accident, estate**

Not Specified - **1 = <1%**

- TOTAL - **374 = 100 %**

C2. How long after the litigation commenced did this JDR take place?(to the closest time period)

1 year or less - **7 = 2 %**

1 - 2 years - **61 = 16 %**

2 - 4 years - **129 = 34 %**

4 - 6 years - **100 = 27 %**] **172 = 46%**] **301 = 80%**

6 or more years - **72 = 19 %**]]

Not sure - - = - %

- No answer - **5 = <1 %**

- TOTAL - **374 = 99 %**

D. YOUR ROLE

D1. Were you the lawyer at the JDR for the/a:

Plaintiff - **183 = 49 %**

Defendant - **180 = 48 %**

Third Party - **4 = 1 %**

Other - **6 = 2 %**

Examples: **Student, plaintiff or defendant by counterclaim, 2 roles (e.g. defendant and 3rd party), motor vehicle accidents claim fund, and SEF 44**

- No answer - **1 = <1 %**

- TOTAL: - **374 = 101%**

D2. In what capacity did your instructing client attend:

Personal - **220 = 59 %**

Corporate Agent - **24 = 6%**

Adjuster - **120 = 32 %**

Other - **9 = 2 %**

- Examples: *In house counsel, no client, client didn't attend, administrator of motor vehicle accidents claims fund, workers compensation, corporate agent and adjuster*

- No answer - **1 = <1%**

- TOTAL - **374 = 100 %**

D3. Have you participated in JDRs before this JDR?

Yes - **359 = 96%**

If "Yes", how many?

1 - **9 = 3 %**

Less than 5 - **54 = 15 %**

5 - 10 - **81 = 23%**

]291 = 81%

10 or more - **210 = 58%**

]

- No answer - **5 = 1%**

- TOTAL - **359 = 100%**

No - **14 = 4%**

- No answer - **1 = <1%**

- TOTAL - **374 = 101%**

E. TYPE OF JDR & PRE-JDR INFORMATION

E1. What type of JDR did you participate in (choose all that apply):

a. Negotiation or Mediation (your client and opposite party negotiated, with your assistance, with a Justice facilitating and chairing the session, but not providing any opinions)

- **134 = 36%**

b. Evaluative Mediation (the Justice not only facilitated and chaired the session, but provided, or was available to provide, opinions (on the law or evidence, or the amount of damages) and/or evaluations of the risk of success or failure at trial)

- **245 = 66 %**

c. Mini-Trial (you and/or your client presented information and argument on your client's case to the JDR Justice, who gave a non-binding opinion for your guidance)

- **110 = 29%**

- d. Binding JDR (a Negotiation or Mediation in which the parties agreed that the JDR Justice was to give a binding opinion or decision if the negotiation was not successful)
- **41 = 11%**

- e. Other - **5 = 1%**

Examples: ***Some combination of above - 3 with mini trials had caucusing (actual or offer) or mediation afterwards, and 1 entered order after evaluative mediation***

- No answer - **0 = 0%**

E2. Who recommended that your client agree to go to a JDR? (choose all that apply)

- Your client's recommendation - **26 = 7%**
 Lawyer's recommendation - **360 = 96%**
 Your recommendation - **323 = 90%**
 Lawyer on other side - **108 = 30%**
 A Justice's recommendation
 - **15 = 4%**
 Other - **1 = <1%**

Examples: ***"Common for my client to endorse JDR process."***

- No answer - **0 = 0%**

E3. Once you started considering a JDR, what motivated your client to agree to go to a JDR? (choose all that apply)

- Less cost than trial - **280 = 75%**
 More settlement options than trial - **151 = 40%**
 Quicker than trial - **270 = 72%**
 Less risk than trial - **207 = 55%**
 Less formal and stressful than trial - **193 = 52%**
 To get a judicial opinion - **253 = 68%**
 Needed to settle rather than trial - ongoing business, community or personal relationship - **45 = 12%**
 Other - **28 = 7%**

Examples: ***Avoid trial, judge would persuade other side, judicial opinion¹⁰ on quantum was helpful, "power of a judge as mediator", party needed to feel "day in court" and hear opinion of judge, other side (client) completely unreasonable, opportunity to say things that may not have been permitted at trial, opportunity of client to present her views/opinions directly to judge,***

more opportunity to persuade, needed other side to assess case in order to discuss settlement, my credibility with client, my advice, law not completely settled, most likely to produce a settlement, issues relatively straight forward; imperative that matrimonial property be dealt with quickly, force other side to see merit of our case (e.g., get judicial confirmation of our case), family/business dispute, difficult party on other side, privacy, court phobic, client was motivated to put an end to litigation as both parties from small centre, can select the Justice to hear the matter.

- No answer - **0 = 0%**

E4. Did the JDR Justice have a Pre-JDR meeting or conference:

Yes - **222 = 59%**

If "Yes":

a. Was it at the instigation of the JDR Justice or one of the parties:

JDR Justice - **207 = 55 %**

One of the Parties - **12 = 3 %**

- No answer - **151 = 40%**

- TOTAL - **374 = 98 %**

b. Was the Pre-JDR useful? (1=low; 5=high)

1 - **27 = 7%]**

2 - **28 = 7%]31**

3 - **62 = 17 %]]**

4 - **63 = 17 %] 39%**

5 - **40 = 11 %]**

- No answer - **154 = 41 %**

- TOTAL - **374 = 100 %**

c. Do you believe the benefit of the Pre-JDR could have been equally accomplished by an explicit letter from the JDR Justice requesting information?

1 - **80 = 21 %]**

2 - **39 = 10 %] 39%**

3 - **31 = 8%]**

4 - **27 = 7 %**

5 - **33 = 9%**

- No answer - 164 =44 %

- TOTAL - 374 = 99 %

Why: Examples: (not yet correlated to # of answer) ***Meeting not necessary; just timelines for briefs; meeting helps to discuss the format of the JDR; letter sufficient for setting filing deadlines; telephone conference would suffice; we were able to narrow down the issues with some discussion; we needed personal interaction to focus the issues and assess the judge's approach; we discussed what approach would work best for all parties; we did receive a letter from the Justice but I prefer a Pre-JDR in person meeting just to discuss issues and expectations in advance; was simply procedural - having said that it was nice to get a sense of the personality of the Justice ahead of time; verbal discussion re: case was NB to focus the JDR; usually meeting to talk about content and length of brief; type of format and amount of evidence could have been detailed; too many parties; too impersonal; too formal and time consuming; too complicated; this was an unusual situation - usually no Pre-JDR is required; in this case - one party needed deadlines re: late medical report for JDR to proceed; there was a useful dialogue between the court and both counsel; there was a letter and the Pre-JDR mostly reviewed that letter; the Pre-JDR meeting dealt with dynamics of the JDR and expectations we all had of our roles - also seemed to warn the judge that the one party had some unreasonable expectations; the physical presence of Justice at Pre-JDR is important; the meeting was rushed; no real discussion - some briefing of judge, but that was repeated in briefs anyway; the meeting was more effective as loose ends were addressed - some issues were later off the table and goals were agreed upon and deadlines given; the meeting was a dialogue - that doesn't occur with letters; the Justice has guidelines that I am very familiar with; the JDR Justice needs to have some dialogue with counsel in order to satisfy him/herself of the real issues and the suitability of the matter for the type of JDR being sought; the JDR Justice did not even have my JDR brief that was filed 3 weeks earlier; the judge was only in possession of one side of the facts and argument; the issues had been clearly identified; the fact situation was not straight forward and it was better to explain in person the need for the Justice to provide an opinion; the discourse between counsel and the Justice helped to narrow the issues and facilitate a decision as to the style of JDR; some specific and unique matters were addressed at the JDR***

regarding non-parties attending the JDR; should have standard deadlines for JDR briefs; good discussion re: type of JDR desired by parties; setting parameters was understood by initial mail out; requests by opposing lawyer had to be discussed with JDR Justice; request as part of brief - the Pre-JDR teleconference was simply a reiteration of information contained in original letter from the court; provides an opportunity to narrow issues - not possible if by letter; presence before Justice allowed counsel to focus issues; Pre-JDR's generally only set deadlines for briefs although at times and depending on the Justice they will suggest certain information they would like to see which is helpful; Pre-JDR's establish a professional demeanor - every case has its peculiar aspects that are best discussed in Private Chambers with the Justice and both counsel; Pre-JDR only went through requirements of the brief; not the structure; Pre-JDR dealt with formality of the JDR; one party's counsel made it clear at Pre-JDR he/she needed assistance to "lower client's expectations"; personal meeting very helpful; personal involvement [of justice] motivates counsel to ensure client committed to bona fide effort to settle; other lawyer not familiar with process - otherwise, would go with the letter; opportunity to get a feel for issues and personalities; opportunity to discuss preliminary matters with judge; opportunity to discuss preferred format; only related to briefs; not required in this instance as the other side needed to hear opinion from the bench; not a particularly complex matter; "No" - that was available too; no - important for Justice to have basic idea of issues and parties involved; no as the JDR Justice would not have known what the parties wanted out of the JDR; No - face to face meeting was important; needed information on other side's expectations to personalize process; needed to discuss best process to be employed; needed timelines and to establish style of JDR necessary/desire for parties; need to 'hear' justice's voice; need to be frank with justice about client's needs and personalities, etc. in absence of clients; MVA cases are quite usual; much of the same information was conveyed in the briefs and at the JDR - the Pre-JDR could be used just to outline JDR strategy and convey whether the parties wanted the justice's opinions; minors involved; needed to talk about logistics and timing (liability or quantum first); meeting with judge Pre-JDR was good and beneficial - both counsel were able to fill justice in orally about dynamics of case; meeting was not interactive but rather it was the Justice setting out the rules; lawyer provided

information on client's background and motivation and expectations; justice needed to know more details of the action; justice needed some background information that could not be expressed at the JDR itself; justice just repeated what was in the mailout; justice solved specific problems between parties at Pre-JDR meeting; justice provided feedback - both parties filed briefs prior to Pre-JDR; it's nice to get a feel for the judge's approach to the JDR and a letter just doesn't do that; it was unique to our factual circumstances; necessary to discuss some non-generic details; it was helpful in agreeing on how we would proceed given there were 2 claims to deal with; it was great to hear directly from the justice about preferences and to meet beforehand; it was better to meet in person and to ensure all parties were on the same page; it seemed as if sole purpose of Pre-JDR was to determine if lawyers wanted to say something about their client without client present - this could be canvassed first before requiring personal appearance; it is easier to fully canvass issues in a meeting; it gave both counsel and JDR justice the opportunity to elaborate on some issues and further clarify the reasons why settlement had not yet been reached; issues, quantum, causation are always the same, these can be summed up in 1-2 paragraphs; issues could be defined specifically in writing; assisted in setting deadlines so matter was ready to proceed; information on the other side's motivations and concerns would not have come to light otherwise; informal face to face meetings are superior to an exchange of letters; in this particular case, some confidentiality to Pre-JDR meeting needed - JDR judge was warned of one of the parties having a "difficult personality" and related barriers to settlement; in this circumstance perhaps as fairly straight forward, but use of surveillance had to be "cleared" with the justice; in person more effective; the only matter dealt with by the Pre-JDR was the dates the parties' briefs would be due; important to discuss issues unique to this file/fact scenario; if it is just to set out timelines, brief length and style and how the JDR would proceed, it can be done in a letter; I have done enough of these by now - I have attended numerous Pre-JDR meetings and have never had anything arise that could not be dealt with by letter; I found contact with the Justice helped me crystalize issue; good to decide type of mediation we wanted - and to hear judge's parameters; generally, the main purpose of a Pre-JDR meeting is to set timelines for briefs, which could be done by letter; forces counsel to look at their file prior to JDR; for specific guidance on issues

that arose in the Pre-JDR meeting; experienced counsel on both sides - no need for pre-meeting but we accommodated justice; expectations individual to justice; exchange of correspondence generally more time consuming over face-to-face discussion; either way is OK with me; easier to be open to and candid with justice about clients' dispositions and idiosyncrasies; each one must be tailored to case; each case is different and it is helpful to meet in person with the JDR Justice; during the Pre-JDR we agreed to do an agreed statement of facts; counsel for the parties were easily able to discuss issues of their respective cases via telephone conference and the justice could ask questions; the meeting really narrowed the JDR; counsel are familiar with the general process; clients present to get instructions on process; clarify issues for JDR.; chance to interact with Justice face to face is valuable; both lawyers quite experienced; issues well known since it had been in case management - meeting not necessary; both lawyers also had questions; binding, therefore needed to evaluate carefully; better to get a feel as to what judge wants in materials if see her/him in person; because defence counsel said they would provide surveillance to Justice; because as counsel we knew the issues - meeting not necessary; as lawyers we know the process - just need to know judge's preferences which can be done by letter; after a few JDR's the procedure is known and a pre-jdr less necessary; and personal meeting allows a flow of conversation between the lawyers and judge.

No - 151 = 40 %

If "No":

d. Was a letter requesting information provided to you?

Yes - 151 = 40 %

No - 57 = 15 %

- No answer - 166 = 44 %

- TOTAL - 374 = 99%

If "Yes" was it adequate? (1 = barely adequate; 5 = highly inadequate)

1 - 9 = 2 %

2 - 5 = 1 %

3 - 26 = 7 %

4 - 53 = 14 %

5 □ - 37 = 10 %
 - No answer - 244 = 65%
 - TOTAL - 374 = 99 %

- No answer - 1 = <1 %
 - TOTAL - 374 = 100%

E5. Do you have any further comments on Pre-JDR Information that might be useful to the JDR process?

Examples: ***Staggered briefs so that defendant's brief can respond to plaintiff's and reach agreement on issues or heads of damages (3-day window between plaintiff brief filed and defendant brief); useful for both sides to disclose previous offers to settle made [one suggestion = mandatory]; we had to track down info as to when briefs were due; all I need is a letter telling me when briefs are due and setting out any special requests of Justice; we don't need a personal appearance on these things; counsel were later requested (post pre- JDR) to provide further information - this may have been requested pre-JDR to avoid the further delay, but not significant; useful to set stage for the Justice re: respective parties' expectations; meeting helps focus the matters in issue; the justice could engage the lawyers in some exchange of position to assure the offering party of a reasonable expectation; tell opposite side this is not a "dry run" - it is to settle; telephone conference would be easier and less time consuming [several]; summary from legal briefs; should have been more specific with regard to briefs; should be mandatory; request each side have a written offer of settlement prior to JDR; pre-JDR meetings are a waste of time [several]; pre-JDR is useful to delineate the issues for the judge, but the parties should already know the issues; detailed information regarding the nature of the materials to be provided, and where applicable, confirmation that there will be no objection to exhibits; outlining the expected client involvement would be helpful; on-line, but a step-by-step process - choose data from link, book with trial coordinator by fax, await letter confirmation, book Pre-JDR with judge's secretary, confirm Pre-JDR, attend Pre-JDR, sample briefs; most of the time I think it is better to have a Pre-JDR meeting; more binding JDR's should be available; mandatory preparation by justice; judicial opinion on evidence presented is always needed and appreciated; judges should be told where the barriers to settlement have arisen and be aware of them; judge can indicate their style or how they like to participate; it is useful to set boundaries on what would or would not be decided; it is very helpful to be able to select the Justice, because often JDR's are useful and effective for client management, i.e., "this judge is a judge whose opinion I as your counsel would highly respect"; is helpful if checklist of deadlines is submitted to JDR judge***

(i.e., like a pre-trial conference summary); information about what kind of statement judge might ask client to make so they can think about it; in some cases it is useful to have a Pre-JDR meeting without the actual parties so that lawyers can indicate the main issues and difficulties; all Justices asked seem to accept a request for a Pre-JDR conference; in most cases Pre-JDR meetings are not necessary provided there is a letter from the Justice regarding material he or she would like exchanged; imposition of deadlines with consequences; if you have experienced counsel who know the issues, don't really need such a meeting; if the judge wants something specific (i.e., a chronology of medical visits, etc.) this should be specified; if possible, have it more than 1 day before the JDR; I think there should be a standard period for due dates for briefs; I encourage the Pre-JDR meeting and appreciated it - it helped me prepare effectively; I believe a Pre-JDR meeting should be required for all JDR's - they are never a waste of anyone's time; I am glad this is available when required; helpful if judge clarifies his/her approach; good forum to be candid absent client; generally, if you are counsel that have attended numerous JDR's they are not particularly useful especially if they are scheduled AFTER the JDR briefs are submitted; disclose format of JDR; format of JDR brief imposed by justice too restrictive; ensure that JDR justice has filed copies of affidavits of parties on matters in issue at JDR; encourage more Pre-JDR's to establish procedure; each party provided extensive briefs that informed the judge, avoided the need for opening statements and facilitated a quick resolution; each judge has their own approach to how they like to conduct the JDR - it would be useful if they included that in the Pre-JDR letter; certain information could be required - e.g. for spousal support - provide current budgets, financial info. and for mat. property, provide a matrimonial property statement; because justices differ in how they conduct the JDR, a description of the process to be used by the particular justice would help in preparing one's self as well as one's client; allows off the record discussion; address and/or fax number where we could send our brief - also, time and location of JDR would be useful; a form letter explaining when a face-to-face meeting would be most useful might eliminate that step; the judge should have the pleadings; pre-JDR meeting should be mandatory in all but the simplest cases; ensure all parties are using the JDR to achieve settlement and not to find weaknesses in their case, or eliminate a justice for trial; and, if dealing with a quantum issue, have all parties provide "realistic" numbers, not numbers simply used to posture.

F. JDR SUCCESS

F1. Was the JDR successful (ended the litigation), unsuccessful (did not end the litigation), or partially successful

(resolved one or more issues):

- Not successful on any issue - **40 = 11 %**
- Successful - **331 = 89 %**
 - on all issues - **304 = 81 %**
 - on some issues (choose the closest) - **27 = 7%**
 - 25% issues - **4 = 1 %**
 - 50% issues - **12 = 3 %**
 - 75% issues - **10 = 3 %**
 - No answer - **1 = <1 %**
 - No answer - **3 = <1 %**
 - TOTAL - **374 = 100%**

a. When was the JDR successful on all issues, or some issues, or significantly contributed to ultimate success?

- At the JDR - **220 = 59 %**
- After the JDR (choose the closest time frame)
 - 1 week later - **8 = 2 %**
 - 1 month later - **6 = 2 %**
 - 3 months later - **5 = 1 %**
 - 6 months later or more - **0 = 0 %**
 - Other (specify) - **4 = 1%**

Examples: ***Opposite party refused to carry forward the agreement, but after some negotiation was "brought back on track"; expect settlement on remaining issues shortly; still had to address forms of complicated orders that resulted; and closer to settlement, but not yet settled.***

- No answer - **131 = 35 % [Note about 7 answered as to different time periods than offered.]**

- TOTAL - **374 = 100%**

G. JUDICIAL PARTICIPATION

G1. Did you and/or your client caucus with the JDR Justice, separate from the other side?

- Yes - **246 = 66 %**

Why: ***Reality check - opinion; to discuss client's position in confidence; justice suggested***

[numerous]; to share our concerns about the claim; to get judicial input - negative and positive; frank discussion of the Justice's opinion on issues [numerous]; wanted judge's opinion [numerous]; to discuss strengths and weaknesses of our claim and to discuss offers made and received; we asked the justice for directions as to how to conduct the JDR; confidentiality - and to avoid conflict with other side; because one side being unreasonable; JDR justice wanted further clarification re: client's willingness to negotiate certain issues; justice's procedure [several]; to ensure confidentiality to develop positions; to provide offers/counter-offers, etc.; to advise justice of insurance limits; for the judge to give other side feedback to allow face saving; to separate issues from the people/personalities; emotions ran high/needed time out; JDR justice used opportunity to broker a potential solution; JDR justice is a skilled former mediator and mediation expertise after formal portion of JDR was invaluable; one side very angry and hostile towards other side; I wanted the justice to tell both parties what he thought and it is received better if other party not present; justice's style [several]; client wanted to; gave client direct private opportunity to hear justice's opinion and be heard; always works best; because emotions too high; to avoid further conflict; tension between parties; normal practice; to discuss issues and risks; for risk assessment; more intimate for the client; to increase the client's comfort in sharing and receiving information confidentially; client's emotional state in the presence of spouse; at the request of parties; although opposing counsel could recommend settlement, client was stubborn and would not accept it; the parties were too emotional/had too much animosity to be in the same room [several]; when at critical stage as to whether we could agree and appeared no agreement; given the long standing personal relationship between the principles, difficult to negotiate face to face; because opposite side was aggressive hot head; one side needed to hear justice's opinion but also needed to save face; client was hesitant to resolve claim; argumentative nature and hostility of opposing client and his counsel; and to resolve blocks in the process.

□ No - 127 = 34%

Why not? Not really necessary [numerous]; did not get that far; ended too early; no one requested it and the judge would not have; unnecessary - resolved immediately; justice unwilling to do so [16+]; settled after the opinion was provided; justice didn't offer it [several]; not the process; not necessary as I recommended that we accept the justice's opinion, like it or not; justice did not feel it was his/her role; takes away from transparency of process; JDR*

justice made opinion known in open session (as we requested); justice rendered a decision; I don't think it is appropriate; no need to in this instance - has worked in past; not in this case; binding JDR - not appropriate; mini-trial [several]; not enough time; was binding - no appeal - more like a mini-trial; would impair his appearance of impartiality and undermine the other side's confidence in the judge's impartiality; all meetings were with all parties present to promote JDR's usefulness to all (fair process); judge not available - first time it ever happened, but was very disappointing; judge decided this and ran it this way; Not offered; not appropriate; not requested by other party; binding JDR [several]; it's never done that way in Edmonton, at least the ones I've participated in; best that everything said is said openly - no opportunity for either side to bias the judge; not the practice in Edmonton; the judge offered near the end (a "first" for me that a judge didn't caucus) - it would have been useful to "guide" the parties if he had - but his opinion of quantum was great (a "first" for me); not required at this one, though I have done so on past JDR's; was not requested, or needed; not necessary - was not a mediation; with the number of parties it was not necessary; and didn't realize it was an option.

- No answer - 1 = <1 %

- TOTAL - 374 = 101%

a. Was it/might it have been useful?

Yes - 201 = 54 %

Why? Almost always useful; helped clients to be realistic; would have helped identify why the case was not able to settle and bring some rational view to the opposing party; we re-evaluated our position - so did the other side; we got a perspective of where we were vulnerable; was able to move the parties together gradually; very helpful to have judicial assistance and opinion [several]; useful because parties very antagonistic towards one another; told us what we needed to hear as to our position; to receive a candid opinion; to brainstorm alternative methods of calculation (apart from experts); to provide further reasoning for decision; to ensure we'd made our points; to be able to candidly speak about the pros and cons of both sides [several]; the judge was prepared and saw the issues; the other side had counter offers without the usual caveats - clean offers; sometimes easier than direct negotiation; significant issue was one party's

credibility; set stage for proper dialogue on issues and positions; seemed to be effective; risk assessment; reality check; promotes more open and thorough exchange of information and opinion; "pro-active judges get settlements, aloof judges just maintain the uncertainty"; people can be less tactful; opinion facilitated movement; one side had to move to settle; my preference is an opinion up-front and caucusing after if necessary, but this style ultimately worked in this case; less conflict, more candor, more resolution oriented; less adversarial/confrontational for client; kept their emotions in check; justice was freely able to express judicial opinion in non-adversarial setting; justice opinion is crucial; justice able to have rational conversation and agreement with parties; judge's skills; judge's opinion helpful and carries weight with all concerned; judge's ability to persuade party with weaker case is greater when stronger party absent (face saving)[several]; in different circumstances might have been (e.g., if had been more like a mediation); if we had more opportunity to do so; I believe it resulted in settlement; helpful at times to a party who is having difficulty understanding why a claim or issue is or is not allowed; helped temper one party's expectations; justice was better able to mediate; justice was able to explore areas of compromise with out client; gives time to speak to judge unreservedly; gave a chance for client to vent; drawing on experience, we might have needed it, but not this time; depends on the judge's style - mini-trial vs. mediation; could not have settled in same room - mediation approach used; clients got comfortable with the judge; client felt he was better able to communicate his position personally to the JDR justice; client feels freer to speak his mind; because client got reassurance that I knew what I was doing; assists client to commit him/herself to follow counsel's advice; an opportunity to discuss strategy; allows for discussion on matters that would not be appropriate to discuss in full group; allowed negotiation without face to face nasty comments; allowed better negotiation, and able to get a deal.

□ No - 73 = 20%

Why? Would have been better with longer caucus; we really only needed the Justice to give us an opinion, we were able to use that opinion to resolve the

claim [several]; the judge was forthcoming with recommendations for both sides in their joint presence; success achieved without need to caucus; justice was determined to misapprehend the evidence anyway; justice gave a well-reasoned opinion, then left us to negotiate; on this JDR looking for objective opinion as opposed to arm twisting; not what the parties wanted; not really necessary; not necessary in this case - better that all issues got aired before both parties & by both; not in this case [several]; not appropriate; not appropriate in mini-trial format; no one wanted a private meeting; my client would not have heard what was being said; most Justices will not caucus separately; low degree of trust between the parties; justice had closed mind on the case, argued with my clients, gave up the neutral ground and became an advocate of the opposing party; in most cases, process should be transparent; I think there should be no side-conferences with justice - potential to manipulate litigants if they do; I prefer to have the judge maintain a "judge" role; I prefer not to be strong armed into settlement for the sake of settlement; I can negotiate without judge; fairness and appearance of fairness; decision was thorough, no need for further discussion; decision unfavourable; best that everything is said "in the open"; authority of judge was in being impartial; and attitude of opposing party.

- No answer - 100 = 27 %

- TOTAL - 374 = 101%

H. JUDICIAL QUALITIES

(Note: The purpose of this section is to use your experience, in the context of this JDR, to identify the best qualities of a JDR Justice. It is neither to identify the JDR Justice, nor to be used to provide a personal evaluation to the JDR Justice)

H1. How would you rate the JDR Justice's overall qualities in this JDR (including: preparation, knowledge, assessment of the issues, approach, style, manner, role in success, or other)? (1 = poor and 5 = excellent)

1 - 8 = 2%

Why - what was positive or negative? *Result was OK but the approach, style, manner, and role in success were very poor; ignored issue JDR was for - didn't seem to know the law, hadn't seemed to read briefs; acted mainly as a messenger, did not seem motivated/interested; would prefer a more robust engagement by the judge in the*

process; did not let the process work; and not prepared, was asked to adjourn but refused, made mistakes, did not even allow myself an opportunity to speak about the case before caucusing.

2 □ - 7 = 2%

Why - what was positive or negative? *Justice seemed fairly uninterested and in quite a hurry to leave; justice let us walk out of JDR only \$10,000 apart; do not think the justice's opinion was reasoned fair or a genuine estimate of what would occur at trial; judge took a very 'light' role - we settled because we had 2 very experienced counsel; seemed to simply compromise on all issues instead of rendering tough opinions; and judge too "chummy".*

3 □ - 35 = 9%

Why - what was positive or negative? *Role became too pushy; negative - caucus up-front before opinion, whereas I prefer opinion up-front; the judge was aware of the issues and had reviewed the material; good facilitation; not willing to read medical charts and too dictatorial re: brief format and content; gave excellent direction once we were in the process, but was not very well prepared and appeared biased at the start of the JDR; courteous, helpful, but did not seem to have mediation training; middle of the road; knowledge of the case and willingness to share his opinion were positive; was familiar with materials but didn't appear to be as familiar with case law; I didn't like that justice only gave an opinion on causation and not on quantum; positive - probing questions, but negative - clear decision; I think an assisted mediation style is preferable; failed to review the materials in detail, in advance; not prepared enough but very good on bringing parties to middle; positive - good manner of dealing with people, but negative - I am concerned about degree of preparation; justice understood the issue and addressed client directly; and justice exhibited the usual, expected, biases against men.*

4 □ - 126 = 34%

Why - what was positive or negative? *Had identified issues; in this case the justice's style was very helpful; the justice was well-prepared and had read all the material carefully [many]; well versed in employment law; the judge knew from the Pre-JDR what the issues were and was prepared to have informed discussion on them; good rapport with parties and experienced in type of case; justice was prepared, aware of issues and case*

and gave us the information we needed to settle; held collateral chatter to a minimum and respected Counsel to advise client skillfully; well prepared, but could have been more forceful; forceful presentation moved recalcitrant party; very delicate case needing sensitivity shown to one party; this was adequate, only; very realistic; justice was prepared and assertive; willing to offer comments on risks; approachable, well-prepared and genuinely interested in helping; proactive [many] approach - candid comments of case to both sides; justice was open, even handed and honest; seemed to lean more to one side before parties had opportunity to state their case; terrific mediator - kept parties focused, asked questions that allowed all parties to better understand the other's position; well prepared and engaged; well prepared but misunderstood one issue; justice had read the material and was respectful and courteous throughout; excellent knowledge of the area of law, moderate and understanding demeanor; caucusing was helpful to reduce animosity; knowledge and approach better than most justices; willing to caucus and to share opinion to client; positive; calm, reasoned, frank; justice was "judicial" - the parties respected the justice's views; only improvement might have been to give counsel a specific opportunity for legal argument; well-prepared, fair but to the point, didn't allow client emotion; negative - somewhat tied to initial assessment, but positive - wanted to get it resolved; great rapport with parties - only (slight) negatives were too much time was allowed on discussing merits of case before actual negotiations began and judge may have been too early and open with views outside of caucus setting; very straightforward, approachable; genuine interest in achieving resolution; informal approach put nervous client at ease; tailored it to the parties and obviously sought best ways to communicate with the individuals involved; overall helpful, but would like reference to same case law in specifics rather than generalities; this judge calls them as it is; fair, balanced, listened, learned the facts; obviously really knew the matter - asked lots of question, but needed to provide a more solid opinion on quantum though; positive, a very even approach and decisive on applying law to factual situation; positive attitude and knowledge of justice created climate for settlement; dealt with all parties (both sophisticated and unsophisticated) very appropriately; sympathetic, knowledgeable; dealt with parties very well - controlled meeting while letting both sides express their views; positive - knowledgeable, personable, excellent valuation, but,

negative - not involved enough, didn't identify the sticking point and help us through it; while disappointed in certain results, can't say justice was wrong - can say justice's effort and commitment to effecting a resolution was excellent (stayed at it til about 6:40 pm on a Friday; positive = spelled out the strengths and weaknesses of both sides, but weakness = because of the judicial opinion, it was less about negotiating and more about meeting in the middle of the justice's opinion with regards to his/her assessment on damages; knew file well and listened and reasoned with both sides but wasn't very concerned about concluding file; I liked the way the justice asked relevant questions of each side rather than asking for opening statements; to the point, not beating around the bush; well prepared, straightforward; well prepared, forthcoming and kept control of the process; was involved and proactive; negative - was telling one side that other side would be spending [many thousand \$] for trial; justice was familiar with the materials, and committed to resolution; justice understood the issues and gave timely advice on them; and could have been slightly more aggressive.

5 □ - 192 = 51%

Why - what was positive or negative? Followed the lead/hints of counsel; excellent knowledge of facts and case law before starting; very knowledgeable [many]; was well prepared [many] and participated effectively; justice understood all issues, had read everything, and was willing to give a forceful opinion; my client felt justice was approachable; thorough, polite and fair; very kind to clients, explained reasons well so that they could understand and accept findings; aware of issues, goal oriented, practical aspects considered; excellent preparation, fair treatment of litigants; very patient, well prepared judge, who gave my client time to speak; allowed one party to vent; very facilitative and evaluative and was prepared to work very hard to bring about resolution when it was appearing unlikely; sincere; paid close attention to detail; excellent mediation skills; great at looking at evidence and conveying basis of opinion; let plaintiff have "day in court"; analytical approach to assessment of the claim and practical; very accurately weighed clients' risks in courts; was very skilled in handling a very difficult situation; orderly, dealt sensitively with client; justice made clear he/she had no bias; knowledge, courtesy, patience; this justice is always great at these; positive - very kind to clients yet forthright, but negative - went to his office to be called back if needed while

we deliberated; had all the qualities - very careful to all concerned (fair and appearance of fairness); fair, reasonable, knowledgeable, highly experienced, well prepared, and fearless; very assertive and decisive; extremely well prepared and applied common sense; relaxed and direct; thorough analysis of issues; cut to the chase; clearly listened to parties and addressed concerns; courteous, well prepared, insightful, respectful, well versed in this law, well spoken and well respected by parties; the Justice allowed the parties to negotiate and only provided opinions when the parties were at odds; style - empathized with other party while rendering opinion unfavorable to other party; excellent people skills; gave the parties a chance to overcome personal grievances and deal with real issue; focused on the issues, was respectful of all parties; business sense, confidence, informality and frankness; eager to participate - enthusiastic; very assertive; justice engaged with the clients; very approachable, very engaging with both parties; clear communication, focused inquiry and solid legal knowledge; friendly, relaxed, respectful but has "aura" of being the ultimate decision-maker - allowed individual parties to say what was needed; good analysis of issues, effective at persuading litigants to take reasonable position; reasonable - common sense approach; unpretentious, constructive and involvement judge; very client-oriented and demonstrated very good grasp of materials; maintained authority and neutrality, described costs in full, listened even to emotional clients, and gave options and compromises; the justice did a great job; respectful of both parties positions, communicated to clients how they might fare at trial; was forthright yet mindful of need for face saving; knowledge of law and preparation by reading briefs and assessing case gave us the best "preview" of a judgment we could hope for; settlement based on lawyers' mutual view of what court would decide; did a good job of explaining process to parties; justice was excellent in sitting down with parties, weighing options; effected mediation skills; frankness on the assessment - debated both parties; good rapport and manner; prepared, calm, personable, knowledgeable, and allowed parties some "vent" time; positive; gave a definite opinion after accounting for risks explicitly; the justice was very personable, fair and the client could tell justice understood; assisted us in adjusting our position having regard to issues where we were weak; established correct atmosphere & benefits of resolution, and supported counsel; collaborative - not afraid to

express views, but not too forceful; positive and necessary because personal emotions felt strongly by one side; the justice listened to the parties so that they had their day in court; respectfully allowed each party to share their perspectives; good style - gave opinion when requested, and discussed positives and negatives; judge a skilled negotiator; gave frank opinion/evaluation of evidence and strengths/weaknesses of our positions; empathetic, could see options, excellent assessment of clients and issues; willing and able to provide insight while caucusing; this justice laid it out as to his leanings - you had to rethink your position; listened and demonstrated efforts to be fair in result; kept it moving without being dismissive of parties; justice was candid and fair in comments, opinions; took leadership role - identified issues, and did not permit irrelevant issues to be raised; our judge was very good at segmenting each issue and dealing with each one separately before allowing the parties to move onto the next or looking at the whole claim 'globally'; justice was able to speak to parties on their level - very well done; justice worked very hard to reach resolution and used a style appropriate for the parties; spoke to parties, got committed to the process and bona fide attempt to settle; was frank in giving opinion, but mindful that the plaintiff was a layperson unfamiliar with the process; forthright, strong opinion; style/quality moved parties to settlement - dismissed unreasonable positions in a very positive way; positive attitude, grasp of issues and kept parties on track; neutral on issues; justice was prepared and indicating how s/he or another judge might view the case based on the facts and law; preparation, succinct and confident yet open to discussion and relaxed; maintained control over the process but disputants participated; was well prepared, neutral, and had common sense; and had clearly taken the time to read rather voluminous materials, which instilled confidence in lawyers and clients.

- No answer - 6 = 2 %

Why - what was positive or negative? Knew materials, firm but diplomatic in giving "The Bad News" to other side; negative: would have like caucusing, but positive: prepared, provided opinion of quantum, brought about settlement; the justice was prepared but ignored key facts/evidence for future claims.

- TOTAL - 374 = 101%

H2. If you had a choice, would you choose this JDR Justice for a future JDR?

□ Yes - 329 = 88%

Why? Did not accept unreasonable positions from the parties but did so in a respectful way; well prepared [frequent]; frank, fair; good use of techniques and skills - good "people" read; gained a fair result as a result of justice's efforts; justice's experience as a counsel prior to going to the Bench helpful; great demeanor towards client and was client-focused throughout; is experienced, listens, and is fair; candid but respectful; caring, smart, dealt well with difficult party opposite, explained weaknesses of case to each side; attentive and sensitive to the clients' perspective and situation; engaged in process and no pressure; fairness, understanding of legal issues, preparation [frequent]; facilitated discussion; knowledge of area of law [several]; straight shooter - direct in trying to resolve issues and offering judicial opinion, risk, etc.; listened to client and counsel; adapted judicial style to the parties; objective, with a good sense of timing; very helpful with regards to the opinion; provided an opinion that was a range, not a specific amount, and opinion on risks, but allowed the parties to negotiate; very good at talking to the non-lawyers; but, seemed more plaintiff-friendly; facilitated the process well; helpful - candid with client, yet not pushy; very calming/non-threatening; effective [frequent], was direct, forceful, focused on the issues; ability to understand my client and the situation; justice took time to understand the matter and engaged the parties in an attempt to find a solution; justice was better than some; took matter (2 days) very seriously - very skilled at keeping things on track - best example of a true mini-trial; did not pressure parties to settle; forthright, strong opinion; good rapport with parties; expression of opinion with authority and credibility really helped move parties towards resolution; very straightforward - clients like justice being very candid but sympathetic; style made all parties feel at ease; focused on issues, and encouraged productive dialogue between parties; ultimately rendered his very fair opinion; got right down to business, however my client was given an opportunity to tell the judge how affected by the accident which was very important to the client; 2nd JDR with this justice - very interactive in JDR process; justice was extremely well prepared and skilled with dealing with different parties and issues; practical and to the point - no nonsense approach; because of the level of experience and the ability to persuade both sides to be reasonable in their assessments; narrowed issues quite quickly; an advantage over

private mediation is a neutral evaluation by a judge whom the parties perceive as an authority (mediators don't usually give their opinions); excellent approach, personality for mediation and very good common sense evaluation of case; able to work on both sides while we separately caucused and gave opinion when asked; effective, sensitive to legal and client issues, knowledgeable about complex areas of law and patient in emotional factual circumstances; thorough analysis of the issues and I like conversational style at JDR; did an excellent job and made both clients feel that they had been heard; made all parties feel comfortable - treated all with respect [frequent]; ensured that 'unsuccessful' party understood reasons; open to both counsels' request to further address and explain opinion to unsophisticated party; listened to rational argument, and reasoning is fair and even-handed; courteous and patient [frequent]; I have had 10+ JDR's (mini-trials) with this justice and would return; approach was very inducive to settlement; effective in bringing parties to reason; very efficient in getting to the main issue and helping us resolve it; very good at running JDR and personable and clear with the clients; all we want in a judge is someone who is 1) polite, 2) good listener, 3) active in giving an opinion - yes we want it!, 4) chides unreasonable parties without causing loss of face; the judge could see that argument about liability would be useless and decided to proceed with interest-based mediation ... what did the party need, how best to achieve it, etc; didn't require counsel to make their usual opening statements which wastes time, but rather zeroed in on the issues and questioned each side and then caucused - very effective and very efficient; because of the ability of the justice to make the client see the relative strengths and weaknesses of their case; involved, prepared and helpful; demonstrated reasonable and balanced approach; for the right case where caucusing might be helpful; right attitude; no nonsense [several]; calm, even-handed approach; was understanding, creative, positive, well-prepared and was determined to get the matter settled so the parties did not go to trial; insightful; fair, but good control over process; approached the matter with sincerity and integrity - showed my client and the other side that the justice was listening, understood the issues, and had read the briefs; personability, respectful, firm answers/opinions, style to get matters done; provided a realistic and accurate assessment of matter, should it proceed to trial, but not overly invested in achieving settlement; balanced, gives reasons; principled

approach to quantification; positive force for settlement of matter; good discussion with clients in "lay" terms, discussing issues and realities of litigation; had a very good perspective on how to quickly evaluate a case, express an opinion, and voice it without being stuck to it - this allowed the parties to re-evaluate their positions and come to a settlement which they constructed; good facilitator; experienced in mediation; effective without being pushy; appreciated informal, frank and productive environment fostered at the JDR; saves the client cost and stress (my client is elderly) - was helpful to reach a settlement, even if more could have been achieved at trial; had a very good manner of communicating with both sides; my client believed the justice "did not like [client]" due to previous Chambers decisions, but was pleased with how pleasantly he was treated - that was positive feedback from client - why I would choose the justice is because it settled, and was done respectfully; justice put whole heart and soul into making sure the client felt got a proper hearing; put the time and effort needed for the process to be meaningful; cared; helpful explanation on the state of the law in Alberta injury claims and different heads of damage; is very well respected; articulate; wise, patient; fair, informed, put considerable energy into the process; effective at explaining value of his/her opinion, reasons to settle, reasons for opinion, risks of trial; result oriented; fairness and smarts; great people skills/mediation skills; got to the heart of the issues; spoke in a direct fashion to my client - I believe my client felt s/he had a fair hearing and saw that a number of his/her goals were unattainable; simply because the justice did a good job even though the matter was not resolved; obviously spent a lot of time reviewing the briefs and other material; positive experience, excellent; good judges result in good JDR results; very effective and efficient style; fair result and recommendations; easy to work with; diligent and candid; demonstrated a goal of trying to achieve a just result; this JDR justice was the most thorough, most effective I've seen; experienced member of Court, believed in process, supported clients and helped them understand and deal with issues from a judicial perspective; this judge had an excellent grasp of the factual and legal issues and gave definitive opinion, yet debated and participated with counsel and the parties such that any ambiguities were cleared up and we were left with well-informed judicial opinion; forceful in opinions; listened, thoughtful - gave road map of where thoughts were; there are some judges I would go to great

lengths to avoid - this judge is not one of them; only exhibited the usual level of bias against the male litigant - nothing out of the ordinary; got results; judge was up front and candid and caucusing was helpful; cut to the chase; chose justice specifically because it was a liability issue and I wanted a no-nonsense judge experienced in the area who could express some strong opinions based on experience; used a civil/fair approach that my client accepted; common sense; hard-working; intent on the parties reaching a settlement; blunt/not shy about sharing views on the case and each side's strengths and weaknesses; for certain matters where clear statement of law might help; few do caucuses; gets them settled; gave a conservative decision; respectful, but demanded participation by parties and demanded commitment to try to settle; was excellent with the clients, gave an excellent opinion and got out of the way so that the parties could settle on their own terms; very hard working [several]; and permitted party to ask questions and voice frustrations head on and with common sense - able to explain the downsides for the party clearly without having to beat that party over the head.

□ No - 36 - 10%

Why? Justice was fine, but not necessarily great; I would shy away from this justice - would rather see what others were like; did not appear prepared to work hard towards a resolution - in other words, appeared to be "going through the motions"; the judge was well-meaning but lacked a clear process and ordinary mediation skills - we were successful because we needed a judge to be there and the judge didn't hinder the process; I felt the justice was led to conclusions before all facts had been discussed; this judge does mainly a mediation style JDR, which I did not like; does not understand role of a mediator; not active enough; I didn't like the justice's mini-trial style; gave opinion re: causation and quantum and then recommended 20% discount for settlement purposes on basis that trial judge might disagree; a more assertive JDR justice is usually needed to bring the parties/lawyers to agreement; not committed to trying to achieve success - simply went through motions; did not enjoy the process and my client had very little involvement as well as other side - why did we need a JDR if all the judge wanted was to reach a settlement between themselves (i.e., the lawyers); did not follow own procedure; no regard for counsel's role; becomes combative over pointed

suggestions; threatened myself, walked out of caucus and left my clients with a bill for my services and loss of income for the day; answer for most claims was simply to "meet in the middle"; reasoning not based on evidence, based on feeling; not enough assistance in mediating the claim, especially with a difficult party and less experienced counsel on the other side; the process was short-circuited and did not allow for full enough consideration of issues for most cases; disappointed with part of the decision re: housekeeping, would not use again where this is an issue; not engaging enough with participants; I felt justice was too willing to accept one side's position in the absence of supporting evidence [a couple]; judge too "chummy"; was not very knowledgeable and made inappropriate comments; amateurish and bullying nature - completely out of touch with the entire concept of negotiation; and lack of preparation.

- No answer - 9 = 2 %

Why? *Undecided; the process broke down when the other side had to ask for an adjournment to allow them to gather more evidence - I was therefore not able to see how the judge would close the deal; maybe - would depend on the case; generally yes but did some defence oriented work prior to the bench - or perhaps just had greater familiarity with defence counsel - seemed a bit cozy; was unbiased and made clients feel understood; and maybe - depends on the case [a couple] and the nature of the parties and their counsel.*

- TOTAL - 374 = 100%

I. OTHER

11. Overall, as to the process and procedures (not the result of your litigation), how do you rate your JDR experience in this case? (1=negative; 5=positive)

1 - 6 = 2%

2 - 13 = 3%

3 - 33 = 9%

4 - 132 = 35%

5 - 187 = 50%

- No answer - 3 = <1%

- TOTAL - 374 = 100%

12. Would you recommend JDR to others or use it again if you had another dispute to resolve? (1 = definitely not; 3 = indifferent; and 5 = definitely yes)

1 □ - 3 = <1%

What, if any changes would like to see if you used JDR again?

2 □ - 3 = <1%

What, if any changes would like to see if you used JDR again? **Judges to be trained in mediation; return of briefs from other side - I do not think they should keep my work and use it as a guide at trial if JDR is unsuccessful; and more finding based on actual evidence.**

3 □ - 11 = 3%

What, if any changes would like to see if you used JDR again? **More formal, alternate presentation of the background facts; deal more with briefs; prefer judges keep all parties in room as long as possible to hear and debate; justice quickly gave each side a conclusion of a range of damages and then left, but was "available" - was not expecting that and had never experienced it before - I specifically wanted a JDR that would be a mediation - my experience is that the mediator assists by mediating - either in the room or as part of shuttle diplomacy - whatever the circumstances call for - leaving after providing an assessment was unexpected and difficult - if the parties had been able to deal with each other professionally and reasonably we would not have been at a JDR - while the matter settled, it was sure difficult after the judge left; and none - there was flexibility with this justice that suited this case.**

4 □ - 68 = 18%

What, if any changes would like to see if you used JDR again? **More caucusing; more judicial involvement; chance to caucus before judge advises of her opinion on matters; the JDR Justices must have basic procedure guidelines and full understanding of the case - briefs should be discussed with counsel; more effort by JDR Judge at pushing parties to a settlement; not all cases are right for JDR, and not all judges are good at it, but I would recommend this judge; more information about times, location, where to send our brief, and what to include in our brief; match judges listed with content/subject matter of litigation; pre-JDR meetings - ½ hour or so; more collaboration between parties; more room to address costs - in this case one party was found completely free of liability and at trial would have been eligible for costs; the judge should have the pleadings; pre-JDR meeting should be mandatory in all but the simplest cases; just have**

justice render their opinion; for this case, none, but for other cases, "shuttle diplomacy" is needed; more pro-active, involved justice; if after 2 months, if the settlement is done to JDR judge's opinions then costs can be awarded for JDR; I pursue different styles depending on each case; and emphasis on negotiated settlement.

5 □ - 286 = 76%

What, if any changes would like to see if you used JDR again? Pre-JDR meeting; ability to choose a suitable judge; better availability; to make sure the judge is prepared and had really gone through the briefs; give the judges free range to "beat-up" on parties taking unreasonable positions; for a binding JDR, more clarity regarding evidence expected to come directly from my client, as opposed to the materials; initial discussion of issues from counsel (if present) and then hear from clients - client initiated dialogue lost focus at times; I think the JDR process is the most effective QB process that there is for dispute resolution; clear confirmation that an opinion will be delivered up-front and then caucusing if necessary; schedule sooner; we could have benefitted from more time; ensure justices who are doing JDR's have mediation-interest based negotiation skills; I would prefer to see more evaluative mediations with caucusing from the get-go; cooler caucusing rooms; both counsel asked for a binding JDR - this appeared to be what we had until the commencement of the JDR when we were told it was non-binding - this has never happened to me before and is perhaps the result of a communication error - if not, the presiding Justice should ensure that the participants and their counsel know at an early date that the justice realizes the character of the JDR - binding or non-binding; different judge; the real legal issues get lost in mediation in my experience; make it clear in advance that clients/parties ought to attend personally; more involvement of the justice; permit justice to read entire discovery transcript; the briefs are never that useful - should be limited to 3 pages like on an appeal motion; none - it was excellent; more focus on legal issues to frame the dispute; consistency in binding JDR process; what do you want/need in our brief - do you want all the pleadings, case law, etc.?; the more dedicated knowledge judges who have had success as private mediators, the better; pre-JDR may not be necessary; must have the clients meet to agree on a compromising attitude - the offers must be realistic - assess nature of compromise required in advance; advise counsel to prepare and come to JDR with intent and authority to settle;

I would have been fine with the judge interacting more with the parties but it was "math" so I understand why he talked to the lawyers; other lawyer needs to respect suggested brief length; judge must be prepared to state what they would decide at trial; JDR experiences vary widely depending on many factors, mostly on who counsel is and who JDR judge is; mandatory disclosure of last settlement position; a bit more ability for the client to tell their story; I think it is a very useful process which is difficult to improve on given that every Justice's approach will differ - continued exposure to JDR's and other ADR processes by judges and lawyers will improve the program; the only change would be for both lawyers to use this method sooner; requirements on counsel regarding "evidence" - appraisals, position on the issues; justice to caucus separately with the parties; make more judges available - it takes a very long time to get JDR dates; standard brief times/deadlines; costs penalty if brief not provided on time; not all Justices use caucusing and that has generally resulted in more guarded discussion rather than promoting open and frank discussion; important to be able to select judge; judges should be trained on evaluative mediation; we should all be clear that JDR is not mediation (interest-based), which is also a useful process, perhaps more useful earlier in the process; I sometimes get the sense judges wish to be done by noon; guidelines re: use of videos for JDR; more judges available for JDR's at an earlier time; confirm expected time of JDR (as in duration); more room for direct settlement discussions between parties; start time at 9:00am; coffee available on JDR floor and water in rooms; prefer if Justice takes a strong position in line with what their trial judgment might be; mandatory pre-JDR meeting with counsel and the justice; less material to be filed; more availability of dates; more consistent judicial approach (i.e., more mini-trial vs. mediation - should know before booking); no last minute documents submitted (stay in deadlines); it's like getting ready for trial - so JDR prep costs should be allowed at taxation; make it binding; the judge should withhold his/her opinion as to quantum until late in day; after submitting briefs, no party should be able to submit further materials; and I like the mini-trial format as used in this case - if we wanted to mediate, we would have gone with mediation as opposed to JDR.

- No answer - 3 = <1%

What, if any changes would like to see if you used JDR again? ***I would like them to be easier to book than trials.***

- TOTAL - 374 = 100%

13. Is there anything that we didn't ask you about on which you would like to comment? Do you believe the JDR program can be improved - if so, how? Do you have any other comments?
- JDR doesn't work with clients that reject any contrary opinion; when we start there is some jockeying for position - everyone has read the brief so don't allow counsel to read it aloud - I like to do an examination and even cross examination of the client - after a few answers then everyone is talking freely; any counsel who does not seriously consider JDR before putting his or her client to the expense/risk of trial is doing serious disservice to the client; judges don't seem to be fine tuned to law in most cases - I don't understand the point of the JDR to resolve legal issues if judge doesn't know it or at least research it - very fair judges seem to read brief thoroughly - their knowledge of content suggests they skimmed it at best; perhaps 2 lists of judges - those who mediate and those who simply give their opinions; each side should be required to submit an offer at the pre-JDR - that way everyone knows what they are addressing in briefs; it's a great program; a clearer sense of how a judge defines their "style" - it is very confusing; mediation training for the judges; the only frustration with the process is that on many occasions, if the opposing party does not like the opinion of the JDR judge, significant time and expense has been wasted; often find that other side's lawyer has not had their client read our side's brief prior to the JDR - suggest that court recognition this is important; the best JDR is not 'these are the issues' (we know the issues) but 'this is the quantum for these reasons'; JDR is not for all cases - some better guidance to the bar as to what types of cases are or are not suitable - mandatory JDR, or mediation, is not appropriate; the JDR opinion was given and the judge clearly had some issues with our position - justice did not ask us to explain the issues s/he clearly had problems with, but just opined against us - it would have been helpful had the justice asked some of those questions first, because my clients felt they could have made a better case; water in the conference rooms; JDR is a great tool when clients are the hold up to settlement - justices that are prepared and identify the issues are the JDR's greatest asset - JDR is always a settlement option for myself and my clients; keep JDR process flexible enough so justice works with particular parties and issues to reach settlement; the "gathering of evidence" at the start was a bit chaotic and led to the judge not really understanding the situation properly; I very much do not like the "Calgary" JDR process of having the court bully the sides into settlement by citing costs***

and uncertainty - I knew this going in - I prefer to get an opinion at the JDR and use it to achieve a settlement; have done 60-70 JDR's in injury cases - prefer mini-trial format, which more effectively manages expectations - usually settlements higher in mediation format - on either format, vast majority settle; JDR justices should try to refrain from giving ranges for heads of damages as it is not helpful in attempting to settle claims; keep enough justices available for both binding and non-binding JDR to keep the waiting period for a JDR short; justices must limit amount of material provided in briefs, otherwise the length of time involved to prepare a brief is similar to going to trial - perhaps thought could be given to the court hiring retired judges who are willing and experienced in the JDR process to help create more availability; it would be helpful if at the pre-JDR meeting the JDR justice could, without going into the merits of the claim, encourage the parties to narrow down the issues that are actually in dispute and also encourage parties to think about which type of JDR is right for their particular dispute and their particular clients; in personal injury cases - could the JDR be opened up to attendance by physicians who hold opposing/different opinions; in my opinion, problem with JDR is opposing counsel often see it as a trial run of their case to see where they are weak in their evidence - I do not think enough people come motivated to settle, they only want to settle if they see case/JDR comes in close to their position; please do not cut back on family law JDR's - it's very helpful; publication of judges willingness or unwillingness to do certain things such as caucus, render definitive opinion, mediate - such preferences aren't always known by counsel before selecting the judge; compulsory obligation to reveal all evidence at JDR - surveillance tapes, expert opinions, etc. - otherwise the party is not willing to put all cards on the table to settle; both my clients and I have been very disappointed in judges who agree to conduct a mini-trial only to turn the process into a form of mediation - this is a waste of time and money when the parties have sought a mini-trial only to have a mediation arise because it's going poorly for one party; I greatly appreciated the JDR Justice's commitment to helping us settle - I prefer JDR's where the justice remains involved after giving his/her legal opinion - ours really was a combined mini-trial and mediation; preferred system where counsel provided list of dates and available justices as opposed to submitting list of agreed upon judges; it's a great process - it ain't broke, don't fix it!; I understand that a few judges have decided not to participate in the process anymore and that worries me - JDR is a superb tool for convincing clients to settle and showing them the strengths and weaknesses of their cases - judges have an authority which is unimpeachable - clients who won't listen to their lawyer will listen to a judge - JDR is probably the most important tool in litigation and must be maintained and

strengthened; sometimes easier to get a trial date than JDR date - the new booking system means it is harder to get a date than before; I just wanted to mention that I think it is very important that the different types of JDR are available - different matters call for different approaches; each judge needs to have read the materials; judges require that parties adhere to the process as laid out in directions - that judge should also follow the process as they set it out in meeting or letter - abuse of the process should not be tolerated; some judges are much better at JDR than others - I would like to see these judges have more JDR weeks in their calendar; on some occasions the JDR justices do not seem as interested or motivated to help with a resolution, I guess that is why you get to choose the justice; imperative that Justice clearly identify each issue where parties are apart and mediate one by one rather than simply taking initial positions, determining too far apart and conclude further discussions; do not have judges doing JDR's that do not want to do them - give them some training - insist on a pre-JDR meeting with counsel to take place; perhaps more dates - they book up quickly; improvements - staggered briefs, confirmation up-front by JDR judge of their personal style - opinion or caucus/mediation; have a computer with child view available - much easier for dealing with spouse and child support; don't add any more layers to the process; I have done many JDR's (54) - most justices have been very helpful and facilitative; there are some QB judges who simply should not be used as JDR judges - with the new system where judges can be selected, it will become obvious as to which judges the Bar do not want to use; outside Calgary and Edmonton, we have justices rotating in every week - most are very good at JDR, but some are very poor - JDR's take a great deal of work and it is important to have justices that will roll up their sleeves and do a good job in this context; wait times could be further reduced - if possible; more training for the justices [frequent]; there is a wide variety of experience - need a wider selection of justices in rural areas - many justices who come here won't do JDR's or don't have much training; I find that the qualities of the mediator are less critical than the actual process - success rates are high not because of the talents of the mediators as much as the momentum to resolve created by the nature of the communication prompted - this momentum overrides the "fight" impulse in "fight or flight" situations - I sometimes wonder about the parties' buyers' regret in the weeks afterwards, and therefore, I'm skeptical of "% settlement success rate" claims; I believe the JDR process is useful primarily to obtain judicial input for clients - both parties - therefore, it is not helpful to have a judge who is not willing to provide an opinion on the issues; all judges should read the material and come ready to dive into the issues and areas that are crucial to the case - they should take control and run the

proceeding - long winded dissertations by counsel should be discouraged; there are some judges who are not good JDR judges [several] - allow the parties to pick a judge and give that judge sufficient time to prepare for the JDR; have the judge more actively work towards finding solutions to move the parties towards settlement; certain cases are better suited to a caucus approach, others require a firm opinion - the JDR list should advise which judges will use which approach; the "binding" JDR process needs to be consistent as between various justices; in my opinion, the JDR process is more effective than mediation - I would like to see litigants opt out of the JDR process before trial, i.e., litigants should be channeled to a JDR unless they opt not to go - alternatively, they should be channeled to either a JDR or mediation mandatorily, unless they opt out; should be mandatory, but earlier in litigation (post affidavit of record) - however, it must continue to be with judges whom I prefer to private bodies; most of the JDR work I do is in Edmonton which is quite different than the JDR in Calgary - in Edmonton most judges do not caucus - in Calgary they do - in my view JDR is a settlement process and settlement requires compromise - thus I find it more effective if the JDR judge caucuses with each side; my experience is that even if settlement, personal injury plaintiffs leave with a bad taste in their mouths, usually pounded by judges on "risk/cost of trial" - that works both ways, whereas defence clients leave and frankly, don't really care about the result, as they aren't paying; less face to face negotiation and more caucusing; the value in the JDR is having a chance to obtain insights and opinion from the justices; the more cases resolved within the JDR process create 2 consequences - the case law may not develop because JDR results are not published so no precedents results, and, second, institutional litigants (e.g., insurance companies and regular defence counsel) become more acquainted with process because of more frequent participation, which puts others less experienced at a definite disadvantage; judges should inquire whether participants want the judge's informed views on the issues - counsel feel awkward raising that matter if there is a sense that the judge is not entirely prepared - additionally, this suggestion would encourage preparedness; some Justices are a little too much like facilitators when what we need from a justice is their "trial judge" opinion on the merits of our case; some justices are much better than others at this, more consistency would help - it helps that we can choose the Justice; it would be helpful if the schedule for JDR's was posted sooner i.e., the January sessions were not posted until mid-November, by which time all of the fall sessions had long been filled; I think all JDR Justices should be prepared to render an opinion regarding what they would do if they were hearing the trial - most are able and willing to do so - but I have had experiences where they would not and it

is less helpful in that instance; all judges should realize that counsel are totally aware of the facts/issues and are looking for the judge's opinion to break deadlocks; other party in this case agreed to come to JDR, but while there, they didn't negotiate in good faith, and in fact started out 50% different than their previous offer 6 months ago - then wouldn't go beyond former offer despite the justice's recommendations - even though client chose to settle, it was a waste of time - not sure how to have other side come to JDR and bargain in good faith; open additional dates [frequent]; imperative that Justice clearly identify each issue where parties are apart and mediate one by one rather than simply taking initial positions, determining too far apart and conclude further discussions faultless unless both parties ask for a view of the case; a justice should never gratuitously offer a view as to which side of the case he or she prefers - this does nothing to enhance further discussions; the focus on legal matters frustrating due to the lack of acknowledgment for clients' non-legal concerns; increase # of judges who would do binding JDR's; use of experts/cost driven up before JDR defeats purpose and cost advantage and increases difficulty in obtaining resolution; if both lawyers agree, the amount of information provided in advance could be streamlined - simple cases should be able to be presented without a brief and the attending cost - sometimes all that is needed is a judicial opinion on a very narrow issue with a one page summary of the issue and relevant facts from each lawyer; the JDR program is very valuable in my area of practice (personal injury) where a plaintiff has little knowledge and would otherwise be subject to an imbalance of "power" in a private mediation; hearing a justice's view of the case is a valuable and powerful tool in effecting resolution in whole or in part before a costly trial; it is an extremely effective process and the diversity of styles of justices allows counsel to select ideal format - diversity is beneficial; the key to a successful JDR is the justice involved - some are good, some are better; I strongly encourage caucusing; hard to deal with liabilities between defendants in presence of plaintiff - almost proved to be a barrier to settlement; past experiences with JDR's in Alberta have all been negative, such that my preference has since been private - my experience in the past was judges giving view based on emotion vs. facts and law - and once this opinion was on the table the cases were very difficult to settle. This JDR was much better - judge was assessing based on facts and law, not on emotion; there should be a choice for binding or non-binding JDR and if binding chosen that ends matter; the mediation template works - in three JDR's the judge has expressed an opinion (essentially a mini-trial) and in all three cases that has ended settlement discussions; availability of a "smart board" to assist in presenting material; availability of water in rooms - availability of a nearby food supply i.e.,

cafeteria/restaurant/coffee bar; the strength of JDR in family disputes is the authority aspect - the explanation of the law; changes - explanation of how evidence might be regarded by a trial judge, the chance for people to speak of "being in a court process" without all the risk and cost that entails; I do not know if it is provided already - but judicial training in interest based negotiations, mediation skills and other JDR background would be helpful; the costs of a JDR should be recoverable under Schedule C of the rules in any event of the cause; one of the problems is that in a JDR credibility is difficult to deal with for the judge - also, one doesn't want to necessarily reveal everything because you still want to preserve your trial strategy in the event you do not settle; JDR's are often used where authority, knowledge and judgment of a judge are perceived as needed to resolve the dispute - the opinion of the judge is usually welcomed, but should never be expressed or telegraphed outside caucus except as a last resort and with the agreement of all; so many JDR's succeed because clients become less rigid - here, the clients were ready to compromise but the judge ruined the mood by taking one side and not focusing on a compromise outcome; I worry that the process of having a JDR week may put too much of a workload on a judge who has to prepare daily for them [Thanks, BR - a test to see if you are reading]; more availability, shorten turnaround time; the judge handling the JDR has a great deal to do with the result - if he/she gives up the "neutral ground", this makes the party who perceives favor really rigid and no compromise will occur; justice should stress 1) goal is settlement, and 2) parties should be prepared to compromise; do best to assign justice familiar with area of law in dispute; I was surprised at how important it is for some parties to tell a person "in authority" their concerns - particularly in front of the "other" if the concerns are about the other - we settled but it seemed more important for client to express themselves than the \$ involved; some counsel ought to pay costs; more mini-trials; perhaps have judge be more clear about whether his or her style/preference is for mini-trial/mediation [several]; it is probably important to only use JDR judges that are truly interested in and prepared to work at the process; there are some Justices who should simply not do JDRs because many don't have necessary skills or don't understand the JDR process; mini-trials and Binding JDRs of little use except in specialized areas; half baked judicial "opinions" cause more harm than good in complex cases - especially when JDR Judge not prepared or experienced; my major concern with JDRs (not this one) is that the judge will not allow me to negotiate successfully because he/she telegraphs his/her position on the case too early - this should come at the end and only if asked by both parties - I want to be allowed to do my job and persuade the other side as to its potential risks without that being torn apart by the judge; and any JDR justice

should have a private talk with counsel separately before the JDR - the justice then has a mosaic to judge the best path to concerns.

INTERVIEWS

If it is decided to conduct **future interviews** of JDR participants (after completion of all Surveys, after June 2008), would you be willing to agree to an interview?

- Yes - **178 lawyers = 48% (also 85 clients = 44%)**

Justice John D. Rooke

LAWYER' SURVEY - "ADDITIONAL QUESTIONS"

(Some questions may have more than one answer - choose all that apply. For additional comments, add at the end.)

J. JDR TIMING & NEXT STEPS

J1. Which of the following identifies the stage of your litigation at the time of the JDR? (choose all that apply)

- Before Examinations for Discovery - **37 = 10%**¹¹
- After Examinations for Discovery, but before Experts Hired - **95 = 25%**
- After Examination for Discovery and Expert Reports - **170 = 45%**
- When ready for trial - **114 = 30%**
- Other (specify):- **30 - 8%**

After expert IME; after plaintiff experts before defence experts; before defence filed; between examinations; did have some expert reports; medical review experts only; Doctor reports obtained but economist not hired; just before trial scheduled after a PTC; halfway through discoveries [a couple]; only plaintiff had experts [several];plaintiff expert reports, no defence experts [several]; there were cross examinations on affidavits twice in the action which had lingered for 9 years; after full financial disclosure; and within 5 weeks of trial.

J2. From your total JDR experience, when in this type of case do you think that a JDR is/would have been most useful (choose all that apply)?

- Before Examinations for Discovery - **39 = 10%**
- After Examinations for Discovery, but before Experts Hired - **118 = 32%**
- After Examination for Discovery and Expert Reports - **224 = 60%**
- When ready for trial - **100 = 27%**
- Earlier than when this JDR was held - **47 = 13%**

- How much earlier: At times earlier can be helpful, sometimes later is necessary as well; before scheduling trial; 6 months; more than 120 days before trial; 18 months [several]; 2-3 months [a few]; 1 year [several]; 2 years [several]; after defendant's IME; 1 to 2 years delay was result of parties delayed agreement to attend JDR; 8 years; for support and custody issues, 2 months earlier; once IME completed; years [a couple]; difficult to get other side on board so delay was unnecessary; soon after first interlocutory application; before parties became so frustrated

and entrenched and had spent so much \$ on legal fees; 10 years; and before expense of experts was incurred.

- Later than when this JDR was held - **4 = 1%**
 - How much later - **For property issues, 4-5 months later; at times earlier can be helpful, sometimes later is necessary as well; and too close to trial (1 month)[a couple].**
- Other (specify) **Nil**

What are the reasons for your choice(s) of answer? **An important function of JDR is to test your assessment against a judicial opinion - the more evidence mustered, the better; our matter dragged on far too long - change of counsel; this was a slow and painful litigation - the outrageous settlement positions only became reasonable when the JDR judge was present; this file needed action but was left alone; examination for discovery and expert reports are generally needed so that the parties clearly understand what case they can put in at trial; this matter could have gone to JDR over a year ago but opposite party refused - also refused to take further steps in the litigation even though that party was the plaintiff; after expert reports to avoid the scramble to get 218.1 statements done if the matter doesn't settle; I find they work at all stages depending on the particular case [several]; circumstances changed significantly which made settlement more difficult; it took almost 2 years to schedule due to available justices, counsel's schedule and opposing counsel's wish to only have JDR in front of certain justices; could have avoided unnecessary delay; the time allowed the interest and costs to grow significantly, which impacted the other side's perception of the value of the actual claim; some property issues still in process and unresolvable until third party input complete; the parties benefitted from the procedure and it may have stopped some of the issues that we now have to deal with; it would depend on the nature of the file - many family files don't need Examinations for Discovery, but some do for various reasons - particularly financial discovery; rising property values recently gave one party no incentive to settle earlier; client had been misled by prior counsel and was distrustful of the process - JDR justice was the person client needed to hear from; we were only 1.5 months before trial so that considerable costs had already been incurred in preparation for trial; matter was minor and should have been resolved through discussions, but failed to be; there was no factual issues - clients need to be convinced to go to JDR; and necessary to provide an opportunity to revise expert reports or obtain additional reports.**

- J3. Whether or not your JDR was successful, if it was not/had not been successful, what will be/would have been, the next litigation step? (choose all that apply)

- Further disclosure of documents or Examination for Discovery of parties - **10 = 21%**
- Further experts = **99 = 26%**
- Trial - **295 = 79%**
 - within
 - 1 month - **14 - 4%**¹²
 - 6 month - **142 - 38%**
 - 1 year - **117 = 31%**
 - more than 1 year - **85 = 23%**

- Other - **17 = 5%**

(specify) ***Trial in 1 year was as soon as it could have been scheduled; retention of defence IME; pre-trial conference [several]; defence IME's and likely exchange of formal offers; perhaps a special chambers assessment application; not applicable - it was a binding JDR [a few]; maybe seek leave to adjourn the trial to get extra reports; formal offer; exam on undertakings; domestic special; discovery of employees; defendant getting IME and then will return to JDR Justice - if not successful, then trial; arbitrate or more interim court applications; and application for leave - derivative action - s.240 ABCA.***

- Don't know or not sure - **31 = 8%**

K. COMPARISON TO OTHER JDRs

(*If you have not previously participated in other JDRs, go to section "L"*)

- K1. How did the procedure and process of this JDR compare with the previous JDR(s)? (1 = worse,;5 = better)

- 1 - **10 - 3%**

Why? ***Conflict/bias evident; justice failed to prepare and fulfill the role of facilitator; judge could have been more active/participatory; turned out to be a different process than what I was lead to believe would occur; we need more judicial input and guidance; the other side was not prepared; judge unfamiliar with issues, law and facts - worst combination possible; amateurish, bullying approach taken by JDR judge, strong expression of opinion (to both sides) thus galvanizing one side and frustrating any further negotiation; mediation type process did not work well; in all the seminars/lectures/workshops, etc. I've attended, the JDR was not what I had expected; and the judge was not interested in bringing the parties through negotiations to a settlement.***

- 2 - **25 - 7%**

Why? *This was evaluative mediation, I prefer mini-trial; the process was very focused on the legal information - the parties didn't have a chance to tell their story or to listen to the other side's story; every JDR prior to this resulted in a settlement - justice did not hammer home the risk of court costs and the quantum of court costs if one party did not beat the other side's formal offer which would probably be that party's final position; the process was too rushed [a couple] and did not include enough discussion of the issues; judge too "chummy"; judge not trained in mediation; in other JDR's judges gave a more definitive assessment of damages; style of mediation and role of judge - prior one was really interest based, this one position based; I prefer opinion up-front, not caucus up-front; no settlement [a couple]; too much control over brief format and content; justice gave opinion re: causation and quantum and then recommended discount on basis that trial judge may disagree; previous JDR was binding, therefore both parties were fully prepared and termination of lawsuit was certain; mediation style took on 'compromise' features instead of legitimate focus on issues; calculations were left to experts without nailing down all necessary assumptions; I found this justice a bit rude - perhaps it was because I did not know the justice and had absolutely no experience or history with the justice; and justice was not involved at all in the negotiation process - provided an opinion prior to the parties negotiating.*

3 □ - 109 = 29%

Why? *Similar to prior JDRs [many]; just different; some were better, some worse; a peculiar situation - counsel asked for and expected a binding JDR, but received a non-binding JDR - however, due in part to the dispute resolution experience of the justice, success was achieved, but the surprise to my client and me created confusion; I've always found JDR's to be very useful [several]; it was very close to my last JDR which was excellent and better than the few I had prior to that; each file has its own issues; justices have too much bias in personal injury matters; all have been successful on some level; 2/3 other JDR's very successful as well - 1/3 other quite unsatisfactory but it turned out JDR judge and trial judge thought the same way (bad for my client); so much is in the style of the justice - the others I have used had a different style but just as effective; good approach but not successful; a settled claim and both sides reasonably unhappy with the result, as in 90% of the files I have taken to JDR; I have been fortunate*

in all JDR's attended - while each Justice used a different approach, that approach was best in those circumstances; this was a binding JDR - the process was very similar to a trial, including the right of cross-examination - I feel that this removes some of the more positive aspects of a JDR from the perspective of the parties; this one was an unusual process - no appearances were made - but we needed judicial input on liability because one of the clients was not prepared to accept a recommended resolution; different processes were used for different litigation situations; and in previous JDR's although procedure may have been different the parties were prepared to compromise.

4 □ - 131 = 35%

Why? Justice was interested and worked the process well; straight to the point - justice didn't permit unnecessary posturing - in and out in 2 hours with settlement - I have had this judge once before with good results - some other judges are equally good, however, others fence sit and/or are not active enough in the process; binding; I prefer conference style, rather than court room style; good decisive opinion; the judge's approach was very well-suited to these parties; more active participation from the judge; I am a believer in judicial mediation and almost all of my JDR's have been positive, especially now that the parties can select a justice; the judge; justice was interested and helpful; we had a hot bench; judge preparation [several]; quicker and to the point [several]; judge more engaged [several] and proactive; lack of cooperation from opposing counsel - no offer (as required by the justice) - new issues raised not in briefs; judge did not disclose opinion in front of all parties together; efficiently done - "forceful" intervention by the judge - clearly spoken opinion that the clients could understand and accept; exemplary effort by presiding judge; well prepared and helpful justice, but different format than most I've done as this time opted for caucusing; felt justice open to being persuaded/consider positions this time but not in others; justices handle them differently but in my experience, they usually settle - for clients, it is like their day in court; more streamlined and more explicit pre-JDR procedures established at the outset; unique approach by judge to "win/lose" model; because the style was preferred - mini-trial over mediation; the caucusing was a bit different, but overall was helpful; got results; the qualities of the justice; there was a better explanation of the law and more of a discussion of findings that would have been made at trial; most have been very good,

with a few not so good experiences; this Justice very candid and to the point about the issues, leading to parties getting to the realistic numbers much quicker and abandoning certain aspects of the claim; our Justice had a lot of experience in the relevant area of law; JDR's lead to settlements because a real judge is talking and the clients like that - after all, most clients only knew what their lawyers filters and spins for them; good judge selected; hard work of Justice; different Justices have different techniques; justice was better prepared - had read materials - was sincerely trying to help; I had one JDR where the judge was negative - we settled 'in spite' of the judge, not with judge's assistance; I prefer when the judge provides opinions privately, but still presents each side of the case to the other party when caucusing; because judge caucused; tremendous constant - consistent presence (not pressure) of justice; justice able to provide good assistance and calm difficult emotions - offer practical, realistic advice as to outcome; and the judge focused on the issues and forceful when needed.

5 □ - 70 = 19%

Why? Pretty much the same; the justice did not want to nickle or dime negotiations; the last JDR I attended was with Justice X, which I did not find to be helpful to the JDR process, whatsoever; this justice had extensive knowledge and experience in personal injury litigation; this judge was fairer; skill of justice; justice did not give opinion "off the cuff" or provide a broad range - quite specific in opinions backed by clear understanding of material and evidence; justice was very accommodating; my better understanding of process - and knowledge that it was binding; screening meeting this time; judge gave evaluation based on facts and law; success here; judge was available to caucus; never really had a bad experience with a JDR; justice required by parties to commit at the outset to participating and to being bona fide attempting to reach a resolution throughout the process - this is key to success with MVA JDR's; judge very decisive and assertive; largely due to clients; I have only had 1 negative experience with a JDR (other side's counsel walked out, judge not forceful, judge "appeared" oriented to other side by his comments when defence and plaintiff were in same room); judge had wonderful manner - 1) an environment of respect was fostered, 2) justice familiar with materials, 3) justice unbiased re: defendant or plaintiff position but provided realistic appraisals of strengths and weaknesses of both parties, and 4) Heads of damage property assessed;

JDR judge spent at least 2-2.5 hours on various aspects of liability before we even got close to discussing dollars/offers - the first offer was not made until 3:30 - this made legal issues fewest, rather than overall "how much do I get?"; excellent justice, reasonable courteous parties; willing to take time to get to resolution - was not in a hurry; proactive justice; judge listened well to clients and explained position in manner that they could understand and accept; judge's preparedness; judicial involvement; clients opened up; actually, this procedure and process and this judge are what I am accustomed to; combined mini-trial/mediation - justice extremely prepared, helpful - best JDR I have ever had; justice did not caucus with parties (binding) - in comparison to previous experiences, it was better not to caucus - avoids one side biasing the Justice with no opportunity to respond to what was said; mainly due to the skills of the Justice involved but previous JDR's were quite good as well; successful before 1p.m.; previous JDRs have been laced with the arrogance which judges with QB bring to a matter - with a modest, caring, approach, this JDR found a consensus; cost effective; judge was very involved and assisted in convincing one of the parties that the amounts being offered were fair and reasonable; good judge; with personal injury cases where quantum is the sole issue a justice who will caucus and provide general opinions like a range helps the parties negotiate more than a mini-trial ruling which risks being more to the position of one side; this Justice was prepared [several]; very assertive - took control of process; facts were clearer and a resolution was easily and readily available; quicker - got right to the point; I have had many excellent JDRs - this was up there among those; successful in facilitating settlement; and a previous judge stopped reading our brief at [the 2/3 mark] when I had expressly cleared the length - very unprofessional for a judge - my client and I were aghast.

- No answer - 29 = 87%

Why? Very effective for these parties and facts but not necessarily "better" than other styles in other cases; it's best to have choice of judges who have their unique styles and qualities to suit the case or partial; only been to 2 others - all have been successful; and about the same.

- TOTAL - 374 = 101%

K2. Was this JDR with the same JDR Justice as the previous JDR?

Yes - **39 = 10%**

If "Yes", did the JDR Justice's participation affect your answer to K1?

Yes - **31 - 8%**

If "Yes", how (specify): ***Worked with lawyers and clients skillfully; understood how Justice would handle case; this JDR judge had an open mind - was willing to listen to both sides; justice took an active role questioning; personality and background of judge is important at JDR; our JDR judge was in full control and guided the parties through the case, one issue at a time; the justice exited before an offer was even made by the other side; last one was more hand on, took more interest in how/whether claim resolved; judge tried harder to put a deal together; it is helpful to have judges actively participate and give opinions; I had one other with this judge - that experience was helpful in choosing this judge; justice was insistent; have had several JDR's with different judges - I knew we would obtain a fair and candid opinion on the merits; have had a handful with this justice - the justice's style was instrumental; had done a better job without an obvious 'split the difference' attitude; experienced mediator; excellent justice, courteous, frank, willing to offer opinion, and reasonable; committed to resolving the issue; been to many, with this justice and others - this justice's style is to "bend arms" to reach settlement; and a very engaging style - addressing and flushing out strengths and weaknesses in each case - moved us to negotiations promptly.***

No - **18 - 5%**

- No answer - **325 = 87%**

- TOTAL - **374 = 100**

No - **296 = 79%**

- No answer - **39 = 10%**

- TOTAL - **374 = 99%**

L. EXTENT OF JUDICIAL PARTICIPATION

(*Answer only L1, L2, or L3 - being the closest to the type of JDR you had*)

L1. Mediation and/or Evaluative Mediation - Did the JDR Justice offer any opinions (on the law, evidence, damage, or risk of success/failure at trial) on his/her own initiative?

Yes - **255 = 68%**

No - **24 = 6%**

If "No", was the JDR Justice asked to give an opinion?¹³

Yes - **26**

Did the JDR Justice provide an opinion after being asked

Yes - **48**

No - **3**

No - **10**

OR

L2. Mini-Trial - Did the JDR Justice participate after giving the opinion?

Yes - **19 = 5%**

No - **51 = 14%**

If "No", do you wish s/he would have participated?

Yes - **5**

No - **37**

- No answer - **9**

OR

L3. Binding JDR - Was a binding opinion or decision necessary because negotiation or mediation was not successful?

Yes - **15 = 4%**

If "Yes", was the Binding opinion or decision necessary

on one issue only, or - **0**

on more than one issue, or - **5**

on all issues, or - **9**

other (specify) - **0**

No - **12 = 3%**

L4. Did you seek a choice of JDR Justice?

Yes - **274 = 73%**

If "Yes", did you get one of your choosing?

Yes - **253 = 92%**

No - **11 = 4%**

- No answer - **10 = 4%**

- TOTAL - 274 = 100%

No - 72 = 19%

IF "No", did you not seek a choice because:

It did not matter which JDR Justice I got - 27

Comments: ***Also - it is time consuming to first agree on justice, then locate; also 'fit schedule'; also didn't think could request a specific JDR justice [two]; and I like the other side to be happy.***

I didn't think we could request a specific JDR Justice - 8 [plus 2 above]

Comment: ***When in Lethbridge, you get who you get.***

Other - 22

(specify) ***Everyone had already booked and this was the only opening left; do not know the justices to choose one over another; choice was acceptable but unknown; conflict; mutual agreement; it is a little complicated - but due to the nature of a previous order it seemed most appropriate that justice do the JDR; I thought the one chosen was appropriate; set before my involvement; I thought all of the possible choices were competent; pressed for time; limited availability [several]; the timing and justice were material; timing was most crucial factor [several]; I could live with the justice proposed; I did choose, however from an available list only; judge was suggested by other justice; limited choice in rural areas; finding a date counsel and clients available was more important; and limited choice prepared to do binding JDR.***

- No Answer - 15

- TOTAL - 72

L5. Regardless of your answers to L4., as a result of your experience in the JDR just completed in this case, do you think a choice of the JDR Justice would be helpful in the future?

Yes - 334 = 89%

Why? ***No point with some judges - I don't want to participate with them; different styles are more appropriate in different settings; mediation/interest based negotiation skills are very helpful - we try to choose the Justice we know has those skills and this makes the chances of success much greater; counsel can match the Justice's style with the parties' needs; background and expertise of judge is important; with all due respect,***

some Justices are known to be more plaintiff-oriented or alternatively more defence-oriented; some justices have better rapport with clients; knowledge of the area of law and experience [numerous] - enhances commitment to process; allows the parties to agree on who they perceive to have a strong understanding of the issues to assist the parties in working toward a solution; I wouldn't go to a JDR unless I had a choice of justice - over the years, one gains respect for certain justice's opinions - I want my clients to hear from a justice whom I highly regard in those tough cases that would otherwise go to trial; tailor to case; this is a voluntary process and both sides must feel comfortable with the choice of justice - some justices are much more effective in the process [several]; because there is significant variation judicial styles with different styles being appropriate for different cases [several]; in order to get consent to binding JDR from both parties and counsel, there must be confidence in the JDR justice based on past rulings and manner and experience - tailor to specific persons/issues; some Justices are not very strong at JDR's either due to personality or disdain for the process - certain justices are better suited to deal with certain issues/parties - different lawyers/clients respond to different judges [common to many]; some justices are useless for various reasons - 1) not interested in participating fully, 2) limited mediation skills, 3) come in with a pre-formed opinion and share it almost immediately - destroys chances of a resolution; it's critical that both counsel agree to the choice of JDR Justice - some are simply more effective than others - the persona of the "judge" is the key here; some Justices are better suited, by temperament, to a consultative process; can try to match client's personality to judge's style; choice is critical - there are some judges I could never do a JDR before [numerous]; there are certain justices who are - 1) just not skilled at JDR, 2) have pre-judicial biases not yet expanded, or 3) have no real interest in getting a resolution [several]; some Justices are proactive; if both parties agree to the JDR justice neither can complain after and each should respect the justice's view - favourable or not - there is some "buy-in", which I think helps resolution [several]; some justices are more directive to clients, which may be more useful on some files; some judges are lousy at mediation - not everyone has the skills to be an effective mediator; more likely to settle if choose a judge one thinks is fair and reasonable and not oriented to one side; I think this is the most important factor because the parties know going into

the mediation that the judge's opinion is critical and likely to be the result at trial; clearly areas of law have become specialized and where a Justice has that special expertise, then time is used effectively and directly [several]; it is critical that the judge knows the practice area well, as there is not time to educate him or her; each has their own approach and each file should be treated differently so the ability to choose each time is essential to success; sometimes the nature of the client affects the choice of justice - in this case the client had a history of abuse from males and we thought she might feel more comfortable with a female justice; I feel more comfortable when preparing my client if I know who will be residing; I am more likely to accept the opinion offered by a judge I choose [a number]; I do not mean to be disrespectful, but some justices are better suited to the process of mini-trial than mediation and vice versa [a number]; allows cases to be heard by justice known in area (i.e., construction, etc.) - better to have a justice with a base knowledge present at JDR than to have to explain a standard before one can determine if there was a breach from it - it helps to have someone with a bit of background knowledge; the ability to have some input as to the process and Justice is one of the major benefits of JDR; personalities are important when dealing with emotionally intense clients or situations; the process relies on the credibility of the process to the participants - if there is a perception that a JDR justice may not review material, may not be prepared, or may not understand the nuances of practice in a certain area, clients may not agree to participate; it is reassuring to the parties to be able to agree on a judge - that in itself is a cooperative process which bodes well to the possibility of a cooperative JDR; some judges are respectful and considerate, whereas others feel the whole process is an imposition and the Counsel are abject failures for not solving this themselves; some justices do a better job of questioning parties (so they feel like they've been heard) and explaining reasons for opinions; sometimes a justice has a conflict in a small community - requested a judge from outside of community; some Justices are better at the "quick study of litigation" and make compromise attractive; ability of judge to make lay participants comfortable; some Justices don't have much training or acquaintance with process or tend to be indecisive [quite common]; some Justices are better at making settlement occur [numerous]; if I could not choose the justice, I would do a private mediation where I can pick the mediator;

puts parties in control of the style desired; certain justices are much better with difficult clients; it is the #1 reason I do JDR's; parties need to be assured of an objective and impartial hearing; different biases on the bench (as to heads of damage); some Justices are known to be pre-disposed to certain outcomes (or are at least perceived to be) - a perceived bias (plaintiff/defence) could persuade rejection of the opinion [several]; to avoid wasted JDR time; absolutely necessary - otherwise, might as well just go to trial; ensures both parties feel they have a Justice familiar in the area and perceived to be "fair"; because all justices are human (I think) and like in all aspects of life, some are better at JDR's than others, for a whole lot of reasons; some judges better suited to family law cases than others; if a party picks the judge they start to take ownership in the result; because that justice gets them settled; different clients need different approaches (some work better with "mediation" judge, some work better with "mini-trial" judge); every judge has a different JDR style - some prefer to negotiate/some render an opinion/some shuttle back and forth - you need to pick the right style and Justice for each case; my client was very nervous and intimidated by the other side - I wanted a Justice that I felt the client would be at more ease with; choice could be the 1st step of the negotiation; look for mediation expertise; each tends to have their own style - some tend to mediate - some tend to do mini-trial - it is important to have style suit parties, lawyers, and action; certain Justices are better at certain roles of JDR Justice (i.e., whether evaluation, mediation or mini-trial); and an unacceptable judge would simply render the JDR meaningless.

□ No - 11 - 3%

Why? Most judges seem to run their JDR's in the same manner; all judges in JDR have been good - this particular one was excellent; very satisfied with the Justice who ran this JDR; generally speaking, the justices who do JDR's seem interested in doing a good job and committed to the settlement process - there are a few files I might want a choice on but not all files; and you don't get to pick your trial judge, but I do think some are more suited to the JDR process than others.

- No answer - 29 = 8%

-TOTAL - 374 = 100%

M. ROLE OF JDR JUSTICE IN SUCCESS OR LACK OF SUCCESS

M1. Would you have achieved the same outcome of success/lack of success, without the JDR Justice, merely by a negotiation session with the parties and/or lawyers present?

Yes - **16 - 5%**

Why? ***Had to explain and negotiate against judge's opinion which the other side agreed was incorrect; knowledge of the parties and counsel; the JDR Justice did not move either party from their initial position - intransigent client; would not have settled; and both sides stuck to their respective positions throughout.***

No - **297 = 79%**

Why? - ***The parties needed an incentive, and some reassurance that the agreement was fair - possibly counsel needed to download some responsibility; had tried earlier - other side not prepared to accept risk of liability finding against them; because both sides needed to be pushed; clients are impressed to speak to a justice, tell their story and have their "day in court" so to speak; had been tried - both counsel are trained in collaborative law and usually try negotiation if possible; parties involved need sense of "day in court"; other side had dug their heels in; other side was entrenched in position on loss of income; other side unreasonable [several]; parties too entrenched [several]; other side needed to hear from a judge why the claim wasn't as good as thought; certain clients need to hear it straight from a judge's mouth [several]; need judge's opinion to scare us into settlement; need client to hear from a justice [several]; clients are more amenable to compromise if a judge assesses their cases than without a judge; other side was a jerk - needed a reality check from the justice; it put the other lawyer "in a box" where they had to be reasonable and look at settlement; we all work well to deadlines and needed a judicial opinion on damages; justice seemed to have influence on parties; justice's opinion did move the other side from some positions; huge difference in quantum assessments; clients were intransigent previously; justice able to convince other side's lawyer that benefit of trial may be minimal; judicial opinion was necessary on some issues [several]; client emotion; other side's counsel believed client needed to hear justice's views on quantum; other side difficult - didn't value claim properly; the other side was entrenched in their view of liability; the other side would not come to the table before a JDR; needed judicial opinion and authority; we ended up settling for [a different amount] than what***

was offered 6 months ago; we were too far apart with too many issues; other side was required to give "evidence" in front of a justice - could assess credibility; difficult party on other side; did not think a court would find basis for loss of income with poor rewards; it was an all or nothing case as liability was in issue; lay clients i.e., personal injury clients, value a justice's opinion more than their own lawyer's opinion; other side had their optimistic blinders on; justices have certain respect in front of clients' eyes; the other side and counsel needed to hear a justice's opinion on damages and causation; difficult party on the other side needed to hear judicial musings; other side's expectations too unrealistic; counsel tend to be too fixed in position; the independence of the justice and the sanctity of the office assisted in the resolution because emotions were strongly felt and rightly so - the loss was laden with grief; we had tried that approach and failed; in both experiences, the matters would have gone to trial; success is relative when dealing with money matters; trials are very expensive; the other counsel had stalled and delayed the process, then served a formal after and refused to move; parties needed to move off entrenched positions [several]; justice was instrumental in impressing upon parties how the issue would be judicially determined; parties very entrenched; although we did not settle, the judge enabled the parties to greatly reduce "the gap"; judicial opinion carries weight in assessing risk; comments on legal issues really motivated the other side to get past some major hurdles in their position; other side unwilling to move at all; party not willing to compromise but needed opportunity to be heard by justice; the other side needed to hear the positives and negatives of her case from a justice; justice provided the direction necessary; the other side's lawyer was not understanding the issues and had incorrectly quantified the file - needed a judge to say so; parties were too far apart in liability, apportionment, quantum, etc.; judicial opinions helpful; presence of justice prevented some game playing by other party; bad news delivered by a justice carries more weight than when delivered by a lawyer; JDR was scheduled as it was difficult to get the other side to respond to requests for information and proposals; I think it was important for other counsel and the other party to hear from a judge; large difference between defendant's and plaintiff's positions; justice's opinion was key - we would not have settled; the issues were "all or nothing"; the presence of a justice adds a sense of knowledge and credibility to the

process; parties were entrenched in positions; needed balanced opinion; lawyers are impotent - judges are revered and respected; parties too firmly entrenched in their views, value of the claim, imbalance of power; caucusing required, some cajoling with judicial authority; the other side miss quantified the claim - my client's expectations too high; mediators cannot provide persuasive reasons for moving on position of liability especially with conflicting case law - the parties needed to hear the opinion of a justice; justice's comments are objective and reflective of what would happen in trial; justice present was important for clients and adjuster to know and see; client needed to hear it from someone in "authority"; tried and failed; very difficult party on other side - they needed the objectivity of a judge to formulate a reasonable settlement position; justice gave an unbiased assessment of the merits of each side's case; the parties were too far apart with respect to their assessment of damages; we needed an opinion of a Justice to break a deadlock; the client would not have been willing to settle without hearing a justice's views; needed judicial influence; the other side was not negotiating - "too busy", and this pushed closure; legal opinion of justice differed from mine - I was incorrect; looking like the other side had to sell the settlement and with the client on hand, the deal was done - not likely in a cross conversation between counsel; clients were very difficult - unrealistic view of opposing party/counsel; settlement positions only became reasonable when JDR justice present; justice kept parties "in line"; other side was intractable in previous negotiations; judicial input on the legal issues is critical; client needed to have "story told", and have judicial comments - likes "tell it to the judge"; it is helpful to have attention on the process and motivation on resolution; mediation skill of justice invaluable; client on other side and lawyer needed to hear a justice's opinion; one side made offer but no response for more than one year; several settlement meetings were held in the year or two prior to JDR, to no avail; both sides needed to move; this justice's opinion was of primary importance - justice's opinion crucial - needed justice's input; we attempted a settlement meeting informally with the lawyers and clients and were not successful - because the other side's counsel wouldn't tell client how much the case was worth; clients are often unrealistic in their expectations; the opinion expressed was different than the other side's valuation - so they had to move more than they otherwise would have; tried it - not successful -

needed the "authority" figure to set things out; may have settled if justice had not poisoned the good mood between these parties; intransigence of one party and lack of realistic expectations on part of their counsel; we had tried to settle but the other side would not move on their position; counsel and the parties need to get the message from a neutral knowledgeable party; needed justice's views on law, risk, etc.; negotiation already tried; justice added some weight to process; need judicial authority to tell plaintiff most of claim unfounded & opinion of surveillance; clients needed to hear from a higher authority [several]; needed some insight on the law; parties needed judicial presence and authority; needed judge to get parties' focus off merits and to persuade them to be more reasonable; clients and issues emotionally charged and unbiased arbitrator helpful with parties needing to be heard; other side was rigid on application of law; personality of parties - stuck; need justice's opinion to make parties see the light; offers had already been exchanged between counsel - other side's counsel needed input from the justice in order to modify figures and adjust position; absolutely not - a justice was needed to get both sides to listen and accommodate; negotiations had been attempted - tried it and did not succeed - it is good for parties to hear a justice tell them of the pitfalls of trial procedure; parties were too emotional to be rational; even experienced lawyers need validation a good judge brings to process; animosity between clients; needed an independent, objective authority figure; needed judicial opinion to close gap; JDR justice's opinion was needed; opinion was necessary because the other side would not budge prior; parties were too opposed, other counsel not helpful for settlement; adds an element of objectivity from the legal perspective; legal reasoning - too far apart; 2 previous settlement meetings failed to resolve 2 main issues; we had tried everything else; I believed that my client would settle once s/he received a judicial opinion; we needed a justice's opinion to bring the parties together; have had difficulty until the JDR in any negotiation; other side needed to hear judicial opinion and from a male justice; judicial involvement brought parties closer together, narrowed and focused the issues; lack of counsel cooperation - settled for what was offered months prior - needed judicial opinion weight; needed legal opinion as to how case may go at trial; disagreement on application of law to facts; client needed to hear judge's opinion on some of the "weaker" aspects of the case - this applied to both sides in my opinion; we

needed the opinion of the Justice regarding liability and causation; otherside would only look at case as "this ruined my life" and expected too large a settlement; we had tried to settle, but were miles apart; need the clout of judge; lawyers and clients can become entrenched in their position unless a justice gives contrary opinion; need to bend client to reality (a.k.a. probable judicial outcome); the negotiation would have been more balanced without the judge; animosity between parties [several]; other side's counsel had not provided any counter-offers prior to the JDR; JDR is very work intensive - I do not go that step unless I need to; tried, cannot resolve it without it [numerous]; other side difficult and not credible; parties had fundamental dispute on causation that needed judge's input; because we both knew what the range was and could not agree, the mini-trial gave us the impartial perspective that led to the settlement; I think the other lawyer needed the protection of having appeared before a judge; we used the JDR to bridge static positions; other side had to hear from a judge what spousal support should be; JDR Justice provided authority/direction/clarified the law, so party had to move off unreasonable conflicted legal position; too much posturing by one side, and lack of sophistication by the other; justice explained advantages of settling; parties were too polarized; pretty sure they wouldn't have come up that far; and justice did a great job, even though the matter did not resolve.

□ Not Sure - 46 = 12%

Why? Very difficult to predict as opposing counsel and his client were quite reasonable to deal with; prior settlement discussions had stalled and were shaken into high gear by caucuses; judge's input minimal; other side's claim was unreasonable - big gap between parties in quantum; justice did help ensure realistic settlement expectations; other side seemed not willing to discuss and they finally decided to attend JDR after some time; likely yes - but only after a struggle; probably, but our clients might have had to hear it from a judge; I was new to the file and had not previously dealt with opposing counsel; because if we were able to do so - it would likely have taken much longer i.e., weeks, and I believe the justice was helpful in persuading both sides to alter their positions significantly; we had been in a holding pattern for 12 months prior to the JDR; this file has been very difficult to settle; I believe the process is an aid to a successful

resolution; not sure if parties would have appreciated issues absent third party clearly assessing issues; and simple presence of a judge likely has impact on parties.

- No answer - **15 = 4%**

-TOTAL - **374 = 100%**

M2. Did involvement of the JDR Justice significantly improve the prospects for, or the achievement of, settlement?

Yes - **338 = 90%** No - **16 = 4%**

- No answer - **20 = 5%**

-TOTAL - **374 = 99%**

If "Yes", specify the degree to which it helped: (1 = little; 5 = a lot)

1 - **2 = <1%**

2 - **6 = 2%**

3 - **20 = 5%**

4 - **90 = 24%**

5 - **185 = 49%**

- No answer - **71 = 19%**

- TOTAL - **374 = 100%**

How? (specify) **Resolution of money issues; opinions and just listening to the client; justice was able to get the parties off their positions and put issues into perspective; managing client expectations and risk analysis; clients hear judicial assessment; justice refrained as much as possible from being positional and taking sides; justice conducted JDR in firm, confident manner - clarifying likelihood of success at trial; persuaded other side to alter offer; other side needed to hear it from a judge; always! - it helps that the client can ask the judge specific questions - I have never had a JDR case not settle immediately after the JDR - would not settle without Justice's involvement; both sides accepted justice's views and reasons for those views; binding JDR - decision rendered at conclusion; I think that we wouldn't have settled without the JDR; justice was forceful in giving opinions on the issues; parties were too far apart; opinions/recommendations; justice's view on likelihood of success had an impact; parties recognized risks, and were persuaded to compromise - some issues were agreed upon - those that remained were decided by the JDR - closure was achieved; reality check - but it didn't sink in;**

client willing to make more offers; assessed likelihood of success; patient attention to all; client wanted to know what a judge would think at trial; justice gave other side clear idea their position was not correct in law - pointed out weaknesses in their case; justice told the parties where they were probably wrong; one party has a much more realistic view of damages; justice gave the other party a reality check as to entitlement at law v. what believed should get; justice gave a clear view of the case to all parties; all parties respected the justice and the opinions provided; by making my client and me reassess position; gives parties a sense of focus and completion; justice educated the parties; after hearing both sides, lawyers & clients were provided benefit of justice's experience in providing view on fair resolution; provided evaluative help; client (and lawyer) learned what risk is; acknowledging clients had suffered significantly - the other side couldn't maintain their low offers; justice laid out view clearly; managing client expectations; because we trust the JDR justice - client would not have listened otherwise; input on liability and damages - justice brought the one party down to earth; authority - objective and judicial view; gave one side extra leverage to get change offer; guidance on various issues [a few]; firm, but kind, reality check; by focusing on the issues/giving an opinion - justice made the risks real; relevant issues and solutions were found quickly with his assistance - session was more co-operative as a result; told plaintiff likely outcome at trial; clients - one position realistically and other not; justice helped client understand best case scenario; process gets people thinking; provided opinion; makes each side come to grips with strengths and weaknesses of each side; realistic opinion from practicing member of judiciary; said we'd lose - client never would have agreed otherwise; judicial opinion [several]; both parties needed to hear a justice tell them what he/she would do at trial; justice got us very close on quantum, bluntly assessed strengths and weaknesses of each case; justice gave opinion on disagreement on application of law to facts; [helped other side realize liability was not what they thought]; justice had ability to tell the other side would lose at trial; provided a number for parties to consider; it gives positions credibility; narrowed and defined issues; justice articulated the reasons for proceeding i.e. a "principled" approach; narrowed significant gap on position, issues and quantum; opinions re: strengths/weaknesses of positions on law [several]; justice leaned on them; other side moved significantly from pre-JDR

position; brought other side back to reality - moved the settlement forward since; clarified how a judge would probably weigh the evidence and rule on the case; pointed out holes in each side's case; judge's opinion, as well as lawyers, was that this was a good deal for the client; both sides listened; other side wouldn't budge from position on liability before speaking with justice; advised other side's counsel quantum was significantly different than originally assessed; justice controlled the other side well; legal opinion provided; given justice mediated, hard to answer; justice's skill set was very appropriate to parties' needs at this JDR - gave opinion on causation which helped to narrow quantum issues; by providing parameters of outcome (ranges); client wouldn't listen to us, but he did listen to judge; provided authoritative opinion; provided a "reality check" [frequent]; justice was committed to results; justice provided a range for quantum; justice gave a very strong opinion that the other side accepted; would not have settled otherwise - judge gave client reality check; honest appraisal of parties' positions; client realized weaknesses in case; helped clarify key issue in dispute; twisted arms; settlement impossible without JDR justice; and simply "weight of authority" behind proposal.

(*If settlement was achieved on all issues, go to section "N"*)

M3. If settlement was not achieved on all issues, did this JDR assist you to obtain further information relevant to the trial, clarify the remaining issues for trial, or assist you get ready for trial, or otherwise assist you in achieving ultimate success?

Yes - 45 = 12% No - 17 - 5% Not sure - 11 = 3%

- No answer - **301 = 80%**

-TOTAL - **374 = 100%**

Assisted in some other way (specify):

"No" Answers = Made it worse.

"Not Sure" Answers = Process may have clarified the issues.

"Yes" Answers = Issues of concern are clarified for both parties - may help later resolution; narrowed issues, provided necessary evaluation; significantly lowered other side's expectations; evidentiary issues; suggested a further expert report or joint testing by parties would resolve one issue; established adequacy of documents; like a second opinion, changed client expectations, more willing to settle; skill set for future binding

JDR on unresolved issues with assignments; clarified and narrowed some issues; we are doing a review in 3 months before same Justice at another JDR; helped specify what are outstanding issues; client's expectations were not achieved - client was unreasonable and not logical; clarified our likely success on our causation argument; justice set out hurdles for client in a frank blunt manner; it confirmed suspicions I had about the other side's evidence; other side had to re-evaluate their position; showed both parties where weaknesses and strengths were in their evidence; identified issues that needed clarification and further proof; we did as told, I thought it proved our case; by identifying areas where additional evidence is required; helped other side see their position was not realistic and gave suggestions to strength our client's case; clarified points of strength/weakness [several]; clarification and identification of issues, burden we need to discharge; educated the parties in a respectful way; not significantly, but helped clarify arguments; issues of credibility, quantum, etc.; only two issues remain; fleshed out which claims will require evidence/expert opinion; identified weaknesses; better understanding of other side's position; by clarifying issues we can focus better on what steps to move the matter - case law research; and client and opposing party have now moved closer to settlement.

N. JUDICIAL PARTICIPATION

N1. Did you and/or your client ask the JDR Justice to caucus with you and your lawyer, separate from the other side?

Yes - 131 = 35% No - 218 = 58%

- No answer - 25 = 7%

-TOTAL - 374 = 100%

If "Yes", did the JDR Justice agree or refuse?

Agreed - 123 = 33% Refused - 5 = 1%

If the JDR Justice refused, did s/he give a reason?

Yes - 5 = 100% No - 0 = 0%

If "Yes", what was the reason: *Not justice's practice; does not caucus; said "your people won't agree on anything" - criticized the clients, the pleadings, and became belligerent; clients hired us as lawyers - don't need clients to be present, just lawyers; and this was in the "pre-JDR" - we knew going in that justice would not*

caucus - in this case it didn't matter - in other cases, I may not have agreed to that choice of justice because of this attitude.

If "No", why did you not ask the JDR Justice to caucus with you?

- it would not have been helpful - **43 = 11%**
- didn't know the option was open - **12 = 3%**
- don't know/not sure - **6 = 2%**
- other (specify) - **121 = 32%**

Examples: No asking - seems assumed; justice offered to do it; JDR justice offered/directed it subject to disagreement; justice did regardless; was evident that no resolution would be forthcoming; it diminished the mini-trial concept; didn't need to, he did it anyways; justice did it right away anyway; the Justice asked us after we agreed on a few issues/heads of damage; and didn't think necessary.

- No answer - **192 = 51%**

-TOTAL - **374 = 99%**

N2. Did the JDR Justice (without being requested) **offer** to caucus with you and your client?

- Yes - **230 = 61%**
- No - **107 = 29%**
- No answer - **37 = 10%**
- TOTAL - **374 = 100%**

N3. Whether the JDR Justice was asked or offered, did the JDR Justice actually caucus with you and your client?

- Yes - **236 = 63%**
- No - **120 = 32%**
- No answer - **18 = 5%**
- TOTAL - **374 = 100%**

If "Yes", did the JDR Justice discuss the strength and weaknesses of your case?

- Yes - **203 = 54%**
- No - **3 = <1%**
- In between or not sure - **17 = 5%**
- No answer - **151 = 40%**
- TOTAL - **374 = 100%**

If "Yes", was it helpful?

□ Yes - 177 = 47%

Why? Not in the detail he should have; mostly the weaknesses and risks of trial; had no idea what the case was about, discussed irrelevant things and readiness issues like filed reports and consolidation orders; independent qualified 3rd party opinion assisted us on assessing risk; helpful to lawyer, not helpful to client; discussed strengths but then suggested number to resolve not appearing to reflect the comments; it set the parameters for negotiation but also limited the creativity of solution; he vacillated - both counsel wanted a stronger opinion - we never got one; virtually no substance to reasons for opinion; far too strong an opinion; expressed same opinion to opponent; believe material not read; that was why we were there; reality check; creates movement in position; helpful to hear view on one particular key issue; both sides needed to hear "risk" of case [several]; my client was present and benefitted from knowing/confirming risks; emphasized areas of concern if went to trial; justice confirmed my advice; because my client had to hear it from a judge; gave opinion on what to expect at trial [several]]; gave a truthful opinion on our position - confirmed or dispelled strengths/weaknesses of our case; candid assessment narrowed issues and quantum; explain reasons for position and what needed for a settlement; allows client to see perspective of justice; let my client know what went well; helped to clarify matters; I think that a judge can be more frank when speaking to a party alone; to have my client understand the risks from a judge; made the client pay attention in a different way; we asked him to advise of value of surveillance evidence, circulated confidentially to him before hand; allowed plaintiff to assess and understand judicial view of the case and likely outcome at trial; my client was able to see the weaknesses in the case; it's always helpful to get unbiased perspective; excellent assessment of issues, client needed to hear; my client needed the opinion that spousal support was very high risk; re-assuring to hear; helped; helped, as fresh eyes looking at it; client

needed to hear; position taken by Justice is helpful to client; it assisted in further risk evaluation; allowed the client to do risk analysis and cost/benefit analysis; confirmed what I had already advised my client; helps with client expectations; adds to lawyer's credibility in client's eyes and is a reality check; made us aware of the relative strength of our claim; forced my client to consider the risk of going to trial; opinion facilitated movement; client was interested; gave the client a perspective; confirmed out concern about the weaknesses of case, which we already appreciated; confirmed my opinion; clarified trial risks [several]; kept emotional outbursts and responses down; encouraged client to settle; client needed to hear from justice; aided in trying to settle matter; helped client to understand; clients value those opinions very highly; assisted compromise; frankly discuss the case; my client was told by me at JDR that client [understands] it from the judge; it confirmed some of my assessments and gave useful opposing thoughts; justice outlined the rationale; reality check; client became more realistic; did not discuss merits but did point out key issues; reiteration of trial risks to client; we requested a judicial opinion; helped confirm opinion previously provided to client; confirmed our opinion [several]; moderately - my case wasn't the problem here; clients have to hear it from judge - helped move our client to compromise; gave a definite opinion; always helpful to get another view; provided perspectives I had not considered; confirmed what counsel knew but client needed to hear; identified areas that were not worth pursuing and narrowed the scope of negotiations; client also received confirmation of advice we'd been giving, but wouldn't accept; clarified issues of concern to court; received confidential opinion on issues; tend to get somewhat blind when too close; allowed my client to hear a judge's opinion on merits of case [several]; clarification of strength of case led to further agreement later; added weight to counsel advice; helped with client understanding; fresh pair of experienced eyes; let my client know that we had weaknesses; the parties needed their risks emphasized; offers additional opinion re: strengths and weaknesses of

position; insight into holes in our case - reality check for us; surveillance evidence was prevented; could have done more; made you think - re-evaluate; offered an opinion without any bias toward either side; risk assessment [several]; narrowed the gap; soften up my client's position; reduced client's lofty expectations; and client needed to hear it from a neutral party.

No - 3 = <1%

Why? *Believe material not read by justice; virtually no substance to reasons for opinion; and far too strong an opinion - expressed same opinion to opponent.*

In between or not sure - 12 = 3%

Why? *It set the parameters for negotiation but also limited the creativity of solution; both counsel wanted a stronger opinion - we never got one; not helpful to lawyer, not helpful to client; justice vacillated; and discussed strengths but then suggested number to resolve not appearing to reflect the comments.*

- No answer - 182 = 49%

- TOTAL - 374 = 100%

If "No", do you wish s/he would have caucused with you and your client?

Yes - 17 = 5%

Why? *May have given my client more information; both sides can be more open; I feel we would have settled if Justice involved until the end of negotiations that day; could have reached a solution; hypothetically, in another case; to get feedback; justice might have got our evidence straight - could have reminded justice of legal issues to be resolved; we had trouble accepting justice's opinion; questions on issues; and not really necessary for this one although it may have sped up the process.*

No - 76 - 20%

Why? *Not necessary [24]; we settled it almost immediately after open session; binding JDR [4]; was not a quantum negotiation situation; this Justice allowed each party to speak freely and didn't hesitate to provide insight to parties; it was a*

one issue case with little grey area; we only wanted to get a judicial opinion; not wanted in this case; it wasn't required because of the findings/opinion she gave; not needed - my client was willing to settle in accordance with justice's initial recommendation [a couple]; don't believe this would have been helpful; wouldn't help; I don't believe it is appropriate; and premature.

- No answer - **281 = 75%**

- TOTAL - **374 = 100%** No

N4. If you were to do another JDR would you wish the JDR Justice to caucus with you and your client?

Yes - **271 = 72%**

Why? Clients need to gain a perspective from frank discussion without the other side present; justices provide an internal assessment to client - imperative - provides a chance for frank exchange of views re: strengths/weaknesses of case, prospects of settlement [several]; more freely speak about the case - always helpful to deal with the more difficult issues or sticky points between the parties - helpful to discuss possible outcomes without other side present [many similar]; very helpful - especially for clients - I believe this is most helpful - always helpful to hear what the judge has to say; insight into case; to assist in risk assessment, it is helpful to have the judge's input and advice - confirm justice understands issues - essential to get input apart from the other side; to discuss strengths and weaknesses and risk factors [several]; opportunity for client to hear from Justice and clarify position/strength of case; eventually, but not immediately; often find opinion helpful; if we could settle by negotiation (face-to-face) we wouldn't need the JDR; caucusing is very valuable; sometimes we need "reality checks"; different cases/clients would benefit from it; enables frank/easy communication; important for full disclosure without a negative impact on negotiations; facilitates open and frank discussion that can be considered and discussed without the pressure of the other side being present; comfort level of client to discuss weaknesses and justice assists lawyer in directing and educating client on irrelevant or frivolous matters - client also feels had their say - or day in court; always; sometimes necessary to advance emotional situation; on request, assists in evaluating the case; provides direct insights to parties as to their position in the eyes of the JDR justice; more flexibility for justice to express views on settlement [in caucus]; can't hurt - also improves the overall dynamics; need that

confidential input - more comfortable for client - allows frank discussion; often times it is helpful; helps client see case from justice's view; critical to the parties understanding strengths/weaknesses; private audience for client is useful/persuasive; if it was a quantum negotiation; can help in separating the people from problems and lets them talk freely - critical to process; all justices I've had have caucused - to get input without an open forum, can only lead to consensus; that is the major benefit of the JDR process - judicial opinion; candid advice/discussion on merits; most useful part of JDR - independent experienced adjudicator discussing case frankly with lawyers and clients; give justice a better appreciation of client and case; but it depends on the situation - most family law parties are very angry towards each other so it would be helpful; neutral input; gives client an opportunity to hear judge's views and reactions; always helpful to hear your weaknesses in private; each case is different and caucusing is usually most helpful; it allows for frank discussions, the neutrality of the offers and reasons - greater empathy to client; obtaining judicial input is the primary reason for choosing judicial as opposed to private mediation; it adds confidentiality (or the appearance of it) to the process; reality check good [several]; provides focus; makes process less confrontational - also allows us to openly discuss strengths and weaknesses - as counsel it's always great to pick the minds of the justice to help us more accurately assess and evaluate cases and positions in the future; it depends - it would be good to have the option; more persuasive to parties - very important part of the process to make it successful in my opinion; helpful for clients to hear justice's views - that is what it was all about; always useful to talk to a judge - client needs to hear the "facts of litigation" from a judge; we explained issues that our client struggled with; it is the best way to push the parties to settle - to get a candid opinion of probable trial outcomes; allows the client a chance to tell their side of the story; property issues more available for negotiation; increase control over settlement process and clients; critical to evaluative mediation; if appropriate - it varies from case to case; parties expect a real judge to be involved; most effective if JDR justice is open & if responsive; more personal; need one on one time with Justice to encourage parties to move in their position; in most cases it is very helpful; depending on the type of claim and the type of client; once before judge did not [caucus] and JDR was unsuccessful - sometimes parties need to discuss issues

in confidence; it gives your client the chance to open up without the other side present - allows for candour - less adversarial; depends on circumstances but in some instances allows client to save face; an essential aspect of the process - negotiation without direct posturing - it might give the client a required push to settle; depends on case [several]; lawyer needs to know type of JDR, and then choose - judicial caucuses are only valuable if the lawyer needs help convincing his own client of the strength of other side or lawyer is not really experienced at trial work; it is great for clients to be able to ask questions; sometimes a "push" is necessary [several]; good insight into opinion; if there is no movement; clients should be able to ask questions of a judge without the other side being present; not caucusing does not promote unfettered discussion of resolution - helps to be completely candid; crucial - clients get to talk to and hear from a judge - persuasive, forceful, etc.; in some cases it may be necessary [several]; very useful - it is effective - it helped; after opinion, maybe be helpful to settlement; allowing Justice to be frank and less tactful; need to discuss application of law to facts; depends on case [several]; if necessary, parties often need to hear it from lips of a Justice; may be helpful at Pre-JDR stage; gives us insight - it's evaluative, what we came for; if the case warrants it, it can be very helpful; helps difficult parties understand their case without embarrassment of other side in the room; most judges understand mediation; allows more "open" discussion of issues/proposals; if necessary after giving reasons and opinion; overcomes obstacles; sometimes a frank discussion without the other side illuminates issues; helps us understand how judge quantifies a file; depending on whether my client needed a reality check from judge; better chance of getting point across; it speeds up the process and provides all participants with an indication of who's on the right track; probably; assists compromise process; if we could settle without JDR - we'd do it - we've already tried face to face negotiations - and were not successful; gives us the chance to ask questions to justice without presence of other side, to better evaluate our stance; if non-binding JDR - caucusing generally helpful; and let client have the judge's view, not just my own - affirm points and encourage settlement.

□ No - 34 = 9%

Why? ***Justice should speak before both parties; not needed or helpful in this kind of case; keep all discussions out in the open; only if the need arises; would ask that they perhaps be available if parties unable to settle on own; I prefer everyone to discuss and meet together; because we wanted an opinion on the issues and that is what we got; not if binding - too sensitive; don't believe it is appropriate; I believe the process must be transparent; would depend on the circumstances; in family matters, good for both sides to hear law - good and bad; and Unnecessary in our case.***

- No answer - **69 = 18%**

Why? [Note: Question not asked where there was "No answer", but answers provided by participants anyway]: ***Maybe - depends on dispute and clients [many]; not necessary; perhaps - depends on circumstances but haven't found this necessary in the past; for type a and b [Negotiation or Mediation, or Evaluative Mediation]; depends on the judge and the particular field; and if required.***

- TOTAL - **374 = 99%**

O. JUDICIAL QUALITIES

(Note: The purpose of this section is to use your experience, in the context of this JDR, to identify the best qualities of a JDR Justice. It is neither to identify the JDR Justice, nor to be used to provide a personal evaluation to the JDR Justice)

(*Rate the qualities where 1 = poor; 5 = excellent*)

O1. In terms of **GENERAL APPROACH**, was/did the JDR Justice:

a. Prepared (appeared to have read all or most relevant material)?

1 - **3 = <1%**

2 - **6 = 2%**

3 - **15 = 4%**

4 - **92 = 25%**

5 - **244 = 65%**

- No answer - **14 = 4%**

- TOTAL - **374 = 100%**

b. Knowledgeable (or appeared to be so) on the law relevant to your dispute?

1 - **3 = <1%**

2 - **5 = 2%**

- 3 - **24 = 6%**
 4 - **96 = 26%**
 5 - **231 = 62%**
 - No answer - **15 = 4%**
 - TOTAL - **374 = 101%**
- c. Explain the JDR process to your client:
 Yes - **337 = 90%**
 No - **20 = 5%**
 - No answer - **17 = 4%**
 - TOTAL - **374 = 99%**
 If "Yes", was the explanation helpful? (1 = little; 5= most)
 1 - **1 = <1%**
 2 - **7 = 2%**
 3 - **50 = 13%**
 4 - **137 = 37%**
 5 - **109 = 29%**
 - No answer - **70 = 19%**
 - TOTAL - **374 = 101%**
 If "No", might an explanation have been helpful?
 Yes - **8 = 2%**
 No - **11 = 3%**
 - No answer - **355 = 95%**
 - TOTAL - **374 = 100%**
- d. Polite, courteous and pleasant (as opposed to impolite, discourteous and gruff)?
 1 - **1 = <1%**
 2 - **2 = <1%**
 3 - **10 = 3%**
 4 - **55 = 13%**
 5 - **292 = 78%**
 - No answer - **14 = 4%**
 - TOTAL - **374 = 100%**

- e. Accommodating and sensitive to you (and your client) telling your story to him/her and to the other side?

1 - **5 = 1%**
 2 - **4 = 1%**
 3 - **31 = 8%**
 4 - **83 = 22%**
 5 - **236 = 63%**
 - No answer - **15 = 4%**
 - TOTAL - **374 = 99%**

- f. Frank, but fair in expressing his/her views on your risks in the dispute?

1 - **5 = 1%**
 2 - **8 = 2%**
 3 - **20 = 5%**
 4 - **89 = 24%**
 5 - **235 = 63%**
 - No answer - **17 = 5%**
 - TOTAL - **374 = 100%**

- O2. How would you describe the JDR Justice's **SPECIFIC ROLE** in attempting to obtain a settlement in your JDR, in relation to the following descriptors?

- a. Assertive (#1) or relaxed/laid back (#5)?

1 - **40 = 11%**
 2 - **66 = 18%**
 3 - **121 = 32%**
 4 - **91 = 24%**
 5 - **38 = 10%**
 - No answer - **18 = 5%**
 - TOTAL - **374 = 100%**

- b. Not very innovative (#1) or very innovative (#5) in suggesting options or ways to reach a settlement that you and your client did not think about?

1 - **37 = 10%**
 2 - **44 = 12%**

3 - **150 = 40**

4 - **86 = 24%**

5 - **27 = 7%**

- No answer - **30 = 7%**

- TOTAL - **374 = 100%**

c. Merely left it to the parties to achieve a settlement (#1) or worked hard to achieve a settlement (#5)?

1 - **62 = 17%**

2 - **38 = 10%**

3 - **71 = 10%**

4 - **98 = 26%**

5 - **81 = 22%**

- No answer - **24 = 6%**

- TOTAL - **374 = 100%**

Exerted pressure on you to settle generally or in a specific way (1=low; 5=high)?

1 - **112 = 30%**

2 - **74 = 19%**

3 - **80 = 22%**

4 - **59 = 17%**

5 - **24 = 6%**

- No answer - **25 = 6%**

- TOTAL - **374 = 100%**

Was that appropriate?

Yes - **282 = 75%**

Why? ***Impossible to rush or push this resolution because of nature of loss; discussion was positive; we have the better case; parties were close, wanted it done; justice had good understanding of the issues - and, experienced counsel on both sides; we did not reach the stage where it became necessary to exert pressure; it worked in the context of this JDR; risk of proceeding to trial was getting too high; file needed it; based on case, facts, evidence, and client; experienced counsel and reasonable parties made this matter proceed with***

minimal judicial participation; the JDR was non-binding; if no settlement, judge would decide issues; fair and honest opinion; our case was strong; as JDR was binding, the JDR justice encouraged parties to agree where possible; reality check - but too far; both sides needed a reality check in this instance; clients like to hear the court's opinion; no need to be aggressive; needed to know justice's views to help modify our own stance where necessary; directed the parties positively; specific concerns better identify risk; more pressure on client than counsel (on scale, pressure level of 2 exerted on counsel); client unrealistic at times; it was quite obvious justice's settlement recommendation should work; persuasion was used rather than pressure and reasons were given so that there was buy in from the other side; it was a fairly simple case; very frank about risks of trial in our fact pattern; in order to get it resolved; another opinion that may be more objective; just explained costs of trial; needed to encourage payor; trial was not a good option for either side but parties not wanting to move; we were prepared to move - other side needed "help"; opinion of justice crucial; client needed to hear; benign JDR - no negotiation of the process; justice felt not a judicial role; we were being reasonable, of course; case needed to be settled due to economics of going to trial; this is what we asked for; our position going in was very reasonable [a couple]; not necessary; I knew what the case was worth; emotion was beginning to take over; other side was being unreasonable - we did not have to move much from our original position; parties had narrowed issues to only a few; because our claim was very optimistic; risk; not judge's role to pressure at JDR; justice described the judicial role as only 1 tool available to resolution; the client needs to hear the problems with the case; case should not have gone to trial; each side needs to realize weaknesses/strengths and risks; I believe it was apparent my client would not respond to pressure; justice agreed with our position; if

too much pressure, client would question objectivity; little pressure - I agreed with justice's position; my client is sophisticated in dispute resolution and was aware of the risks and was able to evaluate the settlement without undue pressure; client needed to hear justice's opinion; let parties make their own decisions; told of consequences at trial; it is up to the parties to resolve; no pressure needed; parties needed to see they had agreed; my client indecisive; set parameters for negotiation; more "mini-trial" style than mediation; we needed "rulings" on some issues; all participants "saw the light" without the need for pressure; our position mostly agreed with; appropriate that judge doesn't reveal inclination while negotiations ongoing because binding JDR; motivated clients to move; brought home importance of resolution; needed to hear when we were not realistic; value of claim vs. trial costs strongly supported a resolution; my client already motivated to settle - just wanted to know what was in the range - we had some risk; important for the client to feel they were making the decision; needed to see risks of going to trial; justice gave us an opinion - shouldn't exert pressure; pressure not needed - would not have been appropriate; necessary because other side intractable and made it appear fair; justice gave a solid opinion; my client responded positively to judge's words - got a deal; the other side disputed the law; maintained objectivity; that's the point - to get a judicial view; client needed to hear it - we were apart - there were contentious issues in the case - we had difficulties we had not considered; our position appears to have more merit; the case needed it; allows client to feel they've made a decision and are in control of the process; both sides needed to hear more of the consequences of not settling - law was against us; very practical - set out the quantum range; this justice made it clear that the justice had no vested interest and this was a helpful reminder to client; because the parties kept negotiating until we reached a settlement; the justice did have counsel assess

the varying degree of general damage awards on the chalkboard when narrowed down the issues - they both needed a reality check; we needed to improve our offer in some areas and dig-in in other areas; parties needed to adjust expectations significantly; no need for pressure; could have used more pressure; the pressure came at the right time; because the justice does it evenly to both sides, and it works, although sometimes the middle is not necessarily the right spot; because of the justice's view of the surveillance evidence; our numbers were in line with the justice's; client needed to make up own mind; some of us needed a push; this case was not one to go to trial; both parties were entrenched; it got results - I know the risks of trial - don't mind getting the evaluation - what we came for; je struck an appropriate balance; file needed it; justice required participation and commitment to resolve from both parties - justice stated the facts and provided the information necessary to help [settlement] - it was a fair assessment; we reached a point where we knew the judge's range and why, but the other side was reluctant to accept, and would need more time to accept it; justice clearly explained the risks to both sides; justice gave input when required but let the process unfold on its own; parties close, just needed a nudge - pressure wasn't required; it worked - clients need direction from the court sometimes; it was a legal interpretation; and justice's approach was "practical", not really "legal".

□ No - 21 = 6%

Why? Not mediation; both sides needed a little push; justice was off base on law/facts; because justice wanted to split; justice needed to be tougher re: risk faced by plaintiff or defendant, instead was more of a facilitator; more pressure in this case would have helped (case specific); justice biased in favor of other side; needed more help; he kept asking my client to put in more money than we believe the case is worth; change in position is vital to settling; inappropriate

678

settlement apportionment of damages; we needed input; John Q. Public needs to be coaxed; could have secured an offer with time; simply suggested settlement without meaningful discussion; and would prefer more pressure.

- No answer - 71 = 19%

Why?[Note: Question not asked where there was “No answer”, but answers provided by participants anyway] **Didn't matter in this as it turned out the parties settled on their own - however, would not have happened without JDR; I expected more pressure from the judge; not applicable - justice gave an opinion and left it at that; guess so; not necessary; in the long run, yes; and justice took tone of counsel - both were experienced.**

- TOTAL = 374 = 100%

Exerted pressure on the other side to settle generally or in a specific way (1=low; 5=high)?

1 - 71 = 19%

2 - 38 = 10%

3 - 72 = 19%

4 - 81 = 22%

5 - 31 = 8%

- No answer - 81 = 22%

- TOTAL - 374 = 100%

Was that appropriate?

Yes - 223 = 60%

Why? **Experienced adjuster and counsel; client unrealistic at times; other side needed a reality check; other side was unreasonable; see above [many]; other side was not negotiating in a principled way; risks to each side need to be explained; other side needed to be realistic; settled the matter; the other side was being unreasonable in what they were claiming [several]; just speculating, but other side needed to hear from a judge that their case was weak [several]; They were not inclined to move from their original position even in the face**

of evidence; other lawyer didn't seem to know law on spousal support; same for both side; opposing party unrepresented - justice very even handed and fair; at the beginning, asked if we all were serious about settling; other side difficult [several]; other side had more risk; also told of consequences [if matter went to trial]; the other side's expectations were very unrealistic and justice had to spend a lot of time explaining certain issues so other side understood and was able to resolve other side's issues; not justice's role; my client had significant mitigation and causation issues - unreasonable expectations - had to make the response serious - client didn't know what it was worth; other side's position was not realistic; issue wasn't worth the fight; other side (and counsel) had unrealistic view of liability, risk, and quantum of damages; the parties themselves had to be comfortable with the deal; especially towards the end the justice seemed more open-minded; other side had hugely unrealistic expectations [a few]; got a deal; other side entrenched [several]; not appropriate; same as for my client - see above; pressure can be a good thing but was not required here; because client felt the justice of client's decision; unnecessary; other counsel was competent and able to control his client; other side had mis-valued claim; JDR was binding; other side had to change their position considerably in their damages; other side needed an unbiased assessment of their risks - they had some unreasonable positions on some issues; it got them to settle; other side was being stubborn; reiterating risks and weaknesses; it got results; justice provided opinion and left it to the parties to assess their own risks as it should be; such influence was needed; position on some issues were not consistent with current authority; other side just needed advice/opinion to appreciate risk; get everyone to move; they needed it; not required; their position was weak; and made them move.

□ No - 16 = 4%

Why? ***Needed to provide tough advice; could have used more pressure, perhaps; had no offer from other side; the other side needed to be pressured [several]; could have done better; and we needed input.***

- No answer - **135 = 36%**

Why? [Note: Question not asked where there was "No answer", but answers provided by participants anyway.] ***Not sure - done via caucus, but suspect some pressure was exerted as other side's position substantially improved; don't know [numerous]; unsure [numerous]; don't know as caucused early in process; opinion coincided more with opposite party; unknown - met in caucus privately [several]; justice committed to getting settlement but did not unduly pressure either side; expected more pressure - felt there was none on the other side; don't know - assume so; a JDR judge has a role to play in achieving a settlement - this requires a balanced approach which is firm and frank while meeting privately - the parties need this objective assessment to make the settlement discussions more effective; did after I requested that the justice provide opinion in fairness of our trial offer to the other side; don't know/used "Kissinger" method [shuttle diplomacy] - parties not in same room very much; didn't appear to; and don't know - I presume justice did based on justice's representation that justice had done so.***

- TOTAL = **374 = 100%**

d. Highly emotional (#1), or cool and logical (#5)

1 - **2 = <1%**

2 - **7 = 2%**

3 - **32 = 8%**

4 - **112 = 30**

5 - **203 = 54%**

- No answer - **18 = 5%**

- TOTAL - **374 = 100%**

e. Patient with the parties and their participation (1=low; 5=high)

1 - **5 = 1%**

2 - **11 = 3%**

3 - **23 = 6%**

4 - **90 = 24%**

5 - **228 = 61%**

- No answer - **17 = 5%**

- TOTAL - **374 = 100%**

f. Appeared impartial and open minded (1=low; 5=high)

1 - **7 = 2%**

2 - **8 = 2%**

3 - **28 = 7%**

4 - **98 = 26%**

5 - **214 = 57%**

- No answer - **19 = 5%**

- TOTAL - **374 = 99%**

O3. Over all, how do you measure the effectiveness of the JDR Justice (1=low; 5=high):

1 - **8 = 2%**

2 - **11 = 3%**

3 - **26 = 7%**

4 - **100 = 27%**

5 - **210 = 57%**

- No answer - **19 = 5%**

- TOTAL - **374 = 100%**

What would you say described the most significant qualities or lack of qualities of the JDR Justice bearing on his/her effectiveness? [To reflect the description with the rating, I have listed them in accordance with the rating given - starting with the highest rating. Note too that there is much repetition.]

#5 - Good interaction with counsel and clients - prepared and experienced; prepared, relevant, took control; justice was fair and logical and assessed the case on its merits without being overcome with sympathy; justice's temperament and general ability to

know when input was required; enthusiasm to get matter settled/understanding of issues and parties' needs/respect shown for client; knowledge of law and mediation abilities - gaining the confidence of the client; overall approach; discussed/analyzed all liability issues, then discussed \$ values in absence of liability issues so when it came time to make offer, it was logical how to craft an offer, but still seemed to each side that it was their own offer; neutral, well prepared, kept opinions to self until all submissions made; listened and prepared; gave thoughtful reason opinion; expressed opinion in fair manner and provided time for parties to work out own position on quantum and heads of damages; practicality; making assessment based on facts and law; I am not certain the same approach would work in other more complex actions - but that again relates to choice of justice; well prepared, rational approach, firm but not overbearing; common sense - patient - hard-working - interested; good listener; was hoping justice would raise specific legal issues and ask for counsel's view on them; calm; interested in helping the clients; giving feedback if positions were reasonable or unreasonable; gave insight on how the other side viewed things; disappointed not read briefs thoroughly, but pleased justice was assertive in opinions; firm, professional, listened, got participation and commitment from both clients, explained reasons; calm neutral evaluation; clear on opinion, explained reasons and basis on evidence; justice's personality, knowledge, experience and insight - did only what needed to be done to get the job done; organized with a clear understanding of issues - knew facts, courtesy, listening, fair, offered opinion; was blunt but polite with other side - decisive and assertive; assertiveness, sharing of experience - blunt, honest - very valuable; this Justice left parties to propose quantum, also worked to share experience; justice having read materials including doctor's reports was very helpful in this case; effective assessment of liability evidence, credibility evidence, and damages; justice was prepared, knowledgeable and quick to hone in on the issues; clarified issues and law - assertive towards settlement; justice had carefully read briefs, listened to all submissions, questioned the parties as needed and stayed to help parties resolve after opinion; level headed and attentive; justice actually had a very good understanding of the difficult validation issues; justice was knowledgeable and prepared (having studied material and case law); sensitivity to clients, objectivity, knowledge in the area, and preparation; justice worked hard; very

good approach - demeanor but willing to comment on risks - quantum and costs of trial; willingness to be involved in process, rather than leave it to the parties to work things out; blunt, direct manner, assertive; frankness, interest/sympathetic, efficient, focused; fair-minded; assertive and decisive [frequent]; knowledgeable about legal issues, facts and their significance, sensitive to real issues, especially complex issues not apparent on the face of the JDR (e.g., limits issues); decisive on issues - pushy at times - assertive; talked straight at parties - not up or down to them; open and honest and interested; maintaining impartial appearance but being very candid on strengths and weaknesses of parties' positions; showed empathy for the client while keeping a firm hand on the risks of trial and the problems in our case; ability to encourage dialogue between parties - allowed them to tell their story/present their case "to each other", not to the justice, while encouraging other party to listen; patience with clients, assertiveness with counsel, and candour on merits; frank and fair - wanted to help parties - personable - relaxed atmosphere; open minded, honest (regarding likelihood of success), cooperative, involved; even-handedness, empathetic but not permitting unreasonable positions, very good at managing the process to help it flowing; justice thoroughly verbally reviewed the evidence, the strengths and weaknesses, and the work to be done before trial - this gave the client a clear understanding of the client's status; experience, patience and specific communication on certain issues; effective and fair; impartial, courteous, communicative, honest; preparedness, sincerity, objectivity, candour, smart, and impartial and forthright; very prepared - provided frank and honest opinions; read and digested material in great detail - kept discussion on track - very good with the non-lawyers; listened to the client and attempted to make the client understand the reason for the justice's opinion; strong opinion expressed, helpful in this case; objective, fair and compassionate; exerted gentle pressure by providing ranges and vague assessments of risk allowed parties to negotiate within range and calculate risk; offered a frank and full opinion; had both sides state their case and other side was able to ask questions; reasoned and provided a good sounding board; knowledge of the materials and law, patient; calm, measured, realistic; focused on issues, frank with parties; assertive, clear on opinion and the strengths and weaknesses of both sides; common sense opinion, open mindedness, patience and gave full hearing to both sides;

appearing caring but neutral and firm - caring without being frank is useless, but this judge struck the right balance; explained the assessment process to the lay party; set the agenda but let the parties negotiate their own settlement with very little judicial interference; preparation and interest in client; all of the above - preparation is absolutely key, otherwise it is a waste of time - flexibility re: process is also important; good listening skills - sensitive to the dynamics of the room - unwavering; very matter of fact, to the point - good knowledge of family law; being extremely frank; straight forward - everyone knew what justice was thinking and why; impartiality - able to speak to the parties at their level - patient; willing to engage the issue and opposing positions; preparation, thoughtful, invested and inquisitive; well prepared, balanced approach - but firm in dealings with parties; fair, reasonable, knowledgeable, highly experienced, well prepared and fearless; detached, decisive; appeared calm, relaxed, balanced and helpful - assisted us in assessing risk and taking a more realistic approach to viewing the claim; prepared [many]; decisive in coming to a decision; experience/disposition/preparation; interested - accommodating - treated us as equals - engaged; knew the file cold, open to reason, and then decisive; respectful of what parties (as opposed to lawyers) had to say - appeared interested and engaged; cool, calm, respectful, polite, available, prepared; patience with parties - clear on legal consequences of situation; cut to the real issues quickly and stayed with heads of damage until very late in the process rather than all-inclusive so that the issues were not lost in the numbers game; well spoken, knowledgeable, logical, assertive, direct, etc.; direct, to the point, discussions - frank; highly prepared and patient; incorporating in discussion/opinion both aspects from briefs filed and evidence/argument heard that day - giving all parties confidence that they were heard even if the justice disagreed; justice cut to the main issues quickly and kept everyone focused; good listener, communication, down to earth, courteous to all parties; prepared and knowledgeable - exuded confidence, plain-speaking and pragmatic and wise; extremely well prepared, asked key questions, articulated reasons well; preparation, open to parties, courteous, empathy with 'unsuccessful' party; polite, sympathetic, gentle; being prepared; judge excellent mediator and able to figure out how to get parties to a deal - even other side said so walking out; not threatening, candid, fair; a little too focused on closing the gap rather than on what is legally correct;

thorough, polite, fair; took time to really hear parties; reasonableness, directive, patient, calm; knowledgeable, assertive at times; prepared, respectful, polite, conscientious, thorough; very involved in assisting the parties in resolving the dispute; knew the materials - interacted well with the clients; mediation skills; was engaged in process - invested in helping achieve settlement; gave opinion with sound reasoning based on clear evidence - ensured client had "day in court" - listened, asked questions to encourage client to speak; preparation, innovative, knowledgeable, persuasive, explained reasoning for opinion; knowledgeable and pragmatic; preparedness, analysis of issues, understanding dynamics of negotiation, able to make parties be reasonable; open minded yet realistic approach; read the materials, gave a good explanation of views, concise; reasoned approach to negotiation and discussion of issues; practical approach to problem; fairness [frequent]; confident in knowledge of the law so clients accepted justice's advice; justice's ability to be fair but still able to express view of each party's case, both strengths and weaknesses; understated, patient, thoughtful, and helpful; ability to relate to plaintiff and empathized with injuries and situation - while remaining firm and in control of the JDR; very approachable, very prepared, provided opinion of quantum, brought about settlement - would have like caucusing, though; clearly outlined cost of trial, risk, acceptance of evidence vis-à-vis law, clear explanation of law, outlined compromises, amazingly patient and no nonsense about how evidence/testimony might be perceived; it was very clear that justice was trying to accommodate this couple and that justice was being 100% fair to both parties; committed to settlement, not in a rush, willing to go back and forth until settlement reached, kind to both parties throughout, calm; justice made it clear that s/he was ready and willing to assist in any way possible if the parties were at an impasse or required an opinion - when asked to provide an opinion, justice was most helpful and frank; reasonable, courteous and measured opinion based on issues; courteous, well prepared, insightful, respectful, well versed in the law, well spoken and well respected by the parties; credibility with all parties; knowledge of family dynamics and preparation to give reasonable options; patience and empathy; and fair minded, well prepared, identified problem areas on both sides, gave reasons for decision.

#4 - Empathetic towards client and let him participate and understand the process; gave an unbiased view of the issues - risks and problems with both parties' case; understanding of materials and differences in positions was obvious and reasons were provided for opinion; fair, open, and provide opinion; calm, patient, blunt; knowledge and confidence - ability to listen; for this case, justice's assertiveness was helpful; well prepared, cooperative and encouraged settlement - the judge's mere presence improved the chance of settlement; apparent impartiality; prepared, engaged, effective, understanding, down to earth; prepared and knowledgeable and engaged in process; everything done well but we needed an opinion and did not get one; read the materials, understood the issues and the law regarding each issue; knowledge of the law; polite, informal, low-key; (1) the office - as a judge, the opinion carries weight, (2) impartiality - listening to both sides, and (3) practicality - risk assessment; listening, approachable, very direct - not too "legal" but at the same time, technical with the law; very calm, no pressure to settle, offered an opinion and facilitated discussion - very well done; fairness, patience and understanding of the legal issues; a willingness to listen even to matters repeated many times - clearly and decisively applied the law to our facts - clearly stated the results of not settling; had focus on the problem and weaknesses of the case; assertiveness with a figure rather than a range, although parties did not ask for a binding opinion; knowledge of the facts and thoughtful assessment of them and the law; got results; knowledge of family law, expressing legal opinion; listened well to both parties to make them feel like they had been heard; refusal to caucus impeded settlement; justice rolled up sleeves and said "let's get it done" - it works; positive - expressed opinion on merits in a sensitive (wise) way, but negative - not sufficiently empathetic; frankness and no nonsense approach - got to the chase immediately - judge gave a clear review of the risk to my client of going to trial on a variety of issues; client was somewhat put off when judge discussed golfing together with other side lawyer after JDR done; knowledge of the law and facts; balanced, tolerant, tough enough to be the "Boss" as needed, civil & able; (1) had a good feel towards the issues, (2) zeroed in on the points of contention, (3) delved into the facts and law on the points of contention; knowledge and practical [numerous]; very professional, patient, to the point - ability to connect with client - exerted pressure on both sides to settle/avoid trial; appeared

impartial yet gave an opinion; willing to give a solid review of all material in a fashion that helped highlight the strengths and weaknesses of both sides; considerate of issues from both sides, polite and conducted JDR in a discussion format; knowledge of the area - willingness to listen to the parties - willingness to privately share thoughts; read material and understood issues - experiential perspective; spoke plainly to difficult client; needs to be a little more critical - just because plaintiff claims a head of damage - does not mean they should be awarded something for it; patience - allowed each party to say story, tried to help each party see the other's point of view; the ability to offer a unbiased opinion; a little brisk, but overall effective - asked the right questions without offending anyone - stressed the risks of trial to both sides and provided a reasonable opinion on the facts and law; brought the issue home to the other side; convincing the other side of his position; fairness (my client was especially impressed), but could have been more assertive - had to ask for opinion when stuck; and very dedicated to the process of JDR.

#3 Exerted pressure on both sides; justice acted too much like a mediator trying to find a common ground rather than a judge focused on the facts; very assertive - certainly told us when we were out of line - towards the end seemed nicer to my client, less civil with the other side; in this case it was the justice's position (i.e., a member of the bench) that was the most effective quality; positive - willingness to actively support or reject positions, but negative - failure to play a role beyond initial assessment; justice's mind was basically made up (on some points) before briefs were even submitted; listened to and spoke directly to my client; caucusing was successful but I have no idea what was said to the other side; not as amiable as other JDR's; misrepresented case law, misunderstood evidence (reduced client's chances of success at trial) - this was "effective" in convincing my client not to expect a fair trial, therefore settle now; the judge was polite, courteous and relaxed, but seemed to lack training and a clear process; to facilitate, have to be prepared to lead, to canvass thoroughly, to bang heads of necessary and be committed to achieving resolution - too compromising; and positive - very respectful of everyone, but negative - possible lack of preparedness which may have led to lack of assertiveness.

#2 Appeared to be in a hurry - also appeared to be impatient; this was a very 'non-traditional' JDR, which was more a facilitated negotiation session than mediation; became too stressed that a settlement wouldn't be reached if we didn't capitulate; analytical, knowledge of law relevant to case, assertiveness; precision in the opinion, but judge needed to roll up shirt sleeves and get involved more in discussion with client; did not follow own process - allowed other side to not follow prescribed process; no questions - just listened and then gave opinion; and needs to engage the parties more to identify what is keeping the case from settling.

#1 - Unmotivated; had no process; no insight as to how to bring the parties to a resolution; too impatient; leaped to a decision; unwilling to listen to any contrary views; unable to see that he had sabotaged the JDR as well as future settlement possibilities; biased, did not understand case; didn't read pleadings or brief; refused to hear my summary; gave the impression he had knowledge but he didn't, except for the opposing party's side; failed to focus on compromise by asking for the same from the other side; judge too chummy; not professional enough; and didn't know law, facts, issues.

No rating # - Justice explained opinions and basis, problems with any evidence, costs of trial, stress and time of trial, risks of trial.

O4. Based on your (above) assessment, if you were doing another JDR, what is the rating you would give as to whether you would choose this JDR Justice (if you had a choice) for that future JDR? (1=low; 5=high)

- 1 - **19 = 5%**
- 2 - **9 = 2%**
- 3 - **29 = 7%**
- 4 - **85 = 23%**
- 5 - **209 = 57%**
- No answer - **23 = 6%**
- TOTAL - **374 = 100%**

O5. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **style** in JDR proceedings, **in terms of achieving a settlement**: (1=negative; 5=positive):

- a. Aggressive
- 1 - **70 = 19%**
 - 2 - **79 = 21%**
 - 3 - **113 = 30%**
 - 4 - **71 = 19%**
 - 5 - **13 = 3%**
 - No answer - **28 = 7%**
 - TOTAL - **374 = 99%**
- b. Assertive
- 1 - **1 = 1%**
 - 2 - **24 = 6%**
 - 3 - **87 = 23%**
 - 4 - **152 = 40%**
 - 5 - **78 = 21%**
 - No answer - **29 = 7%**
 - TOTAL - **374 = 98%**
- c. Gently Persistent
- 1 - **3 = <1%**
 - 2 - **19 = 5%**
 - 3 - **78 = 21%**
 - 4 - **137 = 37%**
 - 5 - **108 = 29%**
 - No answer - **29 = 7%**
 - TOTAL - **374 = 100%**
- d. Carefree (none of the above)
- 1 - **243 = 65%**
 - 2 - **38 = 10%**
 - 3 - **16 = 4%**
 - 4 - **7 = 2%**
 - 5 - **2 = <1%**
 - No answer - **68 = 18%**

- TOTAL - 374 = 100%

e.

Other (specify)

Patient and alters approach depending on parties; able to adjust according to what occurs in the JDR; decisive; understanding, empathetic, knowledgeable, experienced; I want one without bias as to whiplash cases; provide specific opinion/discussion; open-minded, listens, explains all issues; candid, approachable, not overly-sympathetic, impartial; confident and respectful; is case dependent - flexibility important; this depends on the case and your client [several] - sometimes you need an aggressive, assertive judge to move a client with unrealistic expectations; read the material and come prepared; up to speed on legal issues is critical; rational and objective; they should at least have a direct role in encouraging settlement; results-oriented; needs to be judicial; needs to keep involved - have had justices "disappear"; respectful; "guidance" is the word that comes to mind; some pushing is helpful for sure; carefree style would not work as I have experienced JDR's; strategic - s/he should read which approach is best suited for the case at hand; knowledgeable in the area [several]; must be courteous and open-minded; listens; firm - if an argument is a loser - say so; it helps if justice is right [in opinion]; empathetic = 3, courteous = 5, and patient = 5; sympathetic but blunt; able to lay the legal groundwork as a justice to enable settlement (fully informed); the case may require any of these - or none - depends on file; informed on the facts and law for the situation; whatever the situation called for; [trait] at the appropriate time, depending on stages of JDR; depends on the situation/client - what is needed to get this file settled; and can't pick for all occasions.

O6. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **involvement** in JDR proceedings, **in terms of achieving a settlement**: (1=negative; 5=positive):

a. Control the negotiations

- 1 - 21 = 6%
- 2 - 38 = 10%
- 3 - 110 = 29%
- 4 - 128 = 34%
- 5 - 46 = 12%

- No answer - **31 = 8%**

- TOTAL - **374 = 99%**

b. Let the parties/lawyers control the negotiations

1 - **41 = 11%**

2 - **70 = 19%**

3 - **125 = 33%**

4 - **76 = 20%**

5 - **29 = 8%**

- No answer - **33 = 9%**

- TOTAL - **374 = 100%**

c. Be neutral (merely offer suggestions/options others had not raised)

1 - **76 = 20%**

2 - **84 = 22%**

3 - **89 = 24%**

4 - **46 = 12%**

5 - **35 = 9%**

- No answer - **44 = 12%**

- TOTAL - **374 = 101%**

O6d. Other (specify)

Recognize when the parties need to be told how he/she would rule; the process needs to fit the parties; definite opinion helpful; a neutral evaluation/opinion is very helpful; be sure to give a clear opinion on all issues; depends on the case, and the objectives of the parties - we expect George Adams, etc. to do more; important to express opinions on reasonableness of offers; it is largely dependent on the nature of the case and the particular lawyers involved; even at JDR, desirable for judge to be in control of proceedings; there is a dynamic here that cannot be ignored or overlooked; strategy in approach; justice has ability to help by being neutral; depends on type of claim and type of clients and counsel [several]; be flexible to see what would work; judge needs ability to intervene to get to a deal; it helps to be fair (e.g., not put undue weight on unfair precedents); caucus = 5, and offer opinion = 5; control the process, but don't dictate what conclusions should be realized or offers made; know the law/facts, give opinion; be available to caucus and mediate after giving opinion; important not to let the

meeting disintegrate - however one does so; depends at what stage - parties frequently need to confront each other with respective positions; and we want to know what the justice thinks.

O7. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **formality** in JDR proceedings: (1=negative; 5=positive):

a. Formal/structured

1 - **39 = 11%**

2 - **77 = 20%**

3 - **105 = 28%**

4 - **90 = 24%**

5 - **24 = 6%**

- No answer - **39 = 10%**

- TOTAL - **374 = 99%**

b. Informal/easy going

1 - **20 = 6%**

2 - **69 = 19%**

3 - **108 = 29%**

4 - **104 = 28%**

5 - **36 = 9%**

- No answer - **37 = 9%**

- TOTAL - **374 = 100%**

O8. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, what **other judicial qualities** would you like to see in JDR proceedings:(specify)

The ability to render a tough decision (i.e., no liability) knowing that it might negatively affect settlement; (1) be prepared, (2) be fair, and (3) give the [claimants] a chance to vent; justice who can identify or be aware of the underlying issues involved and address them; share opinion on overall aspects of case including quantum; have basic outline of experience of justice or idea as to his or her knowledge of the field in JDR dispute; receptive to parties positions; justices cannot assure every word that comes out of a party's mouth is true - where credibility is an issue, objective evidence needs to be given consideration - bias needs to be done away with; we go to the JDR to obtain an opinion on the file; more knowledge of the law in matrimonial property and divorce; more civility to all parties and the clients; courteous -

makes the process seem "user-friendly" to clients, but still maintains control of proceedings; ability to give an opinion and communicate this to the parties when necessary (i.e., not be too "wishy-washy" as parties can manipulate the process/outcome); knowledgeable in area of dispute [frequent]; sorry, but there needs to be a balance between formal and informal; patience is important, as is ability to gently focus the discussion while remaining courteous to all parties; polite, friendly, formal but approachable; I have had one experience where justice asked client at outset (in caucus) what the ultimate authority [limits of settlement] was - this was very off-putting to the client, who did not want to continue as it felt like the matter was not being discussed on the merits; knowledge of the specific area [frequent]; flexibility, ability to read situation and assess interests; more precise direction re: how we would be proceeding; it is important that the clients are made aware that the opinions given are that of a justice who hears similar cases and therefore the advice and opinion is different than an "ordinary mediator"; depends on the file [frequent]; opinions on matters of evidence and burden of proof, not assuming future evidence will be developed to support damages; proactivity; ability to identify strengths and weaknesses and explain them to the client; I like when the justice has a time when he/she brings up a specific issue that they want to discuss or hear more on; gently persistent is an apt description for a good JDR Justice - s/he should be decisive but not overly opinionated UNLESS one side takes an unrealistic position; needs to make clear that s/he is a judge and that their view is what a judge might think; patience but no nonsense; JDR's in a family setting should appear informal - although formality is required to get there, properly organized, with proper material; interest based skills, listening skills, etc.; clear direction to all parties and counsel as to how negotiations will proceed as the process unfolds - keep counsel focused and allow parties to actively participate while insisting on maintaining focus; openness - what are you thinking, encouragement of the parties in their positions - however point out flaws and weak points as well as positives; justice who has focus on compromise; one justice actually criticized the pleadings, wanted to have further expert reports, generally wandered around the pre-trial issues without putting opposing counsel into a "settle or go home" framework; offer opinion on how he/she would rule on certain points if matter heard by him/her; needs to be informal, but each party; listen to parties - background related to issues - offer views, guidance, explanation of risks, advantage of settlement; non-judgmental for the most part because not all the facts, law, positions, strategies necessarily

are put out on the table; the justice should have a good ability to communicate with the client and instill a sense of confidence in the client that his claim is being treated appropriately in the court system; I would prefer to pick a JDR Justice with life experience, practice experience and ... experience in the area in dispute in the litigation; try to portray an image of a judicial mind, but be kind to the litigants who need to be hammered; hard-working and well prepared; that the judges read the material and be ready - I have been pleased in the ones I have been involved but in some that is not always the case; justice asking questions of each party after he has given his/her opinion so that there is more dialogue concerning his/her opinion and each party's reaction to the opinion; (1) be prepared - try to identify key issues in advance, (2) listen - don't pre-judge; and (3) be firm - if an argument is a loser or expectations are way too high/too low - say so; clarity - nothing is worse than argument over what quantum was intended on what issue; needs some formality to have weight, but informal enough to keep clients comfortable; patience; proactive in identifying issues to be addressed in oral presentation and pressing counsel to justify/explain 'positions'; patience and willingness to listen; control of proceeding - ability to move negotiations along; less fudging of opinions; creativity; needs a balance of formality/structure and informality/easy going, talk about costs, reasonableness of the parties; a focus on a just result; flexible, patient, prepared; what I would really like to see, at any time, is a judge who does not really [do] gender stereotyping that sees the man as "payor" and the woman as "dependent"; as one attends JDR's one learns about the judicial temperament of a justice in the JDR environment - some make counsel and client feel better about the process, some come to the table with a pre-conceived notion of what should happen and push for that result, rather than letting the matter unfold naturally and investing their guidance at a more appropriate time; someone who knew the difference between a Chambers application and a JDR; reads brief and becomes informed of issues; authoritative demeanour - but listens and considers all sides; thoughtful, creative, knowledgeable and experienced; become more aggressive and assertive at later stages of JDR; some formal mediation training or experience; very knowledgeable of the facts of the case and the law that applies to these facts; judge needs to be able to speak with each party in this process - must be able to relate to the party if the party is going to accept the judge's recommendations; creative (especially in family law situations); needs to be able to empathize with both parties - to understand what their concerns are and why they have those concerns; not too

formal/informal, needs a balance of both; JDR justice is still a judge, not a buddy; depending on how difficult it is to manage and control our client's expectations will affect choice of justice - with an obstinate client who won't follow our recommendations we will knowingly choose a justice we feel is more defence-oriented - or who we perceive to be more conservative; well versed in law, and polite/allows clients to express their views whether relevant or not; providing a firm, well-thought-out opinion, avoid being ambivalent or providing ranges of damages; achieving a settlement is not necessarily the goal of a mini-trial in my view so I am uncomfortable answering Sections O5, O6, and O7 as I disagree with the premise; I appreciate justices who give an opinion as they would at trial and not try to short-circuit the process by immediately pushing settlement; flexibility to read the situation and parties in order to adopt the most effective style; informed, not pressed for time, willing to create a relationship of some kind with the parties that encourages trust in his or her opinion - resolution; must balance as situation dictates; must be willing to caucus; I can't see any value in a "rookie" judge - except perhaps one with experience with litigation or mediation experience; result oriented based on experience in the matter being heard; it is extremely important to know the style of the judge and if their style and process will work for the client; patient, perceptive, and informative; some pressure in terms of resolving the dispute without trial - warning client as to court costs issues if they do not better the offer; express their view on the strengths and weaknesses of both sides, either in general session or in individual caucus; be prepared to listen to each side - sometimes a judge will strongly favor one side, but this is not helpful - the judge needs to be able to point out weaknesses in both sides of the case; and clear understanding of issues with a strong sense of how the JDR justice expects to resolve the matter.

P. OTHER

- P1. Having considered these "Additional" questions, is there anything that we didn't ask you about on which you would like to comment? Do you have further believes as to whether the JDR program can be improved - if so, how? Do you have any additional comments?

Expand the JDR so that liability issues can be dealt with not just quantum issues; more available dates for JDR would be helpful; given limited info goes to the judge, in right circumstances a range is helpful - also discussing merits of the reports targets is more helpful as they don't have a chance to hear cross-examination; when my client tried to tell the client's

story during caucus there was no acknowledgment or encouragement, probably because it was personal and emotional and not strictly "evidentiary" or relevant to the law; I think that even though choosing a JDR process rather than a private mediation process may be influenced by the evaluative skills of a judge, the judge should have basic conflict management skills and some understanding of the dynamics of settlement; the JDR process may become mandatory in the future in view of the rewrite of the rules of court - will it result in more settlements? It may not result in more settlements considering the litigation process often illuminates many other issues the litigants are bringing to the process, including lack of objectivity and sometimes even issues of mental health and wellness; as a first time observer and summer student I was generally pleased with the JDR - I think it can be a valuable tool in helping avoid costly trials, however, I do believe that it should not become a replacement for trials - the Justices do not have the benefit of hearing experts - as such, the justices should encourage negotiation/settlement, but not at all costs - a Justice should not try to emphasize their views on liability, damages, etc. in order to discourage trials at all costs; when judges qualify their opinions with "but I'm just one of dozens of judges who might have other opinions", it detracts from the value of their opinions - lawyers can always remind their own client of this fact - the main value I see in JDR's compared to mediation is the weight of a judicial opinion and the value of emphasizing risks, strengths and weaknesses; JDR is an excellent program, but more standardized approaches to involvement of the justices may help, as would a more consistent level of judicial mediating skill amongst all justices - I will continue to use it; perhaps adding some requirement in proceedings early on where all parties are required to attend before a justice to discuss issues on a without prejudice basis - especially in family law matters; for a period of time, clients seem to prefer private mediations over JDR's because a particular mediator could be selected - now that JDR justices can be selected, this seems to be preferable because in most cases, the opinions offered by the judges on the issues seems to be one of the most important factors in having parties come together; I can't speak highly enough of the JDR process; very glad this option is available; different judges word for different clients and circumstances; I participated in a JDR several years ago that involved complex expert opinions - the judge asked for briefs, including the opinions - on arrival at the JDR, the judge advised that s/he had not "really" read the materials, but subsequently offered an opinion as the outcome at trial - this opinion resulted in the parties

becoming entrenched in their positions - however, I have been to other JDRs where the justice has been very well prepared, resulting in a very helpful outcome - in my view, JDR's should not be made mandatory unless justices have time to prepare; while it is important that the clients - particularly plaintiff's unaccustomed to litigation - are comfortable, I believe it is also very important that the parties are aware that it is a sitting justice who is giving an opinion - so, a balance between informal to make the parties comfortable and formal to highlight the value of the opinion is important; (1) If a judge doesn't want to do JDR's then please do not have him do them, (2) all judges should be trained if they wish to do JDR's, (3) it should be mandatory that justices read and prepare for the JDR and come in with a strategy to execute; thank you for the opportunity to comment; some attention should be given to precedent and case law to define damages as well as burden of proof and absence proper evidence to establish certain heads of damages; JDRs are very popular - increase the roster of JDR Justices; my comments are not about the process but about the parties and their counsel - assuming you get your choice of JDR justice (which we did), you should be prepared to accept JDR justice's opinions or you're just wasting everyone's time; the judge sent out a letter setting out what he wanted from the parties, allowed other party to change deadlines, then to supply a brief 5 times longer than allowed with materials that were not requested - our brief was in on time and in accordance with instruction - judge explained that process was to be mediation - it was not - even if it was to be evaluative mediation, then he was far too aggressive; my clients (sophisticated, demanding and well educated) were extremely impressed with the process and the judge's input - it is very fulfilling to have jaded clients end their litigation on such a positive note; (1) keep the process open for the parties to decide on usefulness and timing, (2) do not try to make it mandatory, (3) have both mini-trial and mediation format available - I do 5-10 per year - I use both, (4) keep choice of judge up to the parties, and (5) Calgary could have the mediation format and mini-trial format; when explaining that another justice might reach a different conclusion at trial, perhaps to state it could be a better or worse result as opposed to just different; also discuss costs of trial; in my experience, the ability of the parties to select the judge is critical to the outcome; the JDR program is essential to civil litigation as it markedly reduces the need for trial - in this case we were able to resolve in one day a matter that was scheduled for a 10 day trial; need the right judges; this is the only JDR I have been to that didn't settle, so it was not the best example - upon reflection, I think we all "gave in" too early

to "not settling" - when things got tough and we reached an impasse after lunch, in retrospect, I wish we'd all taken a break, then tried again - we've had discussion since - and one closer - but I wish we'd stuck it out a bit longer at the JDR; in the family context most parties just want closure even if it is not resolved completely in their favour; I think some justices either aren't interest or skilled in doing JDR's and, at least in the smaller centers, they shouldn't be utilized - those that have those skill sets should be used - those that don't should get these skills or simply not do JDR's - it is very frustrating to prepare for a JDR (briefs, etc.), then have a justice who won't exert any effort in a JDR; can a justice on JDR matters really get up to speed by reading a brief? I don't think so - they need help of counsel verbally putting the case before them - this used to be the norm, but now the justices come in and ask the clients a few questions and ignore the best resource they have - experienced, informed counsel; consistency in "binding" JDR process; opportunity to choose Justice is imperative; my firm and I love this process - it is excellent; having the otherside show up after agreeing to JDR but then not being prepared to negotiate - also [having to call someone else] to get authority to settle - leaving the ultimate decision to someone who is not actually having the benefit of face to face discussion with the justice, frustrates the process and makes it easy for a "faceless" 3rd party to control the process without having the opinion/private caucus with the justice - it's unacceptable to come to the process without proper authority to try and settle the case - there are intangibles gained from direct participation in the process that affect the outcome; I think it is an excellent program for clients and the court system - offers great cost savings and reduces risk to all litigants; seems to be most effective with an active participation of judge - however, judge should provide reasons why he/she thinks the way they do to the litigants; the further away from practice the justice is, then the less sensitive that person is to the less obvious "practice" pointers that counsel live by - and, conversely, the more the justice has by way of trial experience, the more "judge's perspective" can be offered - there is a trade-off and the process is ongoing; thank you for the opportunity to participate in this process; the JDR process provides a very valuable mechanism for litigants to access actual judges in a much lower risk environment - it is a very valuable program; more dates available; try this method before being forced to trial; questions above tend to imply a "One Size Fits All", but different approaches appropriate in different circumstances; I very much appreciate the process for some types of files, and would be very grateful if the availability of justices who are effective in

such proceedings could be increased, especially for family files; I sincerely hope there is no plan to remove the right to choose the JDR Justice - this would severely affect our decision of whether or not to do JDR's - the right to choose the justice is essential; no "in person" Pre-JDR meetings unless requested by counsel; (1) encourage parties to disclose their last settlement positions - all too often parties come in with something other than their "real position", (2) be proactive in asking key questions - "why do you say that" - "what about this" - "is there a case that says that?", (3) read the materials - usually considerable time has been spent putting together the materials; at the start there should be a request to comment on the last brief (I filed first and their brief had new and not accurate information) - alternatively a reply brief; have more judges available who: (1) are prepared to participate in binding JDR's, (2) I have had only positive experiences in all the JDR's in QB and only 2 failures in family court; with the briefs and authorities, it becomes more adversarial or litigation like - more thought & time should be given to explaining to lawyers what is wanted - if it become too [detailed], it becomes too expensive; consider having a costs consequence of JDR - I'm finding people are taking an extreme position in their briefs - being unreasonable - costs may force that out; JDR earlier in the process; the case law in family law is all over the map, generally lacking in consistency or principled application - a JDR judge should not pretend otherwise; I have had excellent results in many previous JDR's - the most recent one was a failure, and an embarrassment before my client, who is in-house counsel and has done many mediations (about 12 a year) - I would never do another JDR before this (senior) judge and I would consider someone who did (and had knowledge of his manner) to be negligent to do one before that judge; the "opinion" is the most important part of the JDR process - it is of great value - a judge's participation in settlement negotiations thereafter is gravy, but not critical; notice that in other jurisdictions the guidelines are circulated and signed off - I wonder how that impacts the usefulness of the JDR and if it sets a better stage for successful JDR; in my opinion, being able to pick the JDR Justice to suit the case and parties/lawyers included is critical [several]; the Justice must want the process to succeed and stay with it - not just say "if you don't agree I don't care and I'm going home"; for family law when credibility is not in issue and the issues are largely law based, JDR's work extremely well and the satisfaction level of our clients with that process is higher than after a trial - clients seem to feel they have really been heard; we wish more judges would do binding JDR's (we rarely do non-binding

ones in our family law practice given the costs involved); needed JDR judge to move the parties; no point having JDR's if judges appear not to have read briefs thoroughly, or if judges don't know the area of law; keep up the good work; JDR option not only saves \$, but gives litigants goals (especially family members); I had my doubts about settling this one, especially because the judge's approach was to listen to arguments which I felt were already in the brief and a waste of time and caused argumentative views; set for full day if possible with idea that will stay until absolutely every avenue of settlement has been considered; I believe that the Pre-JDR meeting and the preparation leading up to the actual JDR is important and should not be glossed over - an agreed statement of facts is likely useful, however should be questioned about whether they have full disclosure - if documents are promised at a Pre-JDR and not delivered on time - perhaps the JDR should not proceed; I believe JDR can't be a "one size fits all" type of process - depending on the participants and the nature of the dispute, different judges, styles, formats will be appropriate - this is as it should be; the process of arranging for JDR's and for filing or not filing materials should be consistent throughout the province and simplified as much as possible; JDR's should be pushed by the courts - in typical personal injury litigation the plaintiff is regarded as mere inventory to be abused when valuable hours are needed and ignored when defence is using current litigation in Alberta which is, for a plaintiff, unfair, expensive, terrifying, mysterious and very stressful; the biggest problem is availability - all spots to June 30 were booked by early March; I have been in a few JDR's where the justice never really lets the parties explain their position but simply tells each party they have risks with their position and uncertainty at trial - with all due respect, that is usually why the parties are at the JDR - the mini-trial approach is far superior but seems to be a rare occurrence; opinions should only be given when agreed to and required of counsel and at the appropriate stage; [judicial styles] depend on parties, issues, personalities - this is why pre-JDR meeting so important; generally (1) mandatory pre-JDR meeting, (2) limit justices, if possible, to those who are qualified & suited to JDRs, because could be a waste of time and money, (3) justice should only give opinions when asked if agreed, but that doesn't mean that they can't ask effective questions, not give quantity in opinion; a JDR judge needs to be better prepared than a private mediator - many are not; need more dates/justices available to schedule a JDR so that can be done within a few months of agreeing to proceed to JDR - right now the wait to get to JDR is too long; justices should only do 1 or 2 JDR's/week rather than 4 -

that way Justice is better prepared and can and will give more time to matter at hand, rather than need to get to the one they have to deal with tomorrow; the opportunity to pick a judge from a roster, "on line", is a huge improvement; I would never go to JDR with an "unknown" judge; we need a "menu" of judicial types, for different types of cases - it is not surprising that certain judges are "in demand", and others are not; present JDR is somewhat like litigation in the 70's, where one could pick the judge - if we could pick trial judges, and knew their temperances, we could settle more cases; very hard to give opinions in section "O", as different disputes call for different qualities and approaches - nature of dispute sophistication and experience of lawyers and counsel are major factors in this respect, but there are others; the JDR program currently is, I believe, effective; when the justice knew one side would be willing to make an offer to avoid a trial, but no to the extent sought by the plaintiff, the judge conducted a friendly interrogation of the other side and got that other side to trust the judge and the judge's judgment - none of the counsel involved expected settlement would be achieved - however, it was achieved, easily and without acrimony - well done!; judges should evaluate the proceedings to determine the most effective type of mediation - i.e. principle [rights] based, or interest based, or a combination - judges should discuss the approach to be taken with counsel; a judge MUST NOT state his/her opinion of the case to both parties openly, without first caucusing - if the Judge makes this error, he scuttles one side and gives too much courage to the other side, and drives the parties apart - a Judge MUST NOT show familiarity with one counsel over the others; at the moment the only knowledge lawyers have of the JDR style of each justice is anecdotal - it would help if when choosing the JDR Justice the court provided information as to style, background, years on the Bench; JDR's are the wave of the future - I have no negative comments; and more JDR dates - I think this is the new reality in the court system... more cases going to JDR, and less going to trial.

Thank you for taking the time to read the report on this Survey, including the "Additional Questions". Your advice will provide me with significant assistance in evaluating the Court's JDR Program.

Justice John D. Rooke

December 15, 2008

COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISPUTE RESOLUTION (JDR)

QB JDR PARTICIPANTS' SURVEY - 2007 - 2008

REPORT ON CLIENTS' SURVEY RESULTS

CLIENT SURVEY - "BASIC QUESTIONS"

A. AREA

A1. At which judicial centre did you participate in a JDR:

- Calgary (01) - **90 = 47 %**¹⁴
- Edmonton (03) - **87 = 45 %**
- Red Deer (10)¹⁵
- Lethbridge (06) - **7 = 4%**
- Other
 - Drumheller (02) - **2 = 1 %**
 - Grande Prairie (04)¹⁶ - **0 = 0 %**
 - Medicine Hat (08) - **5 = 3 %**
 - Peace River (09)¹⁷
 - *Wetaskiwin* (12) - **1 = <1 %**
 - Fort McMurray (13)
 - St. Paul (14) - **1 = <1 %**
 - TOTAL - **193 = 101 %**

B. REPRESENTATION

B1. Did you represent yourself at the JDR or have a lawyer:

- Self-Represented - **3 = 2%**
- Lawyer Represented - **188 = 97%**
- No Answer - **2 = 1%**
- TOTAL - **193 = 100%**

B2. Did the other side(s) represent themself(ves) at the JDR or have a lawyer:

- Self-Represented - **1 = <1%**
- Lawyer Represented - **179 = 93%**
- Some of each - **5 = 3%**
- No Answer - **2 = 1%**
- TOTAL - **193 = 98%**

C. TYPE OF CASE & JDR TIMING

C1. What type of case were you involved in at the JDR:

- Personal Injury - **133 = 69%**
 - Motor Vehicle Collision - **114 = 86%**
Includes: **Federal Gov't subrogation (1); insurance coverage issues (3); pedestrian/vehicle (1); and employment/insurance coverage (1).**
 - Slip and Fall - **9 = 7%**
 - Other (specify) - **2 = <2%**
Examples:¹⁸ **Professional negligence (1).**
 - Not specified or miss-categorized - **8 = 6%**
Examples: Constructive dismissal (1); professional negligence (2); motor vehicle/pedestrian (1); stabbing (1); death (1); insurance coverage/long term disability (1); and insurance coverage/motor vehicle/pedestrian (1).
 - TOTAL - **133 = 100%**
- Family Law - **23 = 12%**
 - Matrimonial Property - **16 = 70%¹⁹**
 - Parenting of Child(ren) - **5 = 22 %**
 - Child or Spousal Support - **11 = 48%**
 - Other (specify) - **3 = 13%**

- Examples: **Divorce; trusteeship; and restraining order.**

- Not specified or miss-categorized - **0 = 0 %**

Employment - **6 = 3%**

Insurance Coverage - **6 = 2 %**

Contract Dispute - **5 = 3%**

Other - **13 = 7%**

- Examples: **Professional liability [3]; tort [2] - negligence and property damage by fire; property loss and damage - forest fire; subrogated claim for property damage; oil site explosion; civil - between family members [2]; shareholder dispute; well blowout; and disclosure latent defect re: house sale.**

Not Specified - **6 = 3%**

- Examples: **Subrogation/liability [1].**

- TOTAL - **193 = 99%**

C2. How long after the litigation commenced did this JDR take place?(to the closest time period)

1 year or less - **4 = 2%**

1 - 2 years - **16 = 8%**

2 - 4 years - **58 = 30%**

4 - 6 years - **49 = 25%**] **112 = 58%**] **170 = 88%**

6 or more years - **63 = 33%²⁰**]]

Not sure - **0 = 0%**

- No answer - **3 = 2%**

- TOTAL - **193 = 100 %**

D. YOUR ROLE

D1. Were you present at the JDR as/for the:

Plaintiff - **62 = 32%**

- **Including: Also defendant by counterclaim [2]; and by power of attorney.**

Defendant - **121 = 63%**

- **Including: Also some including defendants insurer [3]; and also third-party [1] .**

Third Party - **2 = 1%**

Other - **5 = 3%**

Examples: **Defendant's insurer [3]; spouse; and defendant by counterclaim.**

- No answer - **3 = 2%**
- TOTAL: - **193 = 101%**

D2. In what capacity did you attend:

- Personal - **74 = 38%**

Including also a corporate agent [2].

- Corporate Agent - **14 = 7%**
- Adjuster - **92 = 48%**
- Other - **9 = 5%**

- Examples: ***Vice President of corporation; trustee for plaintiff; a dependant adult; insurance claims examiner or representative [5]; relative; and executor of estate of deceased defendant.***

- No answer - **4 = 2%**
- TOTAL - **193 = 100 %**

D3. Have you participated in JDRs before this JDR?

- Yes - **100 = 52%**

If "Yes", how many?

- 1 - **2 = 2%**
- Less than 5 - **17 = 17%**
- 5 - 10 - **22 = 22%**] **80 = 80%**] **97%**
- 10 or more - **58 = 58%**]]
- No answer - **1 = 1%**
- TOTAL - **100 = 100%**

- No - **92 = 48%**

- No answer - **1 = <1%**
- TOTAL - **193 = 101%**

E. TYPE OF JDR

E1. What type of JDR did you participate in (choose all that apply):

- a. Negotiation or Mediation (your client and opposite party negotiated, with your assistance, with a Justice facilitating and chairing the session, but not providing any opinions)
 - **46 = 24%²¹**

- b. Evaluative Mediation (the Justice not only facilitated and chaired the session, but provided, or was available to provide, opinions (on the law or evidence, or the amount of damages) and/or evaluations of the risk of success or failure at trial)
- **121 = 63%**
- c. Mini-Trial (you and/or your client presented information and argument on your client's case to the JDR Justice, who gave a non-binding opinion for your guidance)
- **37 = 19%**
- d. Binding JDR (a Negotiation or Mediation in which the parties agreed that the JDR Justice was to give a binding opinion or decision if the negotiation was not successful)
- **15 = 8%**
- e. Other - **5 = 3%**

Examples: ***To extent requested, evaluation mediation provided; negotiation/mediation and mini-trial were participated in during previous JDR's; mediation and chairing while providing options; divorce; and combination of evaluative mediation and mini-trial.***

- Not sure - **5 = 3%**

- No answer - **0 = 0 %**

E2. Who recommended that you agree to go to a JDR? (choose all that apply)

- Your own recommendation - **66 = 34%**
- Lawyer's recommendation - **161 = 83%**
 - Your lawyer - **128 = 80%²²**
 - Lawyer on other side - **39 = 24%**
- A Justice's recommendation - **6 = 3%**
- Other - **10 = 5%**

Examples: ***There was joint plaintiff/defendant agreement for this [3]; should have been case management; second opinion; previous adjutor on file; not sure; familiar with process; Dispute Resolution Officer; and all defence lawyers.***

E3. Once you started considering a JDR, what motivated you to agree to go to a JDR? (choose all that apply)

- Less cost than trial - **124 = 64%**
- More settlement options than trial - **63 = 33%**
- Quicker than trial - **113 = 59%**
- Less risk than trial - **72 = 37 %**

- Less formal and stressful than trial - **88 = 46%**
- To get a judicial opinion - **122 = 63%**
- Needed to settle rather than trial - ongoing business, community or personal relationship - **26 = 13%**
- Other - **17 = 9%**

Examples: *To end this claim; to allow plaintiff opportunity to hear causation issues from a justice; time to do something to make other side step up; some plaintiffs really need to hear a justice's opinion on their case to bring their expectations back into reality [2]; seemed like an interesting option; plaintiff counsel advised he needed JDR (for client to hear from judge); our lawyer wanted "a free kick at the bucket"; negotiations between parties were ineffective; my insurer decided; my children were very stressed; just wanted it over!; JDR scheduled by counsel unbeknownst to trustee, but trustee in agreement with proceeding; don't know [2]; can't get jury trials in Alberta; and believed we had no other choice.*

- No answer - **0 = 0%**

F. JDR SUCCESS

F1. Was the JDR successful (ended the litigation), unsuccessful (did not end the litigation), or partially successful (resolved one or more issues):

- Not successful on any issue - **13 = 7%**
- Successful - **175 = 91 %**
 - on all issues - **124 = 64 %**
 - on some issues (choose the closest) - **51 = 26%**
 - 25% issues - **9 = 5%**
 - 50% issues - **16 = 8%**
 - 75% issues - **26 = 13% [Note: 1 added settled 100% 1 month later.]**

- No answer - **5 = 3%**

- TOTAL - **193 = 101%**

a. When was the JDR successful on all issues, or some issues, or significantly contributed to ultimate success?

- At the JDR - **119 = 66%²³**
- After the JDR (choose the closest time frame)
 - 1 week later - **6 = 3%**
 - 1 month later - **5 = 3%**

- 3 months later - **0 = 0%**
- 6 months later or more - **0 = 0 %**
- Other (specify) - **7 = 4%**

Examples: **48 hours later; I just decided enough was enough; awaiting other side response - it will resolve; was given no choice; not known; in process; and 2 months later.**

- No answer - **43 = 24 % [Note: 1 added after 8 months.]**

- TOTAL - **180 = 100%**

G. JUDICIAL PARTICIPATION

G1. Did you and/or your lawyer meet with the JDR Justice, separate from the other side (called “caucusing”)?

- Yes - **119 = 62%**

Why? X

- No - **73 = 38%**

Why not? X

- No answer - **1 = <1%**

- Total - **193 = 101%**

a. Was it/might it have been useful?

- Yes - **94 = 49%**

Why? **Perhaps to discuss more of judge's findings that were disputed; other side's position was not realistic [2]; simply confirmed we were thinking on similar lines; other side's counsel did not listen to justice's recommendations; a judge's opinion on damages; some minor points to clarify. confirmed our opinion [when asked for a] judicial opinion; the input was of great value to hear; in this specific JDR it opened our eyes; gave other side time to think on problem; ability to hear the justice's opinions and able to ask questions; always useful - the input/opinions, formal or otherwise, identify the issues; other side used meeting as a means to intimidate; to hear justice's thoughts; to convey/stress critical points in our case; we needed to meet independently; was able to express our position and why taken; we felt our position had been heard and considered; if we needed a judicial opinion; shared surveillance going to credibility; helped to determine our downside as well as the other side's downside; it gave us the ability to explain in detail; open discussion on risk; intimidation was eliminated; trust**

relationship/opinion; appreciated opinion re: liability; one side didn't like what was heard; if JDR justice was prepared to give opinion on settlement amount - likely; maybe could have gotten the opinion of the judge in confidence; the justice persuaded the agreement; some judges don't take the caucusing approach; to get an opinion of sorts; another view to consider; helps either side be more direct when discussing pros/cons of case; justice put pressure on us - was active; judge, without going overboard, suggested we were on the right track; heard justice's opinion; it may have been useful if I represented myself; time saver - avoided petty arguing; could have given my insight in a confidential manner; could have told my side more fully without always being interrupted by other side; reality check for other side; affirmed our position; I could have used a talk about all my options - to understand what was open to discussion with the judge & not just my lawyer; as a guide as process matured; easy to discuss problem more freely; had the justice's further involvement been needed, it would have helped to resolve the case - in this particular case, the other side accepted the justice's opinion; and brought us very close to end.

□ No - 27 = 14%

Why? Judge was only interested in money, not issues; extremely one sided - preconceived; mutually yes; in this particular case, one side needed to hear justice's thought process; I don't think that would be fair; justice made thoughts clear; not in this case because I believe it was best for the parties to "lose control" of their positions and see how a trial judge would decide on quantum; not necessary in this case - judicial opinion was what both sides were looking for; judge had predetermined outcome; one side did not like what was heard; I was not happy about this; other side's counsel not receptive; because this was not mediation style JDR; all information was in the briefs submitted; we just wanted (and typically just want) the judge's opinion; other side needed to reassess position/claim and really needed time to think; and not relevant - just looking for the justice's opinion.

- No answer - 72 = 37%

Comments (as to why/why not?): Justice was effective with his own style; unknown [3]; see P1 for comments; unsure; depending upon if done before or after 2nd discovery; not necessary; and not sure.

- Total - **193 = 100%**

H. JUDICIAL QUALITIES

(Note: The purpose of this section is to use your experience, in the context of this JDR, to identify the best qualities of a JDR Justice. It is neither to identify the JDR Justice, nor to be used to provide a personal evaluation to the JDR Justice)

H1. How would you rate the JDR Justice's overall qualities in this JDR (including: preparation, knowledge, assessment of the issues, approach, style, manner, role in success, or other)? (1 = poor and 5 = excellent)

1 - **5 = 3%**

Why - what was positive or negative? **No one would listen - our lawyer did not speak - apparently only the other side was told to bring documents; too focused on numbers and positions, not issues and merits; minimum opportunity for client interaction; totally on the female side; and not knowledgeable regarding how small startup oil and gas companies operate.**

2 - **4 = 2%**

Why - what was positive or negative? **I was told that I was being unreasonable by the judge and that I had wasted judge's time - judge is there for the purpose of giving both sides an assessment, risks we may face at trial, credibility of witness, not to advise how much to offer the other side; justice did not seem interested and was anxious to leave for an appointment at noon; no introduction/opening - blunt approach to \$\$ acceptable to settle; and the judge wasn't supposed to give opinions, but did.**

3 - **16 = 8%**

Why - what was positive or negative? **Appeared to quash our arguments too quickly - did not give other side's lawyer what was for when perceived wrongs were present; case was decided before JDR; too simplistic view in calculating business damages; large claim - justice did not fully understand entire issue - made some leading comments at beginning; judge was knowledgeable and clearly a competent judge - I felt judge needed more mediation skills; the justice just split the decision/settlement - did not give any reason; justice was, in my opinion, not able to give our side credit; justice was middle of the road; and [positive] - practical approach, big picture, but negative - a lot of focus on trial costs.**

4 - **67 = 35%**

Why - what was positive or negative? ***Knew the issues, explained reasons; kept a very reserved atmosphere; justice was prepared, experienced and reasonable; excellent preparation, well explained, solid reasons for quantum numbers; justice was prepared, not intimidating, informative - took the time to understand the issues and did not appear to have formed final opinions prior to JDR; judge very clear on role, gave honest advice for both parties - ran smoothly - well prepared and informed of issues; it was positive because I felt justice was informed - well prepared, familiar with material and issues; got straight to the issues; positive - the approach the justice took - it was immediately clear that the justice had reviewed the material and was very familiar with it - was patient and listened to everyone - firm in opinions but gave good rationale for opinions - knew the stuff - was prepared and well informed - fair, calming style; led appropriately, no bogging down on small points; very relaxed and personable - well handled; justice wasted (discounting special damages) approximately one hour that could have been better served negotiating; tried to put parties at ease - did a reasoned analysis of evidence - was prepared; extensive trial experience with similar cases; preparation and identification of issues was rapid - my preference is to hear opinions and, while success was achieved, this was not done; did not hesitate to confirm liability issues - risks to both sides - pointed out unreasonable expectations to one side; knew the file and dismissed rhetoric - pushed for a settlement, understood details; judge - well reasoned - very committed to settling/resolution; very prepared, discussed strengths and weaknesses on both sides; preparation was like real trial, but ultimate aim was to arrive at settlement - knowledge and approach - justice asked good questions, got all the info out but no discussion or opinion - justice had read all case law and briefs, had numerous notes; overall very good, but occasionally too much emphasis placed on minor points; would have preferred justice to be more evaluative ("reality check") - applied a balanced approach to issues, no appearance of bias; justice's ability to put the parties at ease - was quick and to the point - was open patient and neutral - JDR Justice had the respect and cooperation of both parties; justice was prepared, knowledgeable and was able to deal with conflict (mediate) - had read the briefs - was very approachable; positive: very prepared, but negative: discussion - costs; justice was able***

to bring a "considered opinion" to the table; and lots of material to review, not sure how well it was reviewed prior to JDR.

5 □ - 101 = 52%

Why - what was positive or negative? Obvious had read all documents thoroughly; JDR justice had reviewed all documentation and was well aware of facts - approached in a fair and professional manner - definitely an asset to this JDR; respectful but firm in providing view that one party's position was inappropriate - very professional and knowledgeable; justice was direct, grasped the situation quickly and took control and guided the issues - legal input very helpful; very well prepared - had all material; created a positive, unbiased atmosphere while controlling conversation; very compassionate/personable and respectful to party's circumstances; due to the informal nature of the JDR's, people are more relaxed and open to new suggestions - justice knew the case inside and out; very aware of the specific issues of the case and listened well to all arguments - very helpful in mediating - able to provide concise opinion on the law; justice listened, advised us as to the law - obvious that material was read in advance, yet listened to information presented at JDR; knowledge of all aspects; preparation, knowledge and assessment of the issues; justice was active getting problems in a third party solved (subrogated issues); personable, approachable, prepared to listen, fair; focus on resolution - committed to the process; fair, straight forward, impartial, considered all presented material; judge was very good with our client - created a safe environment to discuss issues; justice was well prepared with the facts and got to settlement; had read the material and aware of quantum assessment; very well prepared; calm, fair, impartial; very well prepared - all materials clearly considered - however, the justice's mind was clearly made up in entrance on basis of written materials; justice had done a lot of research and took time to read both briefs presented; well read - knew the information; the judge was well mannered and prepared, also took control of the situation - did not let any lawyer bully the way in the room; the JDR judge could read between the lines; obviously read all of the materials from both parties; very prepared, knowledge of both law and issues, manner was supportive and understanding, not judgmental - calm, fair; very experienced - very practical - no nonsense; justice informal yet decisive in recommendation; the justice ended up doing

all the client management; effective communicator; the judge's assessment and approach were invaluable; knowledge of all aspects; positive in opinions that were stated; dynamic, positive attitude, trying to see the best in both sides' position - I felt very comfortable with justice's knowledge, comments and demeanor; had thoroughly reviewed the file, but negative, didn't comment on all heads of damage; justice was very well prepared and knowledgeable on the issues and the parties needs; well prepared - fully engaged - ensuring a comfortable environment for all; well prepared, took time to explain approach on each issues, listened to everyone; positive - justice was well prepared - very professional and knowledgeable, yet approachable; was prepared and obviously read the briefs; smart, well spoken; very thorough and balanced; well prepared and helpful in resolving the issues; justice was well prepared, knowledgeable, addressed each issue directly and confidently - gave everyone involved equal opportunity; knew the issues and risks involved; very well prepared; justice knew it came down to the medical "opinions"; justice is very good with people in this situation; very well prepared about case; the Justice had read the briefs and was able to bring the sides together; understanding, communication skills, empathy - justice read and understood the materials - well prepared for all issues - good listener, identify real issues; straight to the point, clear vision and moved file to settlement quickly; explained patiently the legal process, documentation and causation; very well prepared, excellent background knowledge, clear presentation of ideas and law; open attitude; everything positive; justice was not pretentious; justice brought experience and personality to help resolve situation; justice was prepared, thorough and easy to understand in reasoning; excellent description of process - excellent job of explaining reasons for decision; and very well read re: case at hand - good advising and a very approachable manner - knowledgeable, sympathetic, approachable.

- No answer - 0 = 0%

- TOTAL - 193 = 100%

H2. If you had a choice, would you choose this JDR Justice for a future JDR?

Yes - 174 = 90%

Why? *[Many comments about comments expressed above.] Narrows the issues; fair; less stressful, quicker situation, doesn't tie up courts; each side can discuss a*

reasonable outcome for both sides; attentive, sought clarity; was candid with all parties; we found justice firm, friendly, fair and very well prepared; the conduct of the entire JDR was very positive, comfortable - never felt nervous, totally at ease; resolution occurred, therefore success; results oriented and settlement reached; active participation arguing issues with us; more expedient; less stressful and formal; awesome justice who cares; well prepared; justice was able to draw out issues and positions; excellent job; I was happy with the experience and process as a whole; less formal and stressful than trial; to get legal mediation from a justice facilitator; straightforward style; very thorough in preparation - very easy to communicate with; justice presented/approached issues fairly from both perspectives - was not "one sided"; knowledge and willing to provide opinion; keen sense of judgement, straight to the point; was effective; presented risks well; judge was fair, I was able to voice my opinions/ideas; practical and fair; fairness; it served its purpose; no nonsense approach; balanced, fair, not partisan; 3rd JDR with this justice, all successfully resolved; very fair - no bias - easy to feel free to speak to and ask questions of; straightforward approach appreciated and appropriate in this case, where trustee involved for dependent adult; justice had a very good grasp of all issues; faster and easier than trial; justice controlled it well, yet it was informal, easy to discuss problems and was less stressful; justice knew what was talking about - down to earth, not arrogant, good listener, knowledgeable, personable - very prepared, understood the issues and the law - personable, professional, well-read and logical; I liked the justice chosen; was able to put everyone at ease - receptive to both sides - justice expressed opinions in a fair manner; justice is very competent; justice's non-domineering attitude; very helpful and fair to both sides - intervened only when requested or necessary; justice had a very good style to get info and get it settled quickly; good grasp of issues/well prepared - absolutely - for reasons in H1; answers are all of Question E3 answers; experience, communication ability; willing to provide strong evaluation of damages at trial; it would depend on the situation; the Justice was fair and impartial; very prepared; the judge was well informed about all the important points that were on hand and did not let the lawyers bully their way in the room; experience and respect by participants; good working knowledge; good negotiator, very neutral - didn't pick any sides; made us feel comfortable; less stress; finally solved the problem; quicker to

settle; still very good & JDR was a success; good experience; quick, to the point, deals with core issues, focused, very well prepared; because it helped to understand the legal system; because it works and because it can be a positive experience - as opposed to a stressful trial; knowledge and manner of handling; impartial and objective - parties received fair hearing; justice was balanced; no nonsense approach; assisted with quantum evaluation; makes financial sense; justice was understanding of the situation; justice was very effective in dealing with senior defence and plaintiff counsel; very effective - pro active; was prepared, quick to catch nuances of all parties and assisted in keeping professional - wanted to come to resolution and aided in same; very prepared, knowledgeable and an assertive approach; quick and cheaper; very private and fair; resolution in a non-threatening atmosphere; in giving an opinion, justice was fair for both sides; clearly, justice had read and knew the material and understood the issues - was very kind - gave chance to speak - justice though was firm to bring down expectations; brought a balanced approach; most impressed with JDR justice - conduct, procedures, and results; knew the issues well; very professional and well prepared; fairness to all; precise, knowledgeable, professional; facilitated settlement; provided objective opinion, well informed; justice understands each party's risk and works with each party to negotiate positions to reach an agreement; justice's knowledge and approach; knowledgeable, experienced, personality; would be among several I would suggest; effective; quick and good outcome for both sides; appreciated technical nature of this lawsuit; justice seemed well prepared, especially on issues; understood issues and gave excellent direction; knowledge and experience as a lawyer; professional and lots of experience; very approachable - extremely dedicated to studying the facts and understanding the issues; smart, well spoken; only if a mediation is desired; and it did facilitate bringing about some understanding to both sides I believe in a complex action.

□ No - 15 = 8%

Why? I felt that justice just split the award and gave credit to expert evidence - he admitted that; waste of my time; I think justice was way too sympathetic [to the other side]; justice would not listen to anything I had to say and only thought my property was junk; sucked; I have [a medical condition] and justice dismissed it completely even though I had many treatments and need more; not open to hear my explanation of

events; too abrupt and of no help in finding common ground or providing answers; too concerned about small damages instead of the big picture; I did not find him helpful during caucus; and justice came to JDR with mind made up before verbal discussions - also, we were left in a room while everybody else left including the judge and no one informed us that we had been abandoned!

- No answer - 4 = 2%

Comments: **Maybe - it's hard to say without knowing if a different justice could have been worse. So it's sort of a crap shoot either way; don't know; and no opinion - limited experience.**

- TOTAL - 193 = 100%

I. OTHER

I1. Overall, as to the process and procedures (not the result of your litigation), how do you rate your JDR experience in this case? (1=negative; 5=positive)

1 - 6 = 3%

2 - 6 = 3%

3 - 18 = 9%

4 - 68 = 35%

5 - 94 = 49%

- No answer - 1 = <1%

- TOTAL - 193 = 100%

I2. Would you recommend JDR to others or use it again if you had another dispute to resolve? (1 = definitely not; 3 = indifferent; 5 = definitely yes)

1 - 6 = 3%

What, if any changes would like to see if you used JDR again? **Maybe; the judge should meet separately with both sides and their lawyers - everyone should be advised to bring pertinent documents; the surroundings (room) were a bit "sterile" for lack of a better term - make the room more conducive to mediation; and more time for person to tell their story of how the MV has changed their life - also would like to see insurance companies have a time limit put on them as to how long they can drag things out, running people needlessly to psychiatrists and other doctors, etc. for no reason.**

2 - 1 = <1%

What, if any changes would like to see if you used JDR again? ***Clients need to know more about this process and where their rights are.***

3 □ - **8 = 4%**

What, if any changes would like to see if you used JDR again? ***More time - ours was shortened to 1 day so it was rushed - it would have been better to have had another day, so positions could have been better considered over an evening; and it was negative because the other party seemed to be attacking me personally - not allowing this in the future would be helpful to make it less negative of an experience.***

4 □ - **34 = 18%**

What, if any changes would like to see if you used JDR again? All parties should be able to sit down and discuss issues, not just lawyer to lawyer; not being rushed/pressured for what was a huge & very final/permanent decision for a mva; not allow the other side to propose matters in such a way as to promote a particular approach; we typically want a judge's opinion and on all heads of damage; add cost in resolve; when lunch break is - we weren't told our justice left for lunch - we were told later; more assertive role by justice; different Justice; I had expected a decision (binding) or at the least an opinion; need to see other examples of outcomes from other JDR's to make a more informed decision; justice could have given all parties more opportunity to speak; and perhaps more or some caucusing.

5 □ - **144 = 75%**

What, if any changes would like to see if you used JDR again? ***If you didn't have to wait so long to book one; held in recently opened new Court House building - staff not yet up to speed - anticipate that will improve; it depends on the issues (i.e., quantum, liability, causation, credibility); different Justice; I wish we had proceeded to a JDR earlier in the process; this particular JDR met our expectations - however, in the past have attended JDR's where the justice was not prepared - not reviewed briefs and also where it appeared the mind was made up prior and our opinions were not allowed to be presented fully - open mindedness necessary; less discussion from the plaintiff - they had their golden moment to discuss their injuries during examinations; none - the process works well as-is [several]; get the Calgary Court House organized; more input from the justice - others have been very positive, not this one; like to see the courts present the JDR process as a viable option to resolve disputes instead of assuming that***

the only avenue available is trial; when agreement is made in JDR all parties should sign immediately the agreement is prepared; make sure every JDR has a decision made at the end of JDR; I had not been to one before, and I would have liked to have more knowledge of what to expect; a pamphlet mailed to participants with more info on the process and possible alternatives such as caucusing with/without lawyers with JDR justice, etc. - as well as the different types of mediation and possible variations in litigation available; to be held anywhere else than the Court House; sooner, JDR could be beneficial if the parties involved would agree to use JDR in a shorter time frame; as most of the JDR's attended are successful or settle shortly after, I have no recommendations for change - I participate in numerous JDR's and use private mediations very rarely; more choice in justice availability - use retired judges; round tables; I do not believe in a laissez faire approach - we feel the judges should opine, recommend, involved - many of them leave it to the parties; a fair and understanding judge like we had; it would be nice to have a more comfortable room, one with a couch or two and snacks and drinks - we were in the JDR all day and hesitated to take a break as we thought either the other party would walk or we were getting closer to settling - as a result we went all day with just water; snacks, drinks (juices, coffee, etc.); opportunity for pre-JDR meeting with lawyers, parties and justice to provide background on large case files; no changes; more info re what can be discussed & what should be confidential with only my lawyer; better understanding of file prior to JDR; would like them to inform everyone in the room that they can see the judge separately without the other party in attendance or without any lawyers present; none, in this case; none, really - it's fine as is - the only thing I didn't know was what amenities were available at the Court House, in the way of coffee, pop or bottled water - thankfully, there was a [fast food location] nearby; more evaluative - more hard nosed reality check to both sides; clarify attendance of parties - parent of plaintiff attended without notification, with intention of giving "evidence" on behalf of plaintiff; to meet first with the JDR justice before the meeting; current approach is fine; more amenities in the rooms - water, kleenex - and restaurant in the building; nothing significant - this was a really good experience; I was impressed with style used by this JDR justice - not all judges use same style - this has to be considered - needs to be assessed on case/case; quicker

availability (often depends on lawyers, not the judge); more amenities for the participants; have more time - JDR justice to push a little harder for settlement; bottled water was supplied, but I would offer coffee and tea because the session took longer than everyone originally thought -also, no air conditioning in the room in October; breakout rooms to be available in advance; the temperature in the room was very cold and it was affecting everyone in the room - facility change or at least control of environment; prefer mini-trial with non-binding process rather than mediation type; none, this process ran smoothly - textbook; each justice seems to have their own style which, depending on situation, works or doesn't work - more consistency in how each justice handles JDR; I would still like an opinion on quantum even though it was mediation style; on the proper file, access earlier in the process; all JDRs should provide "opinions on outcome"; telephones in caucus rooms; implement the use of JDR's within 12 months of action being filed, even before discoveries which often adds little value - if mandated early then a fee would be appropriate; another room available for negotiation purposes - one party went out in the lobby area - not too private; more information allowed to be used as my JDR was not allowed; and one counsel took too much time - I would have liked to see the justice advise counsel that the briefs were read and counsel should limit summation - which went well into the afternoon.

- No answer - 0 = 0%

What, if any changes would like to see if you used JDR again?

- TOTAL - 193 = 101%

13. Is there anything that we didn't ask you about on which you would like to comment? Do you believe the JDR program can be improved - if so, how? Do you have any other comments? **[Note: Organized in comparison to ratings in I1.]**

#1 Comments: *Treat men as humans too, not just men who have to pay to be father; (1) should have been a panel of more than one reason to listen, (2) more information on the process given to the individuals, (3) someone from receivership board and bankruptcy should have been there to explain how they handled the situation, and (4) have someone explain the differences between case management and JDR process; use round table instead of long rectangular - improve surroundings - no so institutional, industrial; need someone to monitor when parties arrive or leave - my lawyer and I were left on our own - the judge should have informed us that*

- the proceedings were over; and I would like to have the Justice ask the person involved directly how the situation has changed their life and how they have tried to change it and what they would settle for (eliminating lawyers' outrageous accounts).*
- #2 Comments: *Nil.*
- #3 Comments: *JDR and mediation have largely supplanted negotiation (direct), adding a larger financial cost to claims - parties are much more likely to stake their positions early so as to leave room for the expected movement at the JDR; regarding improvement, the Court House dropped the ball on scheduling - we had to wait for an extra hour for our room and the judge was no informed so we lost time on a busy single day of negotiation; and I thought the process was time-consuming and repetitive - maybe if each party could sit and talk with the justice separately it could have been improved - the justice would say that it is my lawyer's turn to talk and the other lawyer could respond after, but justice kept interrupting with comments in the middle - dragged everything on longer.*
- #4 Comments: *Nobody present at either reception area to ask direction on the floor - door was locked and as a result, we were late - should be more user friendly - JDR justice did not follow any set routine - a better guideline to follow might have been more helpful; once the impasse is determined, do not allow any additional submissions; my past struggles have been situations where JDR's turn into a mediation, or where the judge doesn't give an opinion on quantum, but rather just solicits numbers from other side and attempts to mediate, or, just wants to "meet in the middle"; sometimes the judges leaves you with the impression that he/she does not want to be there or has better things to do (golf game?) - these are the JDR's that usually fail - a positive attitude from the judge "we can get this done" would be more helpful; impose strict time line for submission of briefs inclusive of reports being relied upon; [one on substance of case - omitted] - justice's opinion was not fair; and the judge should be allowed to offer opinions and have given a discussion.*
- #5 Comments: *I believe our system should have either mandatory mediation or JDR - I believe presiding Justice should provide opinion, only if requested - I prefer caucusing method; by changing the old world ideals that the poor woman deserves everything and the mean man or delinquent dad deserves to be berated - since changes to the divorce act of 1984 it is still too woman sided - proof being the MEP itself and the courts; the JDR program works very well and generally overall meets our needs - finding common time tables is a problem but usually not*

from the "Justice's schedule"; this is a great tool to move a file forward; no comments - felt it was well run; too tough to book - trials are easier; this greatly helped solve our dispute - I think some parties just want to be heard, whether it makes a difference in the solution or not - it is an informal way to "vent"; yes, can be or should be more accessible to people - this way reduce the drawn out process that some lawyers will try to milk every cent out of their client; all parties should be available immediately the agreement is approved and prepared for signature and completion; I think the JDR process is a necessary "tool" for assistance in resolving contentious issues - I prefer the "mini trial" style with the offer to assist the parties with final negotiations - I think it really helps when a justice actually provides a quantum assessment (mini trial style) and advises the group that this is how he/she would rule if the matter was in trial; I think the process works because of the respect the participants have for our justices - the process helps both sides (but particularly plaintiffs who are usually very unfamiliar with civil litigation) to assess their risks going forward; JDR's in Edmonton usually follow the "mini-trial" approach and in Calgary follow the "evaluative mediation"; interesting the different approaches - need to understand which approach before attending; see P1 for comments; snacks, drinks (coffee, pop, water) and lunch should be provided; I have been involved in the JDR process from the beginning - it is a positive environment for a plaintiff and brings files to conclusion; I think it is an excellent program - I'm thankful we have this option in Alberta - thank you for this research project; I enjoy the JDR's - give one the opportunity to discuss various issue within the judicial system - one does not receive this opportunity at trial - have found gives me a better insight into judge's opinions and why they hold same; this JDR was used to mediate a dispute before going into chambers - I think more domestic specials in chambers should have this option available to them; [dealt with substantive issues and omitted]; better physical facilities, including breakout rooms [several]; our JDR judge was guiding us; it is important that the process remain open and transparent and not leave participants feeling that issues were merely "split down the middle" - each head of damage must be negotiated in fair and open discussion; more Justices so the wait time can be reduced; other side produced several new documents at JDR - only had a few moments to digest new information - all parties need to be clear this is not to occur and parties that do this need to be reprimanded to cost consequences; until I walked in I had no idea what a JDR was about; the efforts of the judge to reach a solution in this case were phenomenal - the judge's

experience approach, feedback of suggestions really were the key to solving this case - I came away with a true admiration for the system of JDR's and judges in particular - I used to think that judges were overpaid - not anymore - this experience has made me re-evaluate my opinions and my trust in the legal system - or at least this aspect of it - the one factor I did not foresee in a JDR was that it forces lawyers, in particular, the, how shall we say, less desirable ones, to appear amiable towards a settlement - this was very apparent in our case, which is why I am so grateful for the judge's efforts - as well, the experience was very educational - I learned a lot from the judge and about these types of cases in that one day; I have attended over 40 JDR's and have found the process very useful for both sides - every JDR that I have participated in has resulted in settlements either at the JDR or within a week thereof; my experience was good, for a first time; we need to educate our lawyers - both plaintiff and defence - about JDR/mediation - the posturing by both sides needs to drop when they go through the security gate at the Court House; to make sure people are aware they can meet the judge without lawyers present should be stressed; I understand that each mediator has his own style, some very opinionated, others (ours) middle of the road - I thought, for what it was, it served the purpose very well; after about 6 hours it was evident the representative for the defendant did not have the authority to negotiate a settlement, thereby delaying the settlement for another month - perhaps a more senior representative would have been beneficial; before the JDR began, the justice spoke to both counsel privately and said we were too far apart for the JDR to be successful - frankly, if we were closer in our positions, we could have likely settled without JDR - even if we are far apart we still appreciate the justice's opinion - maybe one side needs to reconsider their position - for the justice to say the parties are too far apart for the JDR to work is silly and useless for both sides - if we are far apart we need the justice's help to point out problems with either argument; I think that many people do not even know there is an option for JDR - I think it is the way to go and I feel that JDR's are so good that there should be a week of JDR's per month and save everybody money and court time; I have been involved in the JDR process from the inception - it is a positive environment for a plaintiff and brings files to conclusion; make the JDR a mandatory process, unless one or both sides agree it would not be necessary; the JDR program can probably be improved - make them more available/have more available in a shorter period of waiting time; a JDR needs to be suggested to clients sooner in their litigation process - the event took place 9 days shy of 9

years from the date of the accident in question; as this was my first JDR, I was satisfied with the procedures and process; overall process is a good one - sometimes need more JDR dates available yearly as sometimes it is not possible to get a JDR date for a certain year (i.e., if all the dates are taken unless there is a cancellation); the opportunity for JDR provides valuable insight to trial risk, from a judge's perspective, and provides settlement opportunity before the expense and the stress of trial; getting an opinion on the heads of damage is always the most important part of a JDR and the reason the parties are in attendance; the JDR has become the target for resolution of many civil litigation - while it is more desirable than cost and finality of trial, in some ways it has become a barrier to settlement earlier in the process - there has become a reluctance to placing offers before the JDR, in an attempt to avoid getting bid up against oneself - one solution would be the agreement of parties that there would be cost implications if an offer made prior to the JDR was beat; justice asked the parties open ended questions that they would have to answer to in court - this was very beneficial in helping the other side see the risks and for us seeing that similarly - justice was bang on with our risks going forward; nice if JDR justice had asked questions to fill in any gaps that might have been had; more information be allowed to be used on plaintiff side to clarify the case being tried; works well and used extensively in my pending files; and I think the JDR process is an extremely valuable avenue to follow - I do hope however that I do not have to use this again, but if so, this would be the number one option.

INTERVIEWS

If it is decided to conduct **future interviews** of JDR participants (after completion of all Surveys, after June 2008), would you be willing to agree to an interview?

Yes - **85 clients = 44%** (also **178 lawyers = 48%**)

Justice John D. Rooke

CLIENTS' SURVEY - "ADDITIONAL QUESTIONS"

(Some questions may have more than one answer - choose all that apply. For additional comments, add at the end.)

J. JDR TIMING & NEXT STEPS

J1. Which of the following identifies the stage of your litigation at the time of the JDR? (choose all that apply)

- Before Examinations for Discovery - **6 = 3%**²⁴
- After Examinations for Discovery, but before Experts Hired - **47 = 24%**
- After Examination for Discovery and Expert Reports - **96 = 50%**
- When ready for trial - **45 = 23%**
- Other (specify):- **8 = 4%**

Thought we had case management, not JDR; during discoveries; discovers were approximately 50% complete, experts were hired; before domestic special in chambers; after preliminary negotiations; after first discovery, but before discovery on undertakings; after examinations, only plaintiff had expert report; and after assumed agreement had been done and trial cancelled but no agreement ever signed.

- Don't know or not sure - **7 = 4%**

J2. From your total JDR experience, when in this type of case do you think that a JDR is/would have been most useful (choose all that apply)?

- Before Examinations for Discovery - **28 = 15%**
- After Examinations for Discovery, but before Experts Hired - **65 = 34%**
- After Examination for Discovery and Expert Reports - **97 = 50%**
- When ready for trial - **27 = 14%**
- Earlier than when this JDR was held - **48 = 25%**

- How much earlier Years!!; years (1 - 3); within first 2 years [4]; up to 1 year earlier; that is a lawyer's call; right after expert reports; loss was 10 years old - should be getting to JDR within 5-6 years max; first year [3]; few months into the divorce; before experts; before examination for discovery; about 6 months earlier; 6 years [2]; 6 months [3]; 6 - 7 years; 5 years earlier at least; 5 years; 4-6 years; 4 years; 3 years prior (all salient info was investigated/known); 3 - 6 months; 2.5 years; 2 years earlier [2]; 2 - 3 years [2]; 18 - 24 months; 1 year from start of negotiation; 1 - 2 years; and 1 - 2 years earlier.

- Later than when this JDR was held - **1 = XX%**
 - How much later **No answer.**
- Other (specify) - **0 = 0%**
- Don't know or not sure - **11 = 6%**

What are the reasons for your choice(s) of answer? ***Would have saved time and money; would have gotten a better view of where I stood in regards to my case - knowing how far I could push any issues; we needed expert reports to confirm plaintiff had issues not related to MVA but we had those a while ago; usually evidence from discovery is required (evidence given under oath) of undertakings received; unfortunately I was not prepared to attend JDR until several years after first broached idea; trial prep costs have already started to incur; to reduce the cost of expert reports, quicker closure for claimant; time lapse had nothing to do with my schedule, only that of lawyers; this was dragged out too long by other side and JDR would have stopped that; this was a suit that involved 4 accidents over a number of years - the JDR occurred 8 years after the 1st accident - the other side had many lawyers over the course of the litigation; this process could have saved my children from all the turmoil and having to grow up without me as a parent; this matter could have been resolved much sooner than it was set down for; this is when the rubber hits the road - before this point there is posturing going on with knowledge; think that a resolution would have occurred sooner; there has to be enough information and documentation to evaluate liability, causation and quantum; the timing was OK; the reasoning is just that it's nice to have all the facts and expert reports and opinions on the table to discuss; the examinations are very expensive but are necessary; the examinations in this particular case were irrelevant to decision; could have been settled much sooner (parties' fault, not justice); some of the complex cases I have been involved in require discoveries and experts to assist judges in formulating an opinion; some experts were needed but there was "overkill" on other side's part - earlier would have eliminated unnecessary costs (which judges don't seem to question); so details are not lost and life can move forward not having to stay in the event; serious injury with uncertain resolution/recovery needs experts to assess; saves animosity between parties before parties are coached by ignorant bystanders; reduce costs and stress for everyone involved; other side's counsel refused to accept JDR judge opinion, indicating counsel will obtain further evidence; other side's counsel not moving matter along in a timely fashion [2]; pre-judgment interest and costs; our disputes are usually quantum based - we need the reports and assess; one of the issues is that on a case 9 years old the interest is huge; once all expert reports are obtained (following***

examination for discovery) a judge has a better grasp on how to view the claim and make an educated decision; once all discoveries are made, the JDR would be helpful before any other monies are spent; old files take on a life of their own and the older it gets, the more difficult it is to resolve; obvious that negotiation with the other side was futile very early on after it began; need some expert opinions for recommendations but expenses can be significant; necessary for both sides to retain experts for medical/disability/impairment rating, cost of future care, past/future income/capacity; my case was prolonged with no sign of settlement for years - we should have done this long ago; most, if not all, available evidence has been gathered - but from a cost point of view it would be preferable to have the JDR prior to examinations for discovery; most documents produced after a discovery and know if experts required [2]; might have ended this case a lot sooner; litigation was stalled by other side; it's good to have all the info that would be presented at trial; it would have possibly shortened the time things dragged on - six years was unbearable; it was necessary for us to have the discovery and expert evidence we had due to the unrealistic position of the other side; it was a logical progression in the litigation; it depends on the issues involved, complexity may require experts' opinions; important to have as much information as possible before JDR [several]; I'm not a lawyer - not sure how to answer; if unable to negotiate resolution before examination for discovery, very necessary ahead of trial due to ongoing costs and cost of trial; if it was prior to examination for discovery it would have been longer, but all inclusive and JDR justice would have heard it all to make more informed "advice"; I feel the lawyers know/guide the client as to each case; for me, trial was coming and my lawyer got the JDR for me because the lawsuit already ate up 4 years of my life; I believe this claim could have been settled reasonably if all parties met and discussed the case prior to taking it this far; I believe most JDR's could be sooner than this one - this one had technical complexities that prevented earlier discussions; hearing the parties' evidence from discovery would have been helpful with the evasive answers heard at the JDR; have been at JDR's without rebuttal evidence and the judge accepted one side's "evidence" despite obvious arguments to the contrary; got bogged down a bit due to lack of opinion by experts in matrimonial law; given issues and one side's views, needed expert opinions to support an opposing view on causation; expert reports where not required in the JDR process or not as many; expense involved in expert reports which may not be relevant; don't know if it could have been earlier, but it would have saved me some money if it had; did not know that JDR was a viable option until much later into resolving my divorce - seemed like this was used as a last resort but should have been the first; could have potentially changed the

settlement amount if expert had been hired to confirm the issues; cost of experts; cost and time; conflict liability situation - all info was received; causation an issue; case goes on too long - there should be a time limit; both sides had reached a standstill - the JDR was the next logical step before proceeding to trial; both have to agree on JDR; because of lawyers and police and their negligence in proceeding when they should have; because it took over 9 years; at this point there is a decent trade off between wanting information and cost; at this point most/all info needed to assess the issues has been obtained; all parties know the issues and risks and costs; all necessary medical opinions were obtained for proper assessment of claim; went to JDR in hopes to settle all claims; all information available to ensure appropriate decision; after examinations and experts assist in determining if should proceed to trial; address incompetence within the medical professional and be directed to those capable or relieving pain and suffering immediately - avoid international travel for resolution; and 2 files and 1 claimant - oldest was 11 years - combining both made settlement easier.

J3. Whether or not your JDR was successful, if it was not/had not been successful, what will be/would have been, the next litigation step? (choose all that apply)

Further disclosure of documents or Examination for Discovery of parties - **19 = 9%**

Further experts = **43 = 22%**

Trial - **151 = 78%**

- within

1 month - **17 = 9%**²⁵

6 month - **44 = 23%**

- 6 months - 1 year - **1 = <1%**

1 year - **37 = 19%**

more than 1 year - **26 = 13%**

-

Other - **16 = 8%**

(specify) **Trial within 2 months; bank and trustees should have been contacted; trial was set 2 months away; client indicated trial within 3 months would be sufficient; neither party could afford a trial so the actions would have stale-dated in the courts; further discoveries [2]; formalize our offer; finished; divorce; approaching as close to 100% recovery; appeal; appeal of arbitration by other party in chambers; another formal offer and then set for trial; and additional negotiations between counsel.**

Don't know or not sure - **12 = 6%**

K. COMPARISON TO OTHER JDRs

(*If you have not previously participated in other JDRs, go to section "L"*)

K1. How did the procedure and process of this JDR compare with the previous JDR(s)? (1 = worse,;5 = better)

1 - 1 = <1%

Why? *The previous JDR (divorce) must have been a binding JDR because the advice given a decision would be made and maybe it might not be liked and a legal decision is made???*

2 - 6 = 3%

Why? *I did not think the justice reviewed or looked into consideration of all the important facts; judge's approach in caucus; did not settle - no "reality check" opinions given; difficult party on other side; the input was lacking from the justice, who just took the high and low figure and went halfway - justice agreed that the experts provided prime information and said that s/he did not agree with them - I thought perhaps s/he was now taking the position of a doctor.*

3 - 26 = 13%

Why? *They work; no real change from previous JDRs; better than some - where we faced counsel/clients opposite that would not consider compromise; they are all good for different reasons - understanding different approaches and issues on each JDR, the fact they successfully concluded speaks for itself; difficult to compare as prior JDR's focused on different issues - this one quantum focused while prior's focused on liability and mitigation issues; they are a very effective way of getting to a resolution without trial; dispute not resolved but parties brought somewhat closer - other side received a shot of cold water to the face; justice was not interventionist - correctly assumed all counsel involved were competent, but seasoned counsel can be more entrenched and feel reputation on the line; other side probably felt did not get a fair hearing - case appeared to be decided in advance; different justice, different style; the process to explain how JDR's work is time consuming; all have been efficient and successful.*

4 - 40 = 40 = 21%

Why? *Lawyers tended to let personalities enter into the discussion too much - became too personal on both sides; I liked that it was quick and to the point; I find JDR's consistently helpful; ability to move the issues along and keep counsel on track;*

negotiations were good, just could not reach a settlement; have resolved 100% in 2008 so far - went very well but others have also; I liked getting straight to issues; I think most of the participants were not optimistic that we would achieve a settlement - I think the Justice was key in getting all participants to view their risks in an objective manner and this is what, in my view, moved us toward resolution; judge and our side and other side's client (not counsel) motivated to settle; equal in that the justice gave us a judicial opinion; justice ensured plaintiff side was heard in detail; more balanced justice attending; I'm a believer in the JDR process and have seen many files resolved because of this process - this JDR was also a success - it was my first time with this Justice, who did a good job; most JDR's I have attended were mini-trials and often the party who doesn't "win" - walks - the evaluative process brings the same authoritative process to a negotiated settlement; issues were understood and cordially discussed; the justice was prepared to share knowledge/experience and comment as to liability and quantum; both accomplished set goals; the Justice was well prepared, understood the issues, listened to the claimant, questioned the claimant and allowed for positions to be stated - and when it was clear the parties were significantly apart - offered an opinion; my only complaint was that the other side's counsel should have been limited in summations - took until 2 p.m. to finish and I wanted to see the justice tell counsel to wrap up the summations as the justice has read the briefs; did not settle but not due to lack of effort from the judge; briefs well read, understood, could get to main issues; judge let us negotiate on our own; judge was very prepared and willing to participate at every level; purely because we were successful in settling; since a mediation ensued, it required compromise by both parties - had that not occurred, it would not have been successful; and seemed more orderly.

5 □ - 19 = 10%

Why? Justice's effective participation; I prefer the mini-trial type of JDR as provides a \$ amount so both parties can decide to settle or proceed further; style of Justice - by justice's evaluation of claim and being open with thought process allowed everyone to follow along and question where they felt necessary; judge very pro active - caucusing; successful resolution of 2 claims [2]; I believe in this JDR - risks were heard by both parties, which ultimately helped resolve the case; I have been pleased with all JDR's

[two]; judge's participation was valuable; better Justice, well prepared and opinion appeared supportable because of this; because of the particular judge; and have done many - most are better when a judge or very senior lawyer is used.

- No answer - **101 = 52%**

Why? ***Same, both excellent results; almost similar to other mediations in Toronto, Ontario; and only had 1 JDR.***

- TOTAL - **193 = 100%**

K2. Was this JDR with the same JDR Justice as the previous JDR?

Yes - **5 = 3%**

If "Yes", did the JDR Justice's participation affect your answer to K1?

Yes - **2 = 1%**

If "Yes", how (specify): ***Don't know - was the first time; and approach is consistent.***

No - **6 = 3%**

No - **86 = 45%**

- No answer - **102 = 53%**

- TOTAL - **193 = 101%**

L. EXTENT OF JUDICIAL PARTICIPATION

*(*Answer only L1, L2, or L3 - being the closest to the type of JDR you had*)*

L1. Mediation and/or Evaluative Mediation - Did the JDR Justice offer any opinions (on the law, evidence, damage, or risk of success/failure at trial) on his/her own initiative?

Yes - **133 = 69%**

No - **19 = 10%**

If "No", was the JDR Justice asked to give an opinion?

Yes - **11**

Did the JDR Justice provide an opinion after being asked

Yes - **9**

No - **2**

No - **8**

OR

L2. Mini-Trial - Did the JDR Justice participate after giving the opinion?

Yes - **15 = 8%**

No - **17 = 9%**

If "No", do you wish s/he would have participated?

Yes - **2**

No - **10**

OR

L3. Binding JDR - Was a binding opinion or decision necessary because negotiation or mediation was not successful?

Yes - **8**

If "Yes", was the Binding opinion or decision necessary

on one issue only, or - **0**

on more than one issue, or - **3**

on all issues, or - **2**

other (specify) - **1 - Justice just decided on what would be.**

No - **7**

M. ROLE OF JDR JUSTICE IN SUCCESS OR LACK OF SUCCESS

M1. Would you have achieved the same outcome of success/lack of success, without the JDR Justice, merely by a negotiation session with the parties and/or lawyers present?

Yes - **11 = 6%**

Why? *I was aware that the other side's counsel wanted to settle prior to a JDR but the client was being difficult and we felt client needed to hear the judge's assessment; justice did nothing but side with women; more intervention - clarification of issues; because it was a mediation-type JDR; and other side would still refuse reasonable quantum.*

No - **142 = 74%**

Why? *Two different counsel giving other side different opinions; justice's opinion of ultimate settlement influenced other side to accept offer; I feel the JDR justice gave very good advice, non-biased opinions; other side and counsel were not willing to negotiate - they were firm in their assessment on quantum; because the other side's lawyer had a tunnel vision approach; we were at a stalemate - judges opinion required for settlement - other side needed to be convinced; difficult (client and counsel) on other side [a few]; four previous attempts failed - neither side was willing to compromise on their position;*

unrealistic expectations of both (client and counsel) on other side - counsel unwillingness to listen effectively; unrealistic expectations on other side's client behalf [several]; other side needed reality check; other side appeared to have respect for the justice and needed to hear uncertainty of case; JDR seen as non-bias - other side's lawyer was unable/not willing to come up with settlement offer prior to JDR; we needed the opinion of the justice as negotiations had reached a standstill; not possible - other side needed to hear difficulties from uninterested qualified party; I find both plaintiff and defendant are more receptive to negotiation with a judge's opinions and comments; other side would not recognize liability issues and had unrealistic idea as to quantum; other side had to hear from a judge the "weaknesses"/merits of their case [several]; because the judge provided the emphasis to assist us in resolution; opinion; opposing counsel insisted on the JDR process; because the JDR justice made pointed use of specific expert's reports and opinions being the most important as to diagnostics; nothing was accomplished during the past 4 years; because the other side's counsel is an ass - no respect for me or opposing counsel; other side needed to hear reasons from JDR justice; other side would not have seen the other possibilities to their thoughts; we needed a JDR - we needed to know the degree of risk we faced; because other side needed someone with authority; could not resolve issues before with other side - needed the judicial opinion (weight) to disburse of some notions held re: quantum; we could not agree on child visitation issues; we were too far apart and more discoveries were needed; because loss of wages due to MVA was the main disagreement between the parties; one cannot deal with abusers and the other side emotionally, mentally, socially and physically abused me; the justice provided input about likely trial outcomes based on experience; other side really obtuse and needed to place blame; it has failed in the past and we needed an opinion on the law that the lawyers could not provide; justice was an excellent mediator; mediation with legal counsel present had already been tried x2 as well as several meetings; other side needed to hear from the judge that their offer was extremely unrealistic and unlikely to be awarded at trial [several]; plaintiff needed to feel as if had day in court; other counsel did not see damages as we did - formal offers were served in 2006; we'd have gone 'off the rails' - the presence of a judge, even a quiet one, keeps the room in order, keeps up the decor; other side would not have listened -

valued the justice's opinion; the other party felt they held all the aces - I felt I needed more time to pursue [another alternative] after another of issues; I believe the parties were too far apart with respect to the settlement; it did help in at least letting the other side know they will not settle for what they were expecting; one side had an unrealistic view of some aspects of damages and one side needed to acknowledge causation; other side is unreasonable - it took 9 years, 4 months, 7 days to get them to the table; parties too entrenched and too far apart [numerous]; not likely - file ongoing nearly 10 years - needed intervention; would still be arguing liability - other side needed to hear a judge's opinion; other side could not see the issue with case; counsel for other side not agreeable to a meeting; 12 year old file, other side still unprepared; both sides had to understand the weaknesses in their positions - it seems that all counsel have their "blind" spots; justice seemed impartial; because the two lawyers would have positioned themselves to death - to the detriment of the clients; there was abuse (physical and emotional) involved in this matter - justice was aware of all court proceedings and helped maintain a 'spirit' of formality to proceedings - kept abusive party controlled; justice provided opinion on awards and case law which backed up our position; already tried negotiation without JDR; because the parties could not agree on anything; I think in my opinion my lawyer did not have a back bone and the other lawyer picked up on this; multiple MVA's, multiple insurers, parties had "dug in"; while not successful, the process did open settlement discussions that were previously unsuccessful - the JDR gave both sides a better understanding of the action and risks; justice kept everyone down to earth; we were at odds in our views of loss; the JDR did at least move other side into realm of reality in damages; the other party was not willing to move at all with their offers - negotiations were pointless; the other side's lawyer was hard to deal with; I've been trying for 4 years unsuccessfully due to my ex's innate ability to delay all things legal; we were able to talk more specifics of #'s with the JDR justice there; justice's determination to find middle ground; and two separate parties on one side, together with a difficult lawyer on the other side with unrealistic expectations.

□ Not Sure - 28 = 15%

Why? It was good having justice's input; other side isn't flexible; other side was prolonging things without good cause; I believe justice determined this as a delay tactic;

negligence and facts were in question; not sure if the unrealistic expectations belonged to the other side; other side had different view on damages; but think "yes" - none of the information expressed by JDR justice in caucus impacted willingness to settle; JDR justice indicated the likelihood of success at trial in arguing several points; and likely not as we had liability, causation and quantum to discuss and agree upon.

- No answer - **12 = 6%**

Why? **Parties would not be as agreeable - disagreements would ensure - the session had to be controlled.**

- TOTAL - **193 = 101%**

M2. Did involvement of the JDR Justice significantly improve the prospects for, or the achievement of, settlement?

Yes - **169 = 88%**

If "Yes", specify the degree to which it helped: (1 = little; 5 = a lot)

1 - **2 = <1%²⁶**

How? (specify) **Justice just brought back offers; an the other side finally made an offer because judge said time was ridiculous - offer was very poor but I was tired and stressed and ended it.**

2 - **3 = 2%**

How? (specify) **The other side saw position realistically and what potentially could happen at trial.**

3 - **10 = 6%**

How? (specify) **An Order is in place where now I have paperwork showing/stating what will happen; gave other side idea on amount of damages; the lawyers on the other side were initially very stubborn and the judge gave them a more realistic viewpoint; brought realistic view to other side income loss position; and by showing which issues had little chance of "win".**

4 - **51 = 30%**

How? (specify) **But only if other side's counsel listened - we wanted judicial opinion to be heard by other side; opinion as to risks; we see each other's strengths and weaknesses - I believe there is now at least an understanding and agreement on potential liability - settlement not achieved, but maybe will be soon;**

the other side's position not realistic [several]; the opinions of the Justice as to trial prospects/risks - was able to point out risks to other side of trial and point out unreasonable position; hearing of some issues; other side's counsel took notice of justice's opinion; gave us opinion on liability and quantum; helped us based on circumstances - also helped me look beyond some issues on which I was stuck as well; both parties wanted to settle and the JDR justice facilitated it with a non-biased evaluation; opinion on quantum established with reasons why it was arrived at; pushing for Justice's analysis of where file had to go to get settled; my spouse will realize that disclosure means just that - spouse is not above the law and is required to honour our marriage of 25 years; more realistic view of damages; justice let the other party know that this was serious and made them move up in their offers to a more reasonable amount; keeping the lawyers on track to resolution; knowledge of law, relaying risk of trial, being familiar with file; the fact it was a judge providing info and running the process; and justice's opinion was qualified and taken 100%.

5 □ - 91 = 54%

How? (specify) Other side got to understand risks involved; other side gained clear understanding of issues - the matter settled as a result; other side and counsel had to consider the justice's opinion and take it seriously; the justice's opinion carried a lot of "weight" with the other side and counsel; other side had unrealistic view without supporting documentation; settlement achieved; a fair settlement amount; showed other side how a trial could go if advanced to that next level; I trusted justice's opinion when I was offered an amount - I expected something different,, but justice advised me majority of judges would award that for my case, so I accepted the offer; gave direction on quantum, no nonsense; justice successfully had both plaintiff and defendant to "move" on their positions; justice gave suggestion of settlement amount if there was a trial; see P1 for comments; authority on law and quantum respect by all parties; justice gave opinion as to value of claim and parties accepted it; there was an issue of law the other side wanted to "ignore" (i.e., causation); the JDR justice was very understanding and listened - discussion of pros and cons without going to trial with case; resolved

differences/issues to end litigation; gave direction on value of claim; justice was assertive in opinions but provided good rationale - otherwise would likely have gone to trial; had a calming effect on parties; it settled; providing neutral ground and order; needed the "court/law" perspective with control of the direction of arguments and discussions; both sides re-evaluate their positions and are more open to discussion; justice determined liability; put other side in frame of mind to settle; pointed out proof problems loss of income claim; justice's experience, approach and opinion were very helpful - motivated a decision; only other option was trial - had tried everything else; told consequences of no agreement.; kept a resolution focus; justice was a third party indifferent to each side, just an honest opinion with knowledge; I sort of got a view as to my stance in the case; active participation with effective caucusing; other side would not have accepted settlement as offered without hearing justice's opinion; JDR justice's opinion was far closer to the one side's position than the other; kept it going; serious approach in both parties wanting to settle after 6 years - facilitating resolution to impasse; education and perspective of risks going to full trial; settled all issues; and backed up his opinion.

- No answer - **12 = 7%**

How? (specify) ***Justice provided a range for damages and helped both parties to reach agreement; client management; and one party got to tell story to a sympathetic ear..***

-TOTAL - **169 = 100%**

No - **11 = 6%**

- No answer - **13 = 7%**

- TOTAL - **193 = 101%**

(*If settlement was achieved on all issues, go to section "N"*)

M3. If settlement was not achieved on all issues, did this JDR assist you to obtain further information relevant to the trial, clarify the remaining issues for trial, or assist you get ready for trial, or otherwise assist you in achieving ultimate success?

Yes - **32 = 17%**

Assisted in some other way (specify) - How did it assist? **Quantum assessment; explaining the alternatives we had - it enabled us to come to conclusions sooner; gave the other side a look at what to expect at trial; to gather further evidence; allowed all parties to agree on some heads of damage; allowed other side's counsel and client opportunity to digest relevant items; new documents "served" by claimant might validate claim; more medical advice recommended; specified the issue; provided issues that need to be addressed for the future; indicated that access issue will be readdressed again before finalizing it; valued opinion - explained one of the actions was "dead-in-the-water"; by giving an overall view of how the justice system will approach this dispute; input on how courts may view policy limitations and risk of damages - knowing this is helpful moving forward; parties know where risk lie and at least one independent opinion; confirmed trial will more than likely be necessary; eliminated 5 key issues, leaves only 1-left; brought out core concerns of both sides; I knew what I would be up against at trial; and settlement reached on all items except cost of future care - parties to review JDR justice's suggestion - will settle all issues within a week.**

No - **10 = 5%**

Assisted in some other way (specify) - How did it assist? **Never came to obtain advice; and assisted in the fact that one of the parties would not have been very credible at trial.**

Not sure - **9 = 5%**

Assisted in some other way (specify) - How did it assist? **Justice stated opinion of whether specialist physician or family GP opinion worth more in a court; clarified objectives to meet for success, but realized no time in my favour - decision making pros and cons in going to trial made decision easier to make on next step in process; and there was a decision made, no justice achieved.**

- No answer - **141 = 73%**

Assisted in some other way (specify) - How did it assist? **Settlement achieved.**

- TOTAL

N. JUDICIAL PARTICIPATION

N1. Did you and/or your lawyer **ask** the JDR Justice to meet with you and your lawyer, separate from the other side (called "caucusing")?

Yes - **62 = 32%**

- No - **114 = 59%**
- No answer - **17 = 9%**
- TOTAL - **193 = 100%**

If "Yes", did the JDR Justice agree or refuse?

- Agreed - **58 = 94²⁷%**
- No answer - **4 = 6%**
- Refused - **0 = 0%**

Comments: ***[Note: comments don't follow questions, but they were made and are reported here] To obtain justice's assessment apart from other party and to reveal surveillance; justice recommended it and we agreed - best practice!; opinions were expressed only not judgment call; help the process; and fo privacy from other party.***

If "No", why did you not ask the JDR Justice to caucus with you?

- it would not have been helpful - **16**

Comments: ***[Note: comments don't follow questions, but one was made and is reported here] One side needed to hear from Justice.***

NOTE: Client also indicated he/she didn't know the option was open.

NOTE: Also indicated the procedure was in the hands of the lawyers.

NOTE: Client also indicated that both sides needed the opinion of the Justice.

NOTE: Also Other: We all felt we could come to an agreement.

- procedure was in the hands of the lawyers - **16**

Comments: ***[Note: comments don't follow questions, but one was made and is reported here] Justice simply told us this would be done.***

- don't know/not sure - **7**

Comments: ***[Note: comments don't follow questions, but one was made and is reported here] Justice simply told us this would be done Not sure why lawyer did not do this - I did not know it was an option - I was trusting lawyer to be representing my best interests.***

- other (specify) - **37**

Examples: ***Justice offered in opening remarks [a few]; the way the Justice ran the JDR - it was not necessary; not needed/necessary [several]; nothing to really ask; JDR justice already stated s/he would; judge made it clear at onset of the process***

wanted to use and this wasn't one of them; it was given and not asked; ran out of time; it was understood beforehand that we would caucus; other side wanted to meet directly; JDR judge initiated the caucus; one side's lawyer asked for this; justice moved directly to caucus; justice made it clear s/he would not caucus separately; wasn't needed - there was much dialog throughout the process - once opinion given on the numbers justice left with the offer to come back; justice made it clear that s/he would be providing an opinion as to value of claim in a take-it-or-leave-it manner; because judge offered; justice volunteered; the justice told me about meetings; judge dictated this occur without any discussion; opportunity didn't arise; not required or inquired - already part of justice's process; timing - would have if dragged late in p.m.; mediating style of Justice was known in advance; justice requested caucusing before we needed to ask; justice provided an opinion after discussions were finished and was accepted; we knew justice would when the time came; it was not this party that needed to be persuaded; would have been more beneficial for the other side to do so; justice suggested it at the outset; justice did so on his own; judge gave us opinion; we were close to settlement and not required; and this option was not offered to us..

- No answer - **97**

- TOTAL - **193**

-TOTAL - **193 = 100**

N2. Did the JDR Justice (without being requested) offer to caucus with you and your lawyer?

Yes - **118 = 61%**

No - **54 = 28%**

- No answer - **21 = 11%**

- TOTAL - **193 = 100%**

N3. Whether the JDR Justice was asked or offered, did the JDR Justice actually caucus with you and your lawyer?

Yes - **107 = 55%**

No - **71 = 37%**

- No answer - **15 = 8%**

- TOTAL - **193 = 100%**

If "Yes", did the JDR Justice discuss the strength and weaknesses of your case?

- Yes - **84 = 79%**²⁸
- No - **6 = 6%**
- In between or not sure - **12 = 11%**
- No answer - **5 = 5%**
- TOTAL - **107 - 101%**

If "Yes", was it helpful?

- Yes - **67 = 81%**²⁹

Why? Showed what should be awarded for damages but weak case for loss of earnings; justice advised we had no case for liability and downside on causation arguments; pinpointed areas of concern; strengthened our case; provided a clearer picture for damages; helpful information given; helped evaluate both amount of damages and chances of success; encouraged on our position of liability and our quantum position; encouraged realistic offers; needed to hear it from a judicial level and what we may face going forward; confirmed our case strength [several]; favorable settlement reached quickly; dealt with reality - know what evidence would have been helpful; provided judicial perspective on some issues in contention; it clarified options; gave us a reference point to base our decisions to settle or not; to achieve settlement; in depth understanding of case law confirmed our view of case was the more realistic; gave a clear indication of the strengths and weaknesses of our case; another set of eyes; it assured me that our position (strengths) had been properly conveyed - I was already aware of our weaknesses; understanding the risks to all involved; provided clearer understanding of our weaknesses; gave or showed me my options at trial; gave insight as to how court might look at our position; gave assurance of what was already felt; justice sincerely wanted us to settle; justice's opinion on risk was helpful; kept my counsel on track - validated our assessment; solidified our thoughts re: trial; it helped us evaluate our case; helped to understand the procedure; suggested where we were short in our offer; and fresh eyes, fresh opinions.

- No - **3 - 4%**

Why? ***We knew.***

- In between or not sure - **11 = 13%**

Why? ***The justice's views confirmed ours going into JDR; it was harder with so many what-if scenarios to make a decision about the best course of action - a bit overwhelming; initially yes, but as an end result I felt very insulted; justice was more focused on numbers than issues, merits and causation; settlement occurred within range I was prepared to settle in before JDR; and focused on the weak aspects and not enough on strength points.***

- No Answer - **4 = 5%**

- TOTAL - **84 = 103%**

If "No", do you wish s/he would have caucused with you and your lawyer?

- Yes - **19 = 27%**³⁰

Why? ***To become more informed; because the JDR justice could have told me how strong my case was; I would have liked to ask questions without other parties present; because other counsel did not listen to the justice's number recommendations; some matters would have been clearer; to get a feel of how it was going; I always find an audience with a justice to be helpful; to show me other options/opinions that would have been beneficial for me; more information to be used and come out for information; always in favor of caucus; opportunity to ask questions with judge only; so I could have been at least heard on the issues; I would have felt freer to voice my case personally - less stress; to hear the other side - really hear; further insight to the background of our case; more personal, less defensive than when in front of other party; and did not know what to expect.***

- No - **41 = 58%**

Why? ***I don't think it would have made a difference; JDR justice actually agreed with our position [2]; both sides were well presented by lawyers; behind other person's back; not necessary - justice's role was completed; don't fully understand - as it was, it worked - not needed; not in this case, in other cases it may be helpful; not necessary [several]; not helpful in this case; no need - briefs***

summed up the issues; because of the style of mediation; because my lawyer had the most expert advice and reports - don't think any other necessary; would not have assisted to "come to grips" with claim; JDR justice was much closer to our position - would have been better to caucus with our side; the issues seemed to be resolved once the JDR justice provided an opinion; no need - justice had clarified the issues - the other side dealt with quantum and apportionment; and it wasn't needed in this case.

- No Answer - 11 = 15%

- TOTAL - 71 = 100%

N4. If you were to do another JDR would you wish the JDR Justice to caucus with you and your lawyer?

Yes - 140 = 73%

Why? To outline deficiencies in our position and to aid in negotiations; to benefit from the justice's knowledge and experience; it has usually been beneficial and provided opportunity to informally give additional insight of opinions/documents to assist in evaluation of claim; only if needed [a few]; always need an outside opinion based on knowledge and experience; get the whole picture; case by case basis, to discuss risks; always works better; enables candid discussion; to clarify more information pertaining to case being tried; I would have better questions to ask rather than spur of the moment thinking; I liked how justice explained things to me, his demeanor, frankness and kindness when needed at times; it facilitates open communication and asks the necessary questions to assess strength of case without exposing weakness to other side; provides better understanding to ensure that parties are on correct track for their position; it all helps; was a good format; keeps momentum going forward; be more prepared as a client; possibly - if more expert advice/reports needed an independent opinion, may be of value; for privacy; in some cases it is appropriate, but that depends on the case; helpful; possibly more information could have been presented; part of process was to determine how strong our case was and that likely would only come in caucus; more freedom to discuss issues; point of view and opinion is most valuable; always good to hear impartial evaluation of position; frankness of conversation - no games - blunt talk; impartiality - outline of the legal position and possibilities; to hear the justice's views and explore privately; helped both sides to see reason; to better

understand justice's opinion, especially on the amount of the award; so I could have the opportunity to ask questions; most helpful aspect of the process; in case an opinion on our case is required; would be helpful in discussion in areas justice was not familiar (e.g., this case ...); it would depend on the situation - mediation not effective if one or both sides not prepared to negotiate; to ensure all concerns are aired without feeling pressure or combativeness from the other side; at a minimum it created an impression that both sides are being asked to give something; quantum needs to be discussed with the justice; always helpful; opinion was valuable; get opinion of how my case was - was I on the strong side or weak side?; it would depend on the situation; helpful to the process usually; clarity; so our position is clear & justice can provide opinion; guidance; to obtain more information; the judge only talked with my lawyer in private - I believe I should have been part of that process; so I could further understand the process; the judge's impressions are crucial to reaching an agreement in a JDR; helps us understand strengths, weaknesses and risks - keeps us focused; would have known what to expect and how better to handle myself; clarify my options for success or lack of it; frank open discussion without expressing your potential weaknesses to the other party; a third opinion is always helpful; it would help to know where I stand; just to have the private time to talk and ask the Judge questions; unbiased opinion; helpful to see where the justice sees the file; it was helpful; very helpful to express our ideas and concerns - we could be more candid; beneficial; to listen evenly; useful to have the opportunity to ask questions which you may not want anyone else present - sometimes this can prevent disagreements when negotiating; there are times I would like to know how a judge would decide on an issue without disclosing privileged information to the other side; liked direct approach; that's the important part of the process - justice's opinion; could have planned case better; to hear a neutral opinion; for above reasons - as client, need to know justice's opinion on liability, quantum, and apportionment without necessarily bringing it to the attention of the other side or co-party; direct reality check; and it was productive having these somewhat more informed discussions without other side present - felt freer to speak.

□ No - 16 = 8%

Why? *I'm not generally a fan of mediations and typically in a JDR require an opinion and the two sides are usually in strong opposition to each other; not with this particular judge; not sure - plausible deniability - perhaps; feels more impartial without caucus; not sure if one would be any value; I do not see fairness of caucusing; this informal system worked - being hypothetical is not my way; honesty to both sides; not necessary; only if necessary - however, justice usually expresses concerns in front of all parties; and I like how they are done in Edmonton - give opinion and left to negotiate.*

- No answer -37 = 19%

Why? *Only if needed; maybe, depends on file; not sure; depends on the mediation style and issues; depends on the circumstance [a few]; depends on case [a few]; it depends on the matter being heard - some JDR's lend themselves to mediation, others require parties to "hear it from the judge"; sometimes appropriate, sometimes not; better preparation; depends on the file, issues, and how it proceeds - sometimes it is helpful, other times not necessary; it would depend on the nature of the case - if I wanted the justice to be aware of issues that I didn't want to discuss with the plaintiff side I would caucus with the justice; would depend on my lawyer's best advise in the circumstances; and really depends on time issues - if needed some further explanation of the justice's comments, perhaps.*

- TOTAL - 193 = 100%

O. JUDICIAL QUALITIES

(Note: The purpose of this section is to use your experience, in the context of this JDR, to identify the best qualities of a JDR Justice. It is neither to identify the JDR Justice, nor to be used to provide a personal evaluation to the JDR Justice)

(*Rate the qualities where 1 = poor; 5 = excellent*)

O1. In terms of **GENERAL APPROACH**, was/did the JDR Justice:

a. Prepared (appeared to have read all or most relevant material)?

1 - 3 = 2%

2 - 0 = 0%

3 - 12 = 6%

4 - 44 = 23%

5 - 124 = 64%

- No answer - **10 = 5%**
- TOTAL - **193 = 100%**

b. Knowledgeable (or appeared to be so) on the law relevant to your dispute?

- 1 - **3 = 2%**
- 2 - **2 = 2%**
- 3 - **8 = 4%**
- 4 - **36 = 19%**
- 5 - **131 = 68%**
- No answer - **13 = 7%**
- TOTAL - **193 = 102%**

c. Explain the JDR process to you:

- Yes - **174 = 90%**
- No - **10 = 5%**
- No answer - **9 = 5%**
- TOTAL - **193 = 100%**

If "Yes", was the explanation helpful? (1 = little; 5= most)

- 1 - **3 = 2%**³¹
- 2 - **3 = 2%**
- 3 - **17 = 9%**
- 4 - **49 = 27%**
- 5 - **84 = 46%**
- No answer - **27 = 15%**
- TOTAL - **183 = 101%**

If "No", might an explanation have been helpful?

- Yes - **4**
- No - **4**
- Not sure - **1**
- No answer - **1**

d. Polite, courteous and pleasant (as opposed to impolite, discourteous and gruff)?

- 1 - **1 = <1%**
- 2 - **4 = 2%**

- 3 - **2 = 1%**
- 4 - **30 = 16%**
- 5 - **145 = 75%**
- No answer - **11 = 6%**
- TOTAL - **193 = 101%**

e. Accommodating and sensitive to you (and your lawyer) telling your story to him/her and to the other side?

- 1 - **2 = 1%**
- 2 - **6 = 3%**
- 3 - **18 = 9%**
- 4 - **44 = 23%**
- 5 - **112 = 58%**
- No answer - **11 = 6%**
- TOTAL - **193 = 100%**

f. Frank, but fair in expressing his/her views on your risks in the dispute?

- 1 - **3 = 2%**
- 2 - **6 = 3%**
- 3 - **13 = 7%**
- 4 - **45 = 23%**
- 5 - **115 = 60%**
- No answer - **11 = 6%**
- TOTAL - **193 = 101%**

O2. How would you describe the JDR Justice's **SPECIFIC ROLE** in attempting to obtain a settlement in your JDR, in relation to the following descriptors?

a. Assertive (#1) or relaxed/laid back (#5)?

- 1 - **27 = 14%**
- 2 - **29 = 15%**
- 3 - **61 = 32%**
- 4 - **40 = 21%**
- 5 - **27 = 14%**
- No answer - **9 = 5%**

- TOTAL - **193 = 101%**

- b. Not very innovative (#1) or very innovative (#5) in suggesting options or ways to reach a settlement that you and your lawyer did not think about?

1 - **14 = 7%**

2 - **18 = 9%**

3 - **66 = 34%**

4 - **51 = 26%**

5 - **25 = 13%**

- No answer - **19 = 10%**

- TOTAL - **193 = 99%**

- c. Merely left it to the parties to achieve a settlement (#1) or worked hard to achieve a settlement (#5)?

1 - **23 = 12%**

2 - **14 = 7%**

3 - **34 = 18%**

4 - **44 = 23%**

5 - **61 = 32%**

- No answer - **17 = 9%**

- TOTAL - **193 = 101%**

Exerted pressure on you to settle generally or in a specific way (1=low; 5=high)?

1 - **50 = 26%**

2 - **34 = 18%**

3 - **51 = 26%**

4 - **24 = 12%**

5 - **16 = 8%**

- No answer - **18 = 9%**

- TOTAL - **193 = 99%**

Was that appropriate?

Yes - **134 = 70%**

Why? *The judge did not want us to go to trial; the justice gave a very detailed and thorough explanation of the issues and why the quantum was what the justice recommended; the justice emphasized that this is a*

voluntary process, and his/her opinion was just one opinion of a high number of potential judicial opinions; needed to hear judge's opinion; the Justice had a very good approach and found the right tone and method to achieve the objective; more for plaintiff benefit on consequences if loses at trial; alternatives were made prevalent and conclusions were established quickly; I did not feel pressure but felt informed; pressure not needed; both parties were motivated to settle before the JDR - both wanted resolution and were willing players - no games; my decision; it worked; it needed to be settled - we were prepared to settle prior to JDR but other side's position too [unrealistic]; it was what was needed at that time; important to get things resolved; I was informed of my options in the JDR; judge appeared to believe role was facilitator, not judge; that's why we were there - to settle...so having justice hammer on us was also beneficial, as positions tend to become entrenched over the years - we need to be jarred out of them periodically - or have the blinders removed so we can see the larger picture; binding JDR; our offer was [realistic] already; both sides likely wanted to avoid trial [a few] ; to achieve settlement; after 7 years it needed to be settled; JDR justice agreed with our position [a few]; no one likes to be pressured into a corner to make a decision; to finalize the situation; because both sides were being unreasonable; firm pressure; to avoid a trial and further expenditures; left decision to settle with ourselves, which was entirely appropriate; it kept us focused; it ended up being appropriate but had parties been stuck on position, more pressure may have been needed; parties were there to settle - no pressure was needed in this case; this is an all or nothing case so hard to offer a settlement; ended in a settlement; justice outlined what the likely settlement range would be at trial - didn't really need to pressure us as generally agreed with us but I would think justice was exerting a little more pressure on other side; neither side felt the outcome was forced; I strongly feel the role of a justice in a non-binding JDR process is to clarify the issues for all and to offer an opinion and assessment but not to exert pressure on any of the participants; justice

sees it from 2 sides; "economics" of achieving a slightly better settlement as opposed to continuing the litigation; met needs of other party; justice didn't have the power to exert any pressure - the purpose of a JDR is to reach a settlement - one has to try; stayed very balance in pro and con of what my choice should be; justice cared about the situation; limits of policy were exposed; not needed [a few]; justice respected the experience in the room; JDR justice was much closer to one side's position - the other side came in with a somewhat unrealistic position and needed to be told by the justice what the various heads of damages would attract as awards; justice explained the risks if it were to go to trial; because I was scared and emotional; to avoid going to trial and not improving in results; both sides needed pushing; never felt pressure but still felt reassured in my own understanding and estimate of situation; justice's opinion was the primary requirement as negotiations were stalled; justice wanted to see a result for everyone; it would have saved a long drawn out fight; needed a firm hand to resolve it; exerted some pressure on both sides - fair but realistic; decision should be ours; nobody got angry; no pressure but justice presented both sides of the case with good arguments; settled within ½ hour after JDR progress; no pressure - spoke of the law, spoke of perception of trial judge/trial outcome - educated about reality of a trial, strongly suggested settlement; I believe that a higher success rate is achieved when all parties are relaxed and not subject to unnecessary stress; needed the opinion of the Justice; both sides needed to be pushed on some heads of damage; made me recognize risk.; once the justice's assessment was given, it was necessary for each side to caucus for the lawyers to receive instructions and to advise their clients of their recommendations; got the job done; opinion on quantum provided means to settle; yes - made risk assessment reality check; not binding, opinion on quantum only; I felt justice's assessment to be very fair; justice offered input and guidance and let us think for ourselves without pressure; helped us to settle - we were there to try to settle; justice's opinion on liability and quantum was comparable to

our position and justice did not attempt to exaggerate the claim on behalf of the other side just for settlement; and justice was impartial and voiced a very legal and experienced opinion.

□ No - 13 = 7%

Why? You rely on JDR experience and knowledge to guide you to what is fair and reasonable; [comments on the merits of the case - not relevant to survey]; did not seem to focus on any of the other side's negative contingencies; need to push both sides; fueled the other side; foregone conclusion; judge suggested after 9 years [of litigation] it was ridiculous and should not go on; really would prefer to settle than proceed to trial; other options should be discussed - need time to consider options; and justice's purpose is not to advise me what to settle for and how much to increase my offer since the last offer which was withdrawn prior to the JDR.

- No answer - 46 = 24%

Why? We pretty much agreed with the judge; I had to remind myself that the justice did not have my best interests at heart, but rather wanted a settlement to call it a success; I don't know - justice was fairly neutral in this regard - except he did say he didn't plan on doing a lot of back and forth between rooms so I was worried that if I did not compromise further he would become irritated with us; so/so; a hands off approach worked on this day - it would have been helpful at times for the judge to reality check other side's counsel, especially on matters such as costs exaggeration, which are (1) a waste of time and (2) a poor reflection on the system; judge had already assessed quantum and relayed this to all parties and then excused him/herself, ending involvement; decisions should have been made; it would have been helpful for the justice to be more clear with the other side's counsel; and trial is much more stressful and costly - my case did not need to go to trial.

- TOTAL - 193 = 101%

Exerted pressure on the other side to settle generally or in a specific way (1=low; 5=high)?

1 □ - 30 = 16%

- 2 - 24 = 12%
- 3 - 38 = 20%
- 4 - 40 = 21%
- 5 - 20 = 10%
- No answer- 41 = 21%
- TOTAL - 193 = 100%

Was that appropriate?

- Yes - 107 = 56%

Why? The JDR justice made suggestions; several parties were being intransigent; other side a big company - removed/unaware of Alberta law; to resolve issues we had; effective; needed to hear judge's opinion; they would never have settled if there were options/choices; other side just needed to hear reasons from JDR justice; firm fair pressure; other side's expectations were too unrealistic; logical due to expert opinion of most significant value; the other side needed pushing to bring their generals to a more realistic level; binding JDR; other side was culpable in his opinion; other side just needed to hear reasons from JDR justice; to get it over after 4 years - other side would have left it in mid-air; justice gave an opinion and left it to both parties to decide if they would accept the justice's assessment; I wanted to settle after waiting to settle for 2 years; they did not want to settle; risks to be outlined but no pressure to settle; see it from both sides; they were stubborn; I believe very balanced between parties; no prolonged settlement; I suspect this was done in caucus with the other side; other side unprepared; because other side was unrealistic; keeping all focused; they needed pushing!; saved a long fight; more realistic settlement; other side not accepting previous law on quantum/evaluation of injuries - needed to hear from judge; needed to hear it from judge [a few]; realistic; other side's position unrealistic; I'm only guessing yes by the result achieved; may not have settled otherwise; they could have demanded a trial; we settled; poor legal representation from their legal counsel; needed the opinion of the justice [several]; to be reasonable, truthful and

recognize damage and responsibility and to stop demoralizing/discrediting client; made other side see risk; they were way too unrealistic on quantum - they needed it; other side needed to see the whole picture (i.e., both strengths and weaknesses of its case); it worked; to point out their weak case and errors counsel had made; to make them see reason; justice presented a fair assessment; they took 40 minutes each time we countered an offer - we took 5 minutes each time; talked about benefit for both sides; and helped our settlement process.

□ No - 10 = 5%

Why? No respect for me ... - by that point I felt sick; the facts or possible trial outcome should have been made; barely budge - was not open at all; both sides have risk; I was not present of course as we were separate, but it didn't seem the other side was being pressured enough to move on their position - judge did say they were stubborn though; and because other side wanted JDR to settle as beneficial as possible.

- No answer - 76 = 39%

Why? Judge seemed to think we were stalling and not the other side (not the case, it was them); not sure/don't know - it was in caucus if it happened [several]; I think but not sure; and quicker to end dispute.

- TOTAL - 193 = 100%

- d. Highly emotional (#1), or cool and logical (#5)
- 1 □ - 1 = <1%
 - 2 □ - 6 = 3%
 - 3 □ - 22 = 11%
 - 4 □ - 35 = 18%
 - 5 □ - 119 = 62%
 - No answer- 10 = 5%
 - TOTAL - 193 = 100%
- e. Patient with the parties and their participation (1=low; 5=high)
- 1 □ - 2 = 1%
 - 2 □ - 6 = 3%

- 3 - **10 = 5%**
- 4 - **48 = 25%**
- 5 - **118 = 61%**
- No answer- **9 = 5%**
- TOTAL - **193 = 100%**

f. Appeared impartial and open minded (1=low; 5=high)

- 1 - **5 = 3%**
- 2 - **9 = 5%**
- 3 - **16 = 8%**
- 4 - **40 = 21%**
- 5 - **114 = 59%**
- No answer - **9 = 5%**
- TOTAL - **193 = 101%**

O3. Over all, how do you measure the effectiveness of the JDR Justice (1=low; 5=high):

1 - **4 = 2%**

What would you say described the most significant qualities or lack of qualities of the JDR Justice bearing on his/her effectiveness? ***The JDR justice was focused on an appointment at noon and in a hurry - the Justice did not seem to understand the effects of "chronic pain"; justice took the side of the women; and lack of tolerance to listen to me and let the other side verbally abuse me and call me a liar - justice decided it did not matter about any other lawsuits because of the length of time.***

2 - **4 = 2%**

What would you say described the most significant qualities or lack of qualities of the JDR Justice bearing on his/her effectiveness? ***Opinionated; the judge appeared to be biased instead of impartial; and I felt justice was very impartial [partial?] and I was treated very poorly at the end of the JDR.***

3 - **12 = 6%**

What would you say described the most significant qualities or lack of qualities of the JDR Justice bearing on his/her effectiveness? ***Good outcome without a trial; would have preferred more involvement in the negotiation process; the lack of opinions or threats; justice did not look and take into consideration the [substantive negatives] to the other***

side; this was just a run of the mill JDR - most uneventful - I cannot judge the qualities; and while I regard the outcome as favorable, the other side (client and counsel) likely did not - they probably did not feel they had a fair hearing.

4 □ - 46 = 24%

What would you say described the most significant qualities or lack of qualities of the JDR Justice bearing on his/her effectiveness? *Open-minded; there was one topic of negotiation that the justice seemed to have personal experiences/beliefs that influenced decisions/opinions - was empathetic, showed s/he cared; carving out the essential issues and keeping the parties focused; impartiality; language barrier was an issue and the justice ensured that the plaintiff understood the process; identify the key issues and inform the litigants where and how it would likely go in court; gave both sides an opportunity to state their cases; calm, listened attentively, interested in helping achieve this settlement; I'd like to hear "If I were ruling on this..."; allowed plaintiff time to speak, vent and cry; very open; maybe a bit too cool - this wasn't exactly a poker game - rather a very difficult, emotional situation. A little more human connection/mediation finesse would have made the justice superb; was extremely prepared and knew the facts of the case - knowledge of the law as it applies to various issues - unbiased/realistic approach; appeared to have made conclusion about case from briefs - this was appropriate on this file, as very limited information derived from JDR; willingness to hear both sides - expressed uncertainty of trial - acknowledged legal issues; knowledge in the area of head injuries and knowledge of how other settlement are reached; justice was very calming but the feeling I had 1 hour into the JDR was justice knew the ultimate outcome; justice was very friendly and gave the claimant the chance to have a say; I was frustrated that justice would say we were too far apart for JDR; knowledge of particular injury in this file [frequent]; ability to deal with other side's counsel; ability to grasp concepts in our business and apply them to law and justice's experience; relaxed, approachable, knowledgeable; being up-front with opinion; practiced, realistic, reasonable; should have stayed for full process, as once judge left, no one was willing to negotiate past what the judge laid out for quantum; excellent knowledge, solid quantum numbers well founded on evidence and precedent; justice not fully understanding the file; the justice should have told other side's counsel to keep*

summations succinct and to the point - this was a day long JDR and the other side's counsel talked until 2 p.m.; the justice was well prepared and knew the file; and too direct from the beginning (i.e., - OK - how much money to end this, that's it, that's all) - never did hear anything about if we would win at trial.

5 □ - 117 = 61%

What would you say described the most significant qualities or lack of qualities of the JDR Justice bearing on his/her effectiveness? *Justice willing to say what would do at trial; well prepared [numerous]; justice used examples to prove point - explained process well; very receptive and hearing both sides - able to express downside of trial and benefits of avoiding trials without putting pressure on either side; very qualified; read and understood the file - listened to and asked questions - involved everyone - was extremely respectful to all participants; very nice and considerate, kind; very knowledgeable and balanced toward both parties; very knowledgeable about the particular injury which related to the plaintiff; very helpful and willing to work very late to gain a resolution; very direct, helpful, willingness to hear complete story; very confident, however leaves perception of being "fast and loose" with thoughts; very calm, allowed parties to speak freely and let them feel they were being heard; very calm, allowed parties to speak freely and let them feel they were being heard; understanding of facts and application of same within the law - matter of fact; told facts - what saw of documents right at start of procedure; thoroughly read the material beforehand, but also asked plaintiff direct questions, listened sympathetically - did not appear at all biased - both sides received fair hearing; this event drifted quickly to a detailed mathematical exercise without any benefit of defamation on punitive nature of the claim; the JDR justice was assertive while informing both parties of option; superb - calm, understanding, fair, impartial, but realistic; straightforward, reasonable and sincere; straight to the point; straight forward, perception, compassion. stick to the issues - cutting to core - not letting one side or person dominate the negotiations - the justice must believe in the purpose and process; justice was very empathetic with plaintiff but also very clear with the law and how this would likely resolve at trial; justice was thorough, prepared, understanding - exactly what I expected and would want again in the future; justice was excellent, professional, and knowledgeable and, consequently,*

opinion has weight; justice was down to earth, no airs put on, could relate to justice with not feeling ignorant; sensitive, well prepared, strong when necessary, impartial, creating a comfortable environment for all; reasoned opinion; . Argument; well spoken, good listener; focused, to the point; knowledge and assessment of the issues; patient [a few], polite, courteous; listened to everyone, assertive, honest in opinion, personable, not arrogant; open, interested, listened; open minded, expresses view and ensured parties understand what was saying; neutral, calm, fair; most fairness, able to assess risk and voice fairly assessment of quantum; making appropriate suggestions, but leaving decision making to us; knowledgeable, polite, courteous, pleasant - I felt totally at ease and confident with advice given; knowledge of the law - good communicator; knowledge of material [numerous]; process justice took to resolve issues; knowledge of law, quantum, causation and issues at hand but was able to put some personality into the process also; knowledge of file and quantum; knowledge and application of it to facts of the case; knew stuff - captured key points of discussion and incorporated factors in response; knew the issues and risks involved; justice got the point across to both parties; involved - phoned third party related to subrogation and pressured them to get out of the way; impartiality/knowledge; grasp of the situation of the parties involved and recognizing the need for settlement out weighing the value (\$) of assets in dispute; calmness; calm manner put everyone at ease; high knowledge, degree of professionalism, unbiased and impartial; heard all parties/prepared by reading briefs, knew issues; didn't waste time reiterating all the facts in the briefs - questioned the plaintiff on issues that needed clarification - went right to settle; didn't waste time - told both parties what they had to do to settle; actively engaged the plaintiff, attempted use of humour, and very patient with the plaintiff, encourage open and frank conversation; good mediator, if that is desired - also acknowledged the plaintiffs need to be "heard"; good listener, law advisor, keeping the JDR on the topic - assisting in conclusion; good at listening and then making a point; frank, fair, knowledgeable; firm and fair - realistic; fair [several], quiet and reserved - spoke effectively at a level of "matter of fact" understanding; listened carefully - asked questions; fair, but assertive and decisive in opinions; extremely professional, clearly experienced and educated in corporate/business ventures, did homework with respect to our case; experienced,

assertive, not wavering on opinion, patience; executed calmness, openness and non-biased assuredness for both parties to conduct an open floor for arguments while maintaining order; empathy for this particular unusual situation; empathy for the plaintiff but at the same time able to make plaintiff think about the risks in a realistic manner - excellent listening skills (active); education on risk of a non-settlement, and facilitated sides on empowerment after giving opinion of where a reasonable settlement may be; cool and logical but sincere and empathetic to plaintiff; justice did not let anyone "get" to him/her with their behaviour; compassionate and realistic -communicates well and is insightful; clearly had read all material submitted and understood the issues and facilitated the settlement; clear, concise, professional, personable, logical, well educated on case and law, assertive; clear analysis provided of weaknesses of each side; care and concern truly shown; calmness, fairness, knowledge of past situation and of what had been going on in this matter; calm, informed, continued to push both parties toward settlement by caucusing and 'breaks' to think over the positions of both (persistent); calm and confident with a sense of humour but compassionate with plaintiff; brought everyone down to earth; an excellent individual for this JDR - very easy to talk to and approachable; all I can say is, whatever the justice is being paid, it's probably not enough; and ability to effectively listen to both sides.

- No answer - **10 = 5%**

What would you say described the most significant qualities or lack of qualities of the JDR Justice bearing on his/her effectiveness? ***Believe justice accurately delivered messages while caucusing.***

- TOTAL - **193 - 100%**

O4. Based on your (above) assessment, if you were doing another JDR, what is the rating you would give as to whether you would choose this JDR Justice (if you had a choice) for that future JDR? (1=low; 5=high)

1 - **9 = 5%**

2 - **4 = 2%**

3 - **20 = 10%**

4 - **36 = 19%**

5 - **115 = 60%**

- No answer - **9 = 5%**

- TOTAL - **193 = 101%**

O5. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **style** in JDR proceedings, **in terms of achieving a settlement**: (1=negative; 5=positive):

a. Aggressive

1 - **25 = 13%**

2 - **28 = 15%**

3 - **58 = 30%**

4 - **44 = 23%**

5 - **17 = 9%**

- No answer - **21 = 11%**

- TOTAL - **193 = 101%**

b. Assertive

1 - **1 = <1%**

2 - **2 = 1%**

3 - **49 = 25%**

4 - **75 = 39%**

5 - **46 = 24%**

- No answer - **20 = 10%**

- TOTAL - **193 = 100%**

c. Gently Persistent

1 - **5 = 3%**

2 - **4 = 2%**

3 - **30 = 16%**

4 - **75 = 39%**

5 - **60 = 31%**

- No answer - **19 = 10%**

- TOTAL - **193 = 101%**

d. Carefree (none of the above)

1 - **58 = 31%**

2 - **91 = 47%**

3 - **17 = 9%**

- 4 - **4 = 2%**
- 5 - **4 = 2%**
- No answer - **19 = 10%**
- TOTAL - **193 = 101%**

- e. Other (specify) ***Would like judge to read reports from doctors, not notes taken out of context; well prepared; specific, caring, doesn't make assumptions; should have offered informed opinions/decisions; justice was positive; prepared, learned - one who listens to both sides, one at a time, not bantering; client feels this section is difficult to answer since it would depend on the issues and the nature/personality of the client and counsel; neutral to both sides; must take off judge's hat; just give honest assessments and opinions; it's not always easy to know until the process is under way and you can read or assess the other side; innovative; impartial; difficult to say - each case is different - in my experience the judge can sense what styles to use within first few minutes and from the briefs; depends on type of claim; depends on parties involved; balanced and impartial [two]; and a justice needs to provide their opinion on the issues and seek instruction from both sides if they agree - I so, both need to be pushed to settle at the appropriate.***

O6. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **involvement** in JDR proceedings, **in terms of achieving a settlement**: (1=negative; 5=positive):

- a. Control the negotiations
- 1 - **9 = 5%**
 - 2 - **14 = 7%**
 - 3 - **38 = 20%**
 - 4 - **71 = 37%**
 - 5 - **43 = 22%**
 - No answer - **18 = 9%**
 - TOTAL - **193 = 100%**
- b. Let the parties/lawyers control the negotiations
- 1 - **26 = 13%**
 - 2 - **33 = 17%**
 - 3 - **52 = 27%**

- 4 - **45 = 24%**
 5 - **15 = 8%**
 - No answer - **22 = 11%**
 - TOTAL - **193 = 100%**
- c. Be neutral (merely offer suggestions/options others had not raised)
 1 - **23 = 12%**
 2 - **21 = 11%**
 3 - **37 = 19%**
 4 - **37 = 19%**
 5 - **46 = 24%**
 - No answer - **29 = 15%**
 - TOTAL - **193 = 100%**
- d. Other (specify) ***With judge present until the end - not leaving the room to let them hassle you; this depends on the issues involved (i.e., a per case basis) - could be any of the methods; the reason we are at a JDR is that we cannot agree and need a judicial opinion; speak to both sides individually; judge needs to lead the process; if two neutral people do not know how to act; encourage each side to be reasonable & to stick with negotiation; do not raise any "new issues"; both lawyers and justice cooperated; and (b) and (c) answers would depend on the parties in dispute and the volatility.***
- O7. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, rate the relative effectiveness of the following judicial **formality** in JDR proceedings: (1=negative; 5=positive):
- a. Formal/structured
 1 - **10 = 5%**
 2 - **35 = 18%**
 3 - **46 = 24%**
 4 - **48 = 25%**
 5 - **22 = 11%**
 - No answer - **32 = 17%**
 - TOTAL - **193 = 100%**
- b. Informal/easy going
 1 - **10 = 5%**

- 2 - 26 = 13%
- 3 - 40 = 21%
- 4 - 50 = 26%
- 5 - 41 = 21%
- No answer - 26 = 13%
- TOTAL - 193 = 99%

- O8. If you had the right to pick the qualities of a **FUTURE JDR JUSTICE**, what **other judicial qualities** would you like to see in JDR proceedings: (specify) ***Would like it to be stated that results at end of session must be clear to all parties before session ended; would depend on the particular case; why was such a hasty opinion made - justice did not ask where our documents were - we could have explained our lawyers did not advise us to bring them; too many variables to answer; to hear the complete story on plaintiff side; to be more specific as to strength/weakness as to a case and give opinion as to what they feel is reasonable to walk away with; [speaking to the merits of the case and not relevant in this context]; time control; there is no 'one' right quality - perception to the interplay and adaptability to the situation is more important than one individual trait; the judge must have good people qualities and be able to sit and listen - must be with the times; the evidence presented and JDR should be allowed to be used; the entire experience and process was positive; spend more time with actual issues that pertain - give equal time to talk for both parties - in my case other side had 45 minutes, I had 10 minutes; someone that sees both sides and does not form opinion prior to the JDR; sense of humour and no bias against either side regardless of their own prior experiences; read the provided material and review case law - do not be quick to provide opinion and only if requested - maintain control; possibly a clearer communication on who would likely be awarded judgment at trial; open-minded, willing to see all sides of an issue, compassionate, understanding of emotional issues; opening by respective lawyers and ability for clients to speak in caucus at appropriate times; none - this JDR was pleasant, open, in control, made everyone feel important, relaxed; provided clarifications as to law and moved proceedings efficiently and effectively; no change; my JDR was very worthwhile - if you could I would like you to clone the judge I had; more questions to gain information or clarity - to understand that for the plaintiff specifically in a MVA - with injuries - litigation, the process is very stressful & emotional; please do not rush - there is already huge pressure for at least one of the parties or even both; more comment on case law; know the law and not always appear to be sympathetic/oriented to one side; just fairness & knowledge of***

the law; just be human so that everyone is comfortable in the room; impartial [several]; patient - allow both parties to express themselves freely; attentive, listening, caring, constructive, polite, courteous [two]; I would not preface comments by their lack of experience in family court; I think it needs to be made clear that the proceeding, while somewhat informal, is being "led" by a QB justice and all due and proper respect should be given to the justice; I feel the most important qualities is to be neutral, impartial and provide an opinion to both parties in order to avoid trial and settle; good listener, understanding; give an opinion, but not to start the day - after 2 hours, we need the "I think a Justice would do this..." ; genuine commitment to the process; familiarity of the "cause of action" and related laws - effective communicator, both listening skills and verbal; fairness [several]; prepared, communication skills (listening and talking); patience, listen to and hear points being raised during discussion; open, easily approachable; experience, knowledge, not ignorant/arrogant; experience in the area of the JDR (i.e., family law for family law issues, etc.); directness; couldn't get any better than we had; completely satisfied by JDR justice; compassion; broad understanding of commercial damages; better understanding of all parties involved in the proceedings (i.e., WCB and its processes); be aware to the mood of the room, don't be afraid to break if need be - patience, impartiality; as my first experience in the JDR I would want the same qualities in future JDR justice - relaxed, informative and striving to reach an agreement; as long as the justice gives an opinion one way or the other; answers would depend on the parties involved and issues; another smaller room for the opponent side to go to for negotiations; ability to quickly determine what style is going to work in the room; a sense of humour; real people person - good empathy; and think outside of the box.

P. **OTHER**

P1. Having considered these "Additional" questions, is there anything that we didn't ask you about on which you would like to comment? Do you have further believes as to whether the JDR program can be improved - if so, how? Do you have any additional comments?

- We arrived at a settlement the day of the JDR. The settlement was arrived at following a meeting between the plaintiff and the defendants, with no lawyers present. Immediately prior to this meeting, the last caucus session with the defendants, we were discussing a compromise offer that was in the area of one half of the final settlement.

The plaintiff advised early in the joint meeting that s/he was prepared to go to trial unless his/her demands were met. The demands were in excess of the final settlement. During the course of that discussion the justice raised some issues regarding contribution of other parties and suggested that his amount might be more appropriately reduced to the amount finally agreed upon. We, as defendants, were asked what we thought of that.

My feeling, going back to the caucus meeting immediately preceding the meeting with the parties was that we were perhaps moving to a settlement at some amount smaller than finally agreed upon. When the justice suggested a reduction from the initial demand of the plaintiff to the amount finally agreed upon, I felt that we had been sandbagged. The speed with which the numbers increased from the last caucus to this meeting and the fact that the justice seemed to be accepting of the plaintiff's position took me by surprise.

After having time to think it over, and making some assumptions as to the justice's thinking, I have come to believe that s/he handled this part of the JDR very well. The defendant spouse was under a great deal of stress, and did not wish to go to trial. The plaintiff was prepared to walk away and go to trial demanding an amount which did not allow for contribution from third parties. I now believe that the justice had made up his/her mind as to how s/he might rule during the course of this discussion between the two parties. Additionally, I believe that s/he felt that unless s/he moved quickly to suggest the reduction to the plaintiff that we would have been facing the prospects of a trial, with significantly greater financial loss if unsuccessful and the possibility of having to deal with the plaintiff's higher demand had s/he walked away from this meeting without considering the third party contribution.

So in conclusion, I think the result was the best we could do, avoiding trial.

I do wonder if we went to caucus too soon. Hindsight being what it is, I would have liked more of an opportunity to review some of the evidence and the differences in how this evidence was being interpreted by the respective parties. If we had a chance to discuss the matter a bit more in joint session, it is possible that the justice might have been able to make an earlier determination of his/her sense of what the trial result might be. If that had been communicated to us earlier, say in the initial caucus session, we would have had to move our starting point in the negotiation to a much higher level, which would have helped us prepare mentally for the outcome that was finally determined. As it was it came too far, too fast and left us feeling somewhat abused. At the same time,

the plaintiff likely felt that the process was taking too long, which may have led him/her to his/her "take it or leave it position".

In summary, we are very please that this is over, and at the end of the day are satisfied with the performance of the justice.

- When insurers are involved, the JDR justice should ask or suggest that the insurers meet without counsel at some point so that they can discuss their positions after listening to all parties.

- What is the training program for JDR's? Is there mentoring for new Justices?

- This process is more desirable than normal mediation because of having a judge present - it makes the JDR seem official or real. Years ago I met a mediator at a neighbor's party and was immediately tagged a deadbeat dad because the mediator didn't agree with my theory of extortion - paying child support in order to see my children - visitation stopped and the payments stopped shortly thereafter - maybe then was the time for JDR.

- There seemed to be some misunderstanding when the pre-JDR package was filed and should be clearer.

1. Pre-JDR package filed with court was also exchanged with lawyers and parties.

2. Supporting documents and info was not sent because the package was going to the other party and our lawyer told us we would take it to JDR.

3. The JDR justice then did not see this info ahead of time and would have been beneficial.

4. The plaintiffs had no supporting documents even at JDR.

5. We feel there should have been a complete package couriered to the judge for his review separate from the court filed documents. The court document was to include condensing the issues to three, with a solution(s). Each party's "bottom line" to settle was not included and would have been if the info was going only to the judge/justice.

- The reason I like to use a JDR is when we have reached an impasse in negotiations. A gentle nudge by the judge can get the case settled normally. In my experience it's the plaintiff but once or twice I was nudged and the case settled.

- The qualities to seek in a JDR Justice depend on the type of case you have and the personalities of the parties involved. "Unreasonable" plaintiffs and "intransigent" defendants are best served by an assertive approach by the justice in my view. More "reasonable" parties would be better served by a mediation approach. The important thing is that counsel choose a JDR justice who takes the approach most effective for their particular clients.

- The process was successful.

- The opportunity to sit with a judge, in caucus, in a relaxed, non-binding, non-adversarial situation, and get informed, honest opinions is not only effective at solving cases, it is also educational, a positive experience, if you will, and a privilege I truly appreciate as a Canadian and an Albertan. I can only offer my thanks, again, to this justice.

- The justice was well prepared and fair to both defence and plaintiff. The JDR system is generally an excellent alternative to going to trial. It is often the mere fact of "hearing a judge's opinion" that is enough to persuade both plaintiff and defendant to settle.

P.S. - Not all the JDR's that I have attended have been as positive and effective as this most recent one in Calgary. It really does depend on the individual judge and the judge should be "judged" on his or her individual performance each time. The "success" ratio of settlements achieved at JDR's should not be the only criteria on which a Judge is rated.

- Survey is a bit too long.

- Private mediation is always available. In Alberta, the opportunity for JDR allows an audience with a judge. My reason to want an audience with a judge is to get an impartial assessment (reality check) if necessary. I believe in personal injury cases, a JDR may offer the plaintiff their day in court, to be heard, without cost/risk of trial. Overall it seems to be a good program, just need to have more JDR dates available.

- ***Once an agreement has been obtained, the agreement must be immediately prepared and signed by all parties concerned within a short period of time. Other paper work should be prepared immediately for signature also (e.g. divorce papers) so that all parties know the case is complete and binding.***
- ***Now knowing that 90% of cases do not proceed to trial, I feel that lawyers and JDR's should not use the scare tactic of pressuring the plaintiff about court costs, etc. to be the sole reason to settle for less, while knowing the plaintiff is clearly not wealthy.***
- ***I liked our specific JDR Justice, who is a good person overall to do this type of job! Thank you for the experience.***
- ***More education to the public that this is available, if mediation services and negotiation is unsuccessful.***
- ***Maybe have it more clearly stated that all concerns should be brought forth by both parties before an Order is in place. Thus as in my case the other side would not be trying to change Order less than 24 hrs after it was set. I feel the JDR process should be the second phase behind the examination for discovery and this date should be a standard set date not to exceed six months past the date set for discovery. I feel the JDR process is a valuable tool in resolving disputes and clients should know this avenue is available and if the lawyers do not want to inform their clients then the court system should be promoting this avenue instead of the trial path (especially disputes the justice feels would benefit from this). The time and money I spent could have been greatly reduced if I knew about the JDR process much earlier on.***
- ***We were surprised how much the justice had read.***
- ***Justice was quite patient in private.***
- ***I wished justice would have possibly worked harder with our side, as even though he said we had the stronger case, we seemed to do more of the compromising.***

- *Justice could be better than any alternative and he was nice & patient.*
- *Thank you for doing this survey. It gives some closure to the whole JDR process.*
- *JDRs are a valuable tool in getting matters settled. I have participated in over 40 JDR's and have settled 100% of the claims. Some took a week to achieve settlement on all the issues. The process is invaluable. The claimant gets the opportunity to tell his/her story to the justice, and gets an opinion on the damages and the merits of their case. Please continue the program!*
- *JDRs program is well run and effective - 98% of files I have attended at JDR settle at the JDR or shortly after. Even those that don't settle, the process helps clarify future litigation planning.*
- *It would be very beneficial to have the JDR process initiated much earlier. No reason to wait until just prior to a trial.*
- *It was a good experience. I appreciated the justice's "human" aspect. Caring and fair.*
- *It takes a long, long time to go through the court system. I didn't realize that there was different types of JDR's. The JDR should have the authority to make a decision to influence the outcome or else \$\$ are wasted. This was something you the justice did during my divorce JDR, but didn't happen during this hearing. I was impressed with the divorce JDR and had looked forward to this being a similar process and structure.*
- *It is an excellent process. We always attend with settlement in mind - to date we have been most successful. The process, as in court, depends on the luck of the draw. It tends to bring both parties to reality - when neither are happy there is success - when both are happy there is harmony - when one is distressful there is dissolution and distress. The people make the process work. The process does not make the people work.*
- *Glad to see some research being done on this topic. I've always been a strong proponent of the process.*

- Would like to know (broadly) the final results of the survey/project/thesis!!

- If a judge says outright that a person must be better because they were not still taking treatment, I would like them to realize that the injured party is waiting for re-imburement to do so and the judge's words give the opposition cause to deny payments for such, at a JDR each word spoken by the judge is very important so... please make judges aware of thinking out loud.

- I would like to thank the Court of Queens Bench of Alberta ... for having this program, anything that is established to speed up the system is of great value. Although I was not too happy with my outcome, I do not feel it has anything to do with this JDR procedure but rather with the other side dragging things on and on, duplicating tests year after year wasting health care money, asking for reports over and over wasting doctor's time, etc. This program is a positive step and will be much appreciated in the future. Thank you.

- I wish we used JDRs in British Columbia more often - much better than mediations.

- I think there is a role for many different styles of JDR. Injury/family claims may require more empathy, neutral, easygoing process where as contract, property losses between insurers may require a more assertive controlled process.

- I think more comfort is required - a lounge area for stepping away and recharging.

- I think it would have helped had I been better informed as to what was the purpose of the JDR system. I was given no understanding of what was involved until we sat down.

- I have been involved in Mini-Trials/JDRs since inception. I believe very strongly in this forum and will continue to use it. It is particularly beneficial with unreasonable parties or their counsel, but gives individuals an opportunity to "have their day" without the expense of a trial.

- I feel that JDR's should be provided more often because it is easier on everyone and less people (JDRs, expert opinions, etc.) have to miss work. I am thankful that I had a JDR.

- *I actually enjoyed meeting the judge. Very nice person. I could relate.*
- *This was a new experience for myself as I don't or haven't been involved in legal proceedings. I have heard through lawyers that certain JDR judges should not be in these processes. This was not the case with the justice we had - a very distinguished and professional.*
- *Having a justice render an informed opinion carries a lot of weight. It also reinforces the uncertainty at trial and that there is no "one right answer". Both sides have to do a "risk assessment" of the "stumbling blocks" to settlement. Having a judge give an opinion carries a lot of weight.*
- *[Miscellaneous comments on "overflow" from section O on qualities of justice]: Justice: took time to explain the process to me; was focused, committed to process; worked very hard; and was persistent; only wanted to rush what he was going to decide - despite [poor evidence] justice made decision regarding someone else's property; basically said this is the way it is; believed the opinion was accuracy and that's it; basically forced a decision; and, I feel, had made opinion before entering the room.*
- *I feel very fortunate to have had this option.*
- *Ensure that breakout rooms are available. Quite often, the parties do require an opportunity to discuss issues without justice or other party present. It is disconcerting to be standing in the open area of the 6th floor of the Edmonton Court House, wondering who will hear your discussions. I appreciate the space limitations, however.*
- *Ensure plaintiff speaks - they need their "day in court".*
- *Consider extra-jurisdictional JDR's (Canada-wide).*
- *We all signed an agreement at the end, but the other side has not followed through.*
- *As we were told by the JDR justice, trials are costly and long. So this is a good idea.*

- We feel if we had the \$\$ needed up front for a trial our JDR would not have succeeded. We settled for less than we should have as a trial would have cost us more than we have. Trials for a case like ours is for the rich.

- An excellent program, which I believe should be extended. Our justice was superb in gently edging all parties to a settlement. I am very grateful for the justice's help in mediating our settlement after 8 years of legal wrangling.

- Adjusters and their defence counsel should be looking for "windows of opportunity" to settle claims from day one. If we are going to ask a justice to provide an opinion, then the justice should have enough info to render an opinion that takes into account the true position and evidence of both sides. Timing is very important and that's what I mean by recognizing "windows of opportunity". [JDRs are usually necessary because one side] was not ready to be realistic about their [position].... I have learned that the hardest part of the job is moving people into the proper "range" of settlement. Once you have moved them into the range, the job of "fine tuning" the final numbers is easy. Having a JDR has always been so helpful in moving people into the range. Sometimes, you get there without even having to involve counsel. Sometimes you have to go all the way to trial.

Thank you again for taking the time to complete this Survey, including the "Additional Questions". Your answers will provide us with significant assistance in evaluating the Court's JDR Program.

Justice John D. Rooke

**APPENDIX 6 - TABLES AND SUMMARY
OF RESULTS - INTERACTIVE ANALYSIS**

TABLE 6.1 - WAITE TIMES³²

TRIALS

DATE	WEEKS	CALGARY WAIT TIMES		EDMONTON WAIT TIMES		LETHBRIDGE WAIT TIMES	
		WAIT	SITTING JUDGES	WAIT	SITTING JUDGES	WAIT	SITTING JUDGES
Jun 1996	1 Week	NA	NA	6 Months	7 Total	?	1?
	2 Weeks +	NA	NA	17 Months	-	?	1?
Apr 2002	1 Week	2 Months	7?	?	7 Total	?	1?
	2 Weeks +	7 Months	7?	?	-	?	1?
Apr 2008	1 Week	2 Months	?	½ Month	7 Total	?	1?
	2 Weeks +	3 Months	?	½ Month	-	?	1?

JDRS

DATE	WEEKS/ Day (Case)	CALGARY WAIT TIMES		EDMONTON WAIT TIMES		LETHBRIDGE WAIT TIMES	
		WAIT	SITTING JUDGES	WAIT	SITTING JUDGES	WAIT	SITTING JUDGES
Jun 1997	1 Day	3.5 Months	1 x 4 Days	3 Months	1 x 4 Days	?	1 On Request
April 2008	1 Day	2 Months	4 x 3 Days	2 Months	4 x 3 Days	?	"
Apr 2002	1 Week	2 Months	7?	?	?	?	"

APPENDIX 6
TABLE 6.2 - MOTIVATION

MOTIVATION	RANKING		PERCENTAGE	
	L	C	L	C
Cost	1	1	75%	64%
Speed	2	3	72%	59%
Judicial Opinion	3	2	68%	63%
Risk	4	5	55%	37%
Stress	5	4	52%	46%
Options	6	6	40%	33%
Relationships	7	7	12%	13%
Other	8	8	7%	9%

TABLE 6.3 - SETTLEMENT - IMPACT ASSESSMENT

JUDICIAL INVOLVEMENT (M2)	SUCCESSFUL ON ALL ISSUES (F1)					
	CALGARY		EDMONTON		LETHBRIDGE	
RANKING	#	%	#	%	#	%
1 (LOW)	0	0	0	0	0	0
2	2	2	2	2	0	0
3	6	5	4	4	0	0
4	41	34	28	25	2	18
5 (HIGH)	70	59	80	70	9	82
TOTAL	119	100	114	99	11	100

APPENDIX 6
TABLE 6.4 - PEAK PERFORMANCE

LITIGATION STAGE (J1)	SUCCESSFUL ON ALL ISSUES (F1)					
	CALGARY		EDMONTON		LETHBRIDGE	
RANKING	#	%	#	%	#	%
BEFORE DISCOVERY	18	11	13	9	0	0
AFTER DISCOVERY	46	28	20	14	3	19
AFTER DISCOVERY & EXPERTS	64	40	65	45	6	38
TRIAL READY	34	21	47	32	7	44
TOTAL	162	100	145	100	16	101

APPENDIX 6
TABLE 6.5 - JUDICIAL QUALITIES

QUALITY	HIGH RATING (4 & 5)		LOW RATING (1 & 2)	
	L	C	L	C
O1. Preparation	90%	87%	3%	2%
Knowledge	88%	87%	3%	4%
Explain JDR Process - Helpful Explan.	90% 66%	90% 73%	5% 3%	5% 4%
Polite & Courteous	91%	91%	2%	3%
Accommodating	85%	81%	2%	4%
Frank, but Fair	87%	83%	3%	5%
O2. Assertive (1) - Relaxed (5) ³³	34% 3 = 32%	35% 3 = 32%	29%	30%
Not Innovative (1) - Innovative (5)	31% 3 = 40%	39% 3 = 18%	22%	16%
Left to Parties (1) - Worked Hard (5)	48% 3 = 10%	55% 3 = 18%	27%	19%
Exerted Pressure on Reporting Side ³⁴ - Low (1) & High (5) - Appropriate	23% 3 = 22% Yes = 75% No = 6%	20% 3 = 26% Yes = 70% No = 7%	49%	42%
Highly emotional (1) or Cool/Logical (5)	80%	84%	3%	4%
Patient - Low (1) or High (5)	85%	86%	4%	4%
Impartial - Low (1) or High (5)	83%	80%	4%	8%
O3. Overall - Low (1) or High (5)	84%	85%	5%	4%

QUALITY	HIGH RATING (4 & 5)		LOW RATING (1 & 2)	
	L	C	L	C
O4. Choose JDR Justice again	80%	79%	7%	7%
O5. Ideal JDR Justice - style in achieving settlement				
Aggressive - Low (1) and High (5)	22% 3 = 30%	32% 3 = 30%	40%	28%
Assertive - Low (1) and High (5)	61% 3 = 23%	73% 3 = 25%	7%	2%
Gently Persistent	66% 3 = 21%	70% 3 = 16%	6%	5%
Carefree - Low (5) and High (1)	75	78%	4%	4%
Other	Qualitative	Qualitative	Qualitative	Qualitative
O6. Ideal JDR Justice - involvement in achieving settlement				
Justice Control of negotiations	46% 3 = 29%	59% 3 = 20	16%	12%
Parties/Lawyers Control of negotiations	28% 3 = 33%	32% 3 = 27%	30%	30%
Justice Neutrality	21% 3 = 24%	43% 3 = 19%	42%	23%
Other	Qualitative	Qualitative	Qualitative	Qualitative
O7. Ideal JDR Justice - formality				

QUALITY	HIGH RATING (4 & 5)		LOW RATING (1 & 2)	
	L	C	L	C
Formal/Structured	30% 3 = 28%	36% 3 = 24%	31%	23%
Informal/Easy going	37% 3 = 29%	47% 3 = 21%	25%	18%
O8. Ideal JDR Justice - other	Qualitative	Qualitative	Qualitative	Qualitative

APPENDIX 6
TABLE 6.6 - MINI-TRIAL ANALYSIS

DESCRIPTION	CAL	EDM	LETH
Total	18/176 = 10%	85 ³⁵ /162 = 52%	2
Pure Mini Trial	2/18 = 11% 2/176 = 1%	46/85 = 54% 46/162 = 28%	0
Mini Trial & Mediation	3/18 = 17% 3/176 = 2%	2/85 = 2% 2/162 = 1%	0
Mini Trial & Evaluation	3/18 = 17% 3/176 = 2%	20/85 = 24% 20/162 = 12%	1
All Three	10/18 = 56% 10/176 = 6%	14/85 = 16% 14/162 = 9%	1
Caucusing			
Yes	13/18 = 72%	15/85 = 18%	1
No	3/18 = 17%	60/85 = 71%	1
No, but wish caucus	1/3 = 33%	16/60 = 27%	0
No, but not wish caucus	2/3 = 67%	34/60 = 57%	1
Success			
100%	14/18 = 78%	67/85 = 79%	2
0%	1/18 = 6%	7/85 = 8%	0
Some%	3/18 = 17%	9/85 = 11%	0
Type of Case			
Personal Injury	13/18 = 72%	70/85 = 82%	1
Motor Vehicle	10	64	1
Slip & Fall	1	2	0
Other	2	3	0
Family	3/18 = 17%	9/85 = 11%	0
Property	3	7	0

780

DESCRIPTION	CAL	EDM	LETH
Parenting	0	1	0
Support	0	0	0
Other	0	1	0
Employment	0	1	0
Insurance	0	1	0
Contract	1	2	1
Other	1	2	0

TABLE 6.7 - MEDIATION/EVALUATION ANALYSIS

DESCRIPTION	CAL	EDM	LETH
Total	138/176 = 78%	58/162 = 36%	17/18 = 94%
Pure Mediation	28/138 = 20% 28/176 = 16%	6/58 = 10% 6/162 = 4%	5/17 = 29%
Pure Evaluation	79/138 = 57% 79/176 = 45%	39/58 = 67% 39/162 = 24%	10/17 = 59%
Both	31/138 = 22% 31/176 = 18%	13/58 = 22% 13/162 = 8%	2/17 = 12%
Caucusing (from Evaluation only)			
Yes	75/79 = 95%	23/39 = 56%	9/10 = 90%
No	4/79 = 5%	17/39 = 44%	1/10 = 10%
No, but wish caucus	2	4	0
No, but not wish caucus	2	8	0
Success			
100%			
- Pure Mediation	21/138 = 15% 21/176 = 12%	4/58 = 7% 4/162 = 2%	4/17 = 24%
- Pure Evaluation	67/138 = 49% 67/176 = 38%	33/58 = 57% 33/162 = 20%	10/17 = 59%
- Pure Both	21/138 = 15% 21/176 = 12%	10/58 = 17% 10/162 = 6%	0/17 = 0%
- Total	109/138 = 79% 109/176 = 62%	47/58 = 81% 47/162 = 29%	14/17 = 821%
0%			
- Pure Mediation	5/138 = 4% 5/176 = 3%	1/58 = 2% 1/162 = <1%	1/17 = 6%
- Pure Evaluation	8/138 = 6% 8/176 = 5%	5/58 = 9% 5/162 = 3%	0
- Pure Both	7/138 = 5% 7/176 = 4%	1/58 = 2% 1/162 = <1%	2/17 = 12%
- Total	20/138 = 14% 20/176 = 11%	7/58 = 12% 7/162 = 4%	3/17 = 18%
Some%			

DESCRIPTION	CAL	EDM	LETH
- Pure Mediation	1/138 = <1% 1/176 = <1%	0/58 = 0% 0/162 = 0%	0
- Pure Evaluation	4/138 = 3% 4/176 = 2%	2/58 = 3% 2/162 = 1%	0
- Pure Both	3/138 = 2% 3/176 = 2%	1/58 = 2% 1/162 = <1%	0
- Total	137 ³⁶ /176 = 78%	57/162 = 35%	0
Type of Case (All 3 categories)			
Personal Injury	104/138 = 75%	34/58 = 59%	9/17 = 53%
Motor Vehicle	87	30	5
Slip & Fall	6	1	2
Other	9	2	2
Family	24/138 = 17%	13/58 = 22%	6/17 = 35%
Property	3	6	5
Parenting	3	6	0
Support	9	6	1
Other	3	0	0
Employment	2/138 = 1%	5/58 = 9%	0
Insurance	3/138 = 2%	4/58 = 7%	0
Contract	0	0	1/17 = 6%
Other	6/138 = 4%	2/58 = 3%	3/17 = 18%

APPENDIX 6
TABLE 6.8 - BINDING JDR ANALYSIS

DESCRIPTION	CAL	EDM	LETH
Total - Pure Binding JDR	19/176 = 11%	19/162 = 12%	1/18 = 6%
Caucusing			
Yes	12/19 = 63%	3/19 = 16%	1/1 = 100%
No	7/19 = 37%	15/19 = 79%	
No, but wish caucus	0	3	
No, but not wish caucus	6	8	
Success			
100%	18/19 = 95%	14/19 = 74%	
0%	0	0	
Some%	1/19 = 5%	5/19 = 26%	
Type of Case			
Personal Injury	1/19 = 5%	6/19 = 32%	0
Motor Vehicle	1	5	
Slip & Fall	0	0	
Other	0	1	
Family	12/19 = 63%	13/19 = 68%	1
Property	6	10	1
Parenting	7	3	0
Support	7	8	1
Other	3	1	0
Employment	0	0	0
Insurance	0	0	0
Contract	0	0	0
Other	4/19 = 21%	0	0

APPENDIX 6

TABLE 6.9 - SUCCESS BY JUDICIAL DISTRICT AND CASE TYPE

ITEM	Total	CALGARY				EDMONTON				LETHBRIDGE SUCCESS				TOTAL
		# ³⁷ Rept	# Rept	#/% Success			# Rept	#/% Success			# Rept	#/% Success		
ITEM	#	#	All	O	S	#	All	O	S	#	All	O	S	#
Personal Injury	236	118	98 - 83%	11 - 9%	8 -7	109	88 - 81%	9 - 8	9 -8	9	9 - 100%	0	0	236
Motor Vehicle	201	97	80 82%	9 9	8 8	99	80 81%	8 8	8 8	5	5 100	0	0	201
Slip and Fall	12	7	6 86	1 14	0 0	3	2 67	1 33	0 0	2	2 100	0 0	0 0	12
Other	19	11	10 91	1 9	0 0	6	6 100	0 0	0 0	2	2 100	0 0	0 0	19
Sub Total ³⁸	232	115	96	11	8	108	88	9	8	9	9	0	0	232
Family Law	67	28	23 82%	3 11	2 7	33	25 76	3 9	5 15	6	5 83	1 17	0 0	67
Property ³⁹		21				27				5				53
Parenting		11				9				2				22
Support		18				19				6				33
Other		6				3				1				10
Employment	9	2	1 50	1 50	0 0	7	7 100	0 0	0 0	0	0	0	0	8
Insurance	6	3	2 67	0 0	1 33	3	3 100	0 0	0 0	0	0	0	0	6
Contract	18	12	7 58%	5 42	0 0	4	2 50%	2 50	0	2	1 50	1 50	0 0	18
Other	19	11	8 80%	3 27	0 0	5	5 100	0 0	0 0	3	2 67	1 33	0 0	19
TOTAL	355	174	139 80%	23 13	11 6%	161	130 81%	14 9%	149%	20	17 85	31 5	0 0	355

TABLE 6.10 - CAUCUSING BY JUDICIAL DISTRICT AND CASE TYPE

ITEM	Total	CALGARY		EDMONTON		LETHBRIDGE		TOTAL	
	# ⁴⁰ Rept	# Rept	#/% Caucusing	# Rept	#/% Caucusing	# Rept	#/% Caucusing	# Rept	#/% Caucusing
Personal Injury	236	118	112 - 95%	109	37 - 34%	9	8 - 89%	236	157 - 67%
Motor Vehicle	201	97	92 95%	99	29 29%	5	4 80%	201	125 62%
Slip and Fall	12	7	7 100%	3	1 33%	2	2 100%	12	10 83%
Other	19	11	11 100%	6	5 83%	2	2 100%	19	18 95%
Sub Total ⁴¹	232	115	110 96%	108	35 32%	9	8 89%	232	153 66%
Family Law	67	28	23 82%	33	25 76	6	5 83	67	53 79%
Property ⁴²		21		27		5		53	
Parenting		11		9		2		22	
Support		18		19		6		33	
Other		6		3		1		10	
Employment	9	2	1 50	7	7 100	0	0	8	7 88%
Insurance	6	3	2 67	3	3 100	0	0	6	5 83

786

ITEM	Total	CALGARY		EDMONTON		LETHBRIDGE		TOTAL	
	# ⁴⁰ Rept	# Rept	#/% Caucusing	# Rept	#/% Caucusing	# Rept	#/% Caucusing	# Rept	#/% Caucusing
Contract	18	12	7 58%	4	2 50%	2	1 50	18	10 56%
Other	19	11	11 100%	5	4 80%	3	3 100%	19	17 89%
TOTAL	355	174	156 90%	161	78 48%	20	17 85	355	251 71%

TABLE 6.11 - DEMAND FOR FUTURE CAUCUSING

ITEM	To tal		CALGARY		EDMONTON			LETHBRIDGE			TOTAL	
	#	#	%		#	%		#	%		#	%
			Ca l	To tal		Ed m	To tal		Lt h	To tal		Gr nd To tal
Want to caucus in the future	259	159	99%	61%	85	73%	33%	15	100%	6%	259	89%
Don't want to caucus in the future	33	2	1%	<1%	31	27%	11%	0	0	0	33	11%
TOTAL	292	161	100%	62%	116	100%	44%	15	100%	6%	292	100%

APPENDIX 6
TABLE 6.12 - PRE-JDR CONFERENCE AND INSTRUCTION LETTERS ANALYSIS

ITEM	T	CALGARY					EDMONTON					LETHBRIDGE					TOTAL PJDR/LI				
		# R	# R	PJDR & IL	No PJDR & IL	No PJDR & IL	# R	PJDR & IL	No PJDR & IL	No PJDR & IL	# R	PJDR & IL	No PJDR & IL	No PJDR & IL	# R	PJDR & IL	No PJDR & IL	No PJDR & IL			
ITEM ⁴⁴	#	#	P # %	IL # Y # N	P # %	IL # Y # N	#	P # %	IL # Y # N	P # %	IL # Y # N	#	P # %	IL # Y # N	P # %	IL # Y # N	#	P # %	IL # Y # N	P # %	IL # Y # N
Personal Injury	236	118	363	129	826	448*	109	103	241	55	32*	9	111	00	889	80	235	140	362	954	5510*
Family Law	67	28	134	516	155	111*	33	319	99	26	20	6	350	01	350	11*	67	470	141	203	142*
Employment	9	2	00	00	210	200	7	583	30	117	01*	0	-	-	-	-	8	563	30	313	21*
Insurance	6	3	00	00	310	200	3	310	20	00	00	0	-	-	-	-	6	350	20	350	20
Contract	18	12	325	00	975	40	410	30	00	00	00	2	00	00	210	20	18	739	30	116	60
Other	19	11	327	00	873	52*	5	480	02	120	10	3	133	00	267	00	19	842	22	115	62*
TOTAL	355	174					161					20									
BINDING	39	19	1158	50	842	60	19	1789	54	211	20	1	1100	00	00	00	39	2974	104	1026	80

APPENDIX 6

TABLE 6.13 - SUCCESS/DURATION ANALYSIS

DURATION OF CASE	NUMBER & PERCENTAGE OF CASES		NUMBER & PERCENTAGE COMPLETELY SUCCESSFUL	
	#	%	#	%
1 year or less	7	2%	7	100%
1 - 2 years	61	16%	49	80%
2 - 4 years	129	34%	96	74%
4 - 6 years	100	27%	78	78%
6 or more years	72	19%	68	94%
TOTAL	369	100%	298	81%

APPENDIX 6

TABLE 6.14 - SUCCESS/LITIGATION STAGE ANALYSIS

STAGE OF CASE	NUMBER & PERCENTAGE OF CASES		NUMBER & PERCENTAGE COMPLETELY SUCCESSFUL	
	#	%	#	%
Before Examinations	37	10%	33	89%
After Examinations, but Before Experts	95	25%	73	77%
After Examinations and Expert Reports (separated from next category)	133	35%	106	80%
When Ready for Trial (separate from last category)	79	21%	64	81%
Both of last 2 categories	37	10%	31	84%
TOTAL	381	101%	307	81%

TABLE 6.15 - LAWYERS' SURVEY QUALITATIVE HIGHLIGHTSSection-By-Section Observations

Contained below are some of the more significant - thus, highlights - indeed, gems - of the qualitative comments of respondents in relation to qualitative questions, together with my comments - only loosely edited in each case.

E3. Motivation for JDR

Enumerated motivations are provided for quantitative analysis, as discussed *supra*. However, "Other", non-enumerated motivations are very clear. Some include: "avoid trial"; "power of a judge as a mediator"; opportunity to say things that may not have been permitted at trial; opportunity of client to present her views/opinions directly to the judge; court phobia; and can select the justice.

E4.c. Could Pre-JDR be Accomplished by an Instructional Letter

It appears that lawyers feel passionately for or against Pre-JDRs - there seems to be little middle ground. This seems like an important issue for JDRs, so I will dwell on it a little more than would otherwise be necessary. It is hard to do justice to the expression of opinions on the pros and cons, but I know few will take the time to review them, so I will provide a representative sample.

Some comments (without including them all, but adding in comments that end up in E5) supporting Pre-JDRs, and indicating (often implicitly only) that JDR Instruction Letters alone are not sufficient (some indicating both positive and negative suggestions), include: "we were able to narrow down the issues with

some discussion”; “we needed personal interaction to focus on the issues and assess the judge’s approach⁴⁵”; “we discussed what approach would work best for all parties”; “was simply procedural - having said that it was nice to get a sense of the personality of the Justice ahead of time”; “verbal discussion re: case was NB to focus the JDR”; “this was an unusual situation - usually no Pre-JDR is required”⁴⁶; “in this case - one party needed deadlines...”; “there was useful dialogue between the court and both counsel”; “the Pre-JDR meeting dealt with dynamics of the JDR and expectations we all had of our roles - also seemed to warn the judge that the one party had some unreasonable expectations”; “the meeting was a dialogue - that doesn’t occur with letters”; “the JDR Justice needs to have some dialogue with counsel in order to satisfy him/herself of the real issues and the suitability of the matter for the type of JDR being sought”; “the fact situation was not straight forward and it was better to explain in person the need for the Justice to provide an opinion”; “some specific and unique matters were addressed at the JDR regarding non-parties attending the JDR”; “provides an opportunity to narrow issues - not possible if by letter”; “one party’s counsel made it clear at Pre-JDR he/she needed assistance to ‘lower client’s expectations’”; “personal meeting very helpful”; “opportunity to discuss preferred format”; “face to face meeting was important”; “need to ‘hear’ justice’s voice”; “need to be frank with justice about client’s needs and personalities”; “meeting with judge Pre-JDR was good and beneficial - both counsel were able to fill justice in orally about dynamics of case”; “justice needed to know more details of the action”; “it’s nice to get a feel for the judge’s approach to the JDR and a letter just doesn’t do that”; “necessary to discuss some non-generic details”; “it was great to hear directly from the justice about preferences and to meet beforehand”; “informal face to face meetings are superior to an exchange of letters”; “in this particular case, some confidentiality to Pre-JDR meeting needed - JDR judge was warned of one of the parties having a ‘difficult personality’ and related barriers to settlement”; “... use of surveillance⁴⁷ had to be ‘cleared’ with the justice”; “in person more effective”; “important to discuss issues unique to this file/fact scenario”; “I found

contact with the Justice helped me crystalize issues”; “forces counsel to look at their file prior to JDR”; “easier to be open and candid with justice about clients’ dispositions and idiosyncrasies”; and (from E5) - “useful to set stage for the Justice re: respective parties’ expectations”; “pre-JDR is useful to delineate the issues for the judge, but the parties should already know the issues⁴⁸”; “judges should be told where the barriers to settlement have arisen and be aware of them”; “judges can indicate their style and how they like to participate⁴⁹”; “... useful to have a Pre-JDR meeting without the actual parties so that lawyers can indicate the main issues and difficulties”; “I believe a Pre-JDR meeting should be required in all JDRs - they are never a waste of anyone’s time”; “good forum to be candid absent client”; “encourage more Pre-JDRs to establish procedure⁵⁰”; “allows off the record discussion”; and, emphasizing the most adamant view, “Pre-JDR meetings should be mandatory in all but the simplest cases”.

Examples (again, not all of them, but including some that ended up in E5) contrary to Pre-JDRs, and/or indicating that JDR Instruction Letters are an appropriate alternative (some are both positive and negative at the same time), include: “Meeting was not necessary”; “just timelines for briefs”; “meetings helps [merely] to discuss the format of the JDR”; “letter sufficient for setting filing deadlines”; “we did receive a letter from the Justice but I prefer a Pre-JDR in person...”; “too formal and time consuming”; “this was an unusual situation - usually no Pre-JDR is required”; “there was a letter and the Pre-JDR mostly reviewed that letter”; “no real discussions - some briefing of judge, but that was repeated in briefs anyway”; “setting parameters was understood by initial mail out”; “the Pre-JDR teleconference was simply a reiteration of information contained in original letter from the court”; “Pre-JDRs generally only set deadlines for briefs although at times and depending on the Justice they will suggest certain information they would like to see which is helpful”; “Pre-JDR only went through requirements of the brief”; “only related to briefs”; “MVA cases are quite usual”; “much of the same information was conveyed in the briefs and at the JDR...”;

“meeting was not interactive but rather it was the Justice setting out the rules”; “justice just repeated what was in the mailout”; “it seemed as if sole purpose of Pre-JDR was to determine if lawyers wanted to say something about their client without client present - this could be canvassed first before personal appearance”; “the only matter dealt with ... was the dates [for] the parties briefs...”; “if it is just to set out timelines, brief length and style and how the JDR will proceed, it can be don in a letter”; “I have done enough of these by now - I ... have never had anything arise that could not be dealt with by letter”; “... no need for pre-meeting but we accommodated justice”; “after a few JDRs the procedure is known and a Pre-JDR less necessary”; and, from E5 - “pre-JDR meetings are a waste of time [several]”; “a form letter explaining when a face-to-face meeting would be most useful might eliminate that step”⁵¹; and, representing several similar comments (especially with experienced counsel) and making the whole point, in my view, “*in most cases Pre-JDR meetings are not necessary provided there is a letter from the Justice regarding material s/he would like exchanged*” [emphasis added].

As to the method of carrying out a Pre-JDR, a number believe that a telephone conference call would be sufficient: “telephone conference would suffice”; “counsel ... able to discuss issues ... via telephone conference ...”; from E5 - “we don’t need a personal appearance on these things”; “telephone conference would be easier and less time consuming [several]”; and from P1 “no ‘in person’ Pre-JDR meetings unless requested by counsel”. Some justices have already used telephone conferencing: “the Pre-JDR teleconference was ...”.

It appears that a good Instructional Letter will dispel the need for many Pre-JDR meetings, and, as knowledge of the justices’ JDR proclivities (see JDR Judicial Profile) are known, the need for Pre-JDR is even less. Moreover, with experience by counsel, fewer Pre-JDR meetings are necessary.

Thus, the answer is simple. There is no need for some artificial “mandatory” Pre-JDR to be imposed on JDR justices, contrary to their individual judicial independence. However, there is an answer that meets all needs and expectations - a Pre-JDR if necessary (indeed, one respondent said “I am glad this is available *when required*” [emphasis added]), but not necessarily a Pre-JDR. I know of no JDR judge who will refuse a reasonable request for a Pre-JDR (indeed, one comment in E5 was that “all Justices asked seem to accept a request for a Pre-JDR conference”) - therefore invite counsel to seek one if they want, it will surely happen, and everyone will be happy. Moreover, I know of no counsel who would refuse to attend one if the JDR justice requires one, keeping in mind the comments that they need to be more useful than just the information that can be included in an Instructional Letter, and, perhaps should be conducted by telephone⁵² - so if a JDR justice, based on the information received, believes a Pre-JDR is needed, direct one, and counsel will attend. Thus, the use of Pre-JDRs when they are needed can be achieved, without imposing them unnecessarily or to no real purpose.

E4.d. Adequacy of Information Letter

As we can see from the data in E4.d., only 26% found the information letter “barely adequate” and 78% found it “highly inadequate”. I have now changed the terminology and will recommend that a JDR Instruction Letter be utilized and I will make some recommendations for its contents. While Calgary JDR justices seem to do their own individual JDR Instruction Letter, many Edmonton JDR justices use a common letter, which will be the starting point for my recommendations.

E5 Other Comments on Pre-JDR Information/Instructional Letters

Other comments on Pre-JDR information, and translation of some comments into what I have called Instructional Letters, arises from the statistics in

E4.d. and is contained in this section. Some comments relevant to the recommendations I will make relative to JDR Instruction Letters include: “staggered briefs so that the defendant’s brief can respond to plaintiff’s and reach agreement on issues or heads of damages...” (also raised in I3); “useful for both sides to disclose previous offers to settle made”; “request each side have a written offer of settlement prior to JDR”; “we had to track down info as to when briefs were due”; “all I need is a letter telling me when briefs are due and setting out any special requests of Justice”; “should have been more specific with regard to briefs”; “should be mandatory”; “detailed information regarding the nature of the materials to be provided, and where applicable, confirmation that there will be no objection to exhibits”; on-line, but a step-by-step process⁵³ - choose data from link [available dates and justices, and JDR Justice Profile], book with trial coordinator by fax [can now be done on-line], await letter confirmation [indeed, it is the parties that will provide the JDR Booking Confirmation Form, confirming the on-line booking and the information necessary to determine the need for a Pre-JDR], book Pre-JDR with judge’s secretary, confirm Pre-JDR [last two steps should be one], attend Pre-JDR, sample briefs [JDR Information Letter]”; “judges should be told where the barriers to settlement have arisen and be aware of them”; “information about what kind of statement judge might ask client to make so that they can think about it”; “imposition of deadlines with consequences”; “if the judge wants something specific (i.e. a chronology of medical visits, etc.) this should be specified”; “I think there should be a standard period for due dates for briefs” - also expressed in I2. (ranking 5)⁵⁴; “helpful if judge clarifies his/her approach”⁵⁵; “ensure that JDR justice has filed copies of affidavits of parties on matters in issue at JDR”; the judge should have the pleadings⁵⁶; several comments to this effect “each judge has their own approach to how they like to conduct the JDR - it would be useful if they included that in the Pre-JDR letter”⁵⁷; “certain information could be required - e.g. for spousal support - provide current budgets, financial info. and for mat. property, provide a matrimonial property statement”; “address ... for brief ... time and location of JDR...”; “if dealing with a quantum issue, have all

parties provide 'realistic' numbers, not numbers simply used to posture"; from I2 (ranking 4) - "more information about times, location, where to send our brief, and what to include in our brief"; from I2 (ranking 5) "what do you want/need in our brief - do you want all the pleadings, case law, etc.?" ; "mandatory disclosure of last settlement position"; and from I3 - "each side should be required to submit an offer at the Pre-JDR - that way everyone knows what they are addressing in briefs"; "a clearer sense of how a judge defines their 'style' - it is very confusing"; [encouragement to have each party read the other side's brief]; "justices must limit amount of material provided in briefs, otherwise the length of time involved to prepare a brief is similar to going to trial"; "... could the JDR be opened up to attendance by [experts]..."; "the amount of information provided in advance could be streamlined"; and from P1, require JDR justice to make parties follow JDR Instruction Letter; "encourage parties to disclose their last settlement positions - all too often parties come in [to the JDR] with something other than their 'real position'"; sequential filing of briefs with the plaintiff having a right to a reply brief; "with briefs and authorities it becomes more adversarial or litigation like - more thought and time should be given to explaining to lawyers what is wanted - if it becomes too [detailed], it becomes too expensive"; "notice that in other jurisdictions the guidelines are circulated and signed off..." (I understand this to mean specific agreement in writing to the rules for JDRs); "set for full day if possible with idea that [everyone] will stay until absolutely every avenue of settlement has been considered"; "the process of arranging for JDRs and for filing or not filing materials should be consistent throughout the province and simplified as much as possible"; and "judges should evaluate the proceedings to determine the most effective type of mediation - e.e. principle [rights] based, or interest based, or a combination - judges should discuss the approach to be taken with counsel".

Other comments, not specifically related to Pre-JDRs or JDR Instruction Letters specifically, include: "more Binding JDR's should be available" (same

point in I3); “mandatory preparation by judges”; “it is very helpful to be able to select the Justice ...”; “it is helpful if checklist of deadlines is submitted to JDR judge (i.e. like a pre-trial conference summary)”; and “each party provided extensive briefs that informed the judge, avoided the need for opening statements and facilitated a quick resolution”⁵⁸.

E1-E5 Conclusions and Recommendations

In light of the comments in Section E (and elsewhere), I make a number of recommendations. First, in chronological order, I recommend that each JDR justice be encouraged to provide a JDR Justice Profile that sets out what type of JDR service they will or will not provide and any other information as to their JDR process that will assist counsel in booking a JDR - a sample is provided in **Table 1.2***. Second, I recommend that once an on-line or JDR Coordinator booking of a JDR has taken place, at least one counsel (jointly, or with a copy to the other(s)) provide, within 10 days, a JDR Booking Confirmation Form to the JDR Coordinator. This JDR Booking Confirmation Form would provide the necessary information about the proposed JDR, and be used by the JDR justice to determine whether a Pre-JDR should be scheduled. Third, a Pre-JDR conference be held if requested by counsel or directed by the JDR justice. Fourth, and in any event of a Pre-JDR, that an Instructional Letter be sent to counsel in ample time for counsel to carry out the instructions in the letter before the JDR. While respecting the independence of JDR justices to do their own IL, and not to preclude further recommendations of the JDRC, in conjunction with JSR Coordinators, a sample JDR Booking Confirmation Form and a sample JDR Instruction Letter are contained in **Tables 1.4 and 1.4A*** respectively.

Recommendations from lawyers’ comments *supra*, relevant to these forms, have been taken into account in drafting the forms.

G1. Caucus

It is to be noted that 66% of the cases involved caucusing and 34% did not. They were asked “why”. The answer to the 66% that did caucus included (some representative or unique comments only): “reality check - opinion”; “to discuss client’s position in confidence”; “justice suggested [numerous]”; “frank discussion on the Justice’s opinion on issues [numerous]”; “confidentiality - and to avoid conflict with other side”; “to advise justice of insurance limits”; “... to allow face saving”; “to separate issues from the people/personalities”; “emotions ran high/needed time out”; “One side very angry and hostile towards other side”; “because emotions too high ... to avoid further conflict”; “tension between parties”; “at the request of parties”; “the parties were too emotional/had too much animosity to be in the same room [several]”; “when at a critical stage ... [of impasse]”; “... difficult to negotiate face to face”; “to resolve ... [impasse]”; and in I3 - hard to deal with liabilities between defendants in presence of plaintiff”. Also, in section I3 of the Lawyers’ Survey, one respondent said “most of the JDR work I do is in Edmonton which is quite different than the JDRs in Calgary - in Edmonton most judges do not caucus - in Calgary they do - in my view JDR is a settlement process and settlement requires compromise - thus I find it more effective if the JDR judge caucuses with each side”⁵⁹. From N3 (*infra*) on a similar point, as to whether caucusing was helpful in discussing the strengths and weaknesses of the case, some of the positive responses (some had also a negative side) seem very germane: “it set the parameters for negotiation but also limited the creativity of solution”; “virtually no substance to reasons for opinion”; “both sides needed to hear “risk” of case: “candid assessment”; “allows client to see perspective of justice”; “I think that a judge can be more frank when speaking to a party alone”; “helps with client expectations”; “adds to lawyer’s credibility in client’s eyes and is a reality check”; “kept emotional outbursts and responses down”; “provided perspectives I had not considered”; “added weight to counsel advice”; and “fresh pair of experienced eyes”. Additionally when asked if they wanted caucusing to be

available for another JDR, 72% were positive for a number of reasons: “clients need to gain a perspective from frank discussions without the other side present”; “more freely speak about the case - always helpful to deal with the more difficult issues or sticky points between the parties - helpful to discuss possible outcomes without other side present”; “if we could settle by negotiation (face-to-face) we wouldn’t need the JDR”; “more flexibility for justice to express views on settlement”; “need that confidential input - more comfortable for client - allows frank discussion”; “separating the people from the problems”; “most family law parties are very angry towards each other so it would be helpful”; “always helpful to hear your weaknesses in private”; “adds confidentiality (or the appearance of it) to the process”; “makes process less confrontational...”; “need one on one time with Justice to encourage parties to move in their position”; “allows client to save face”; “helps difficult parties understand their case without embarrassment of other side in the room”; and “if we could settle without JDR - we’d do it - we’ve already tried face to face negotiations - and were not successful”.

The answer to why 34% did not caucus included (again, some representative or unique comments only): “not really necessary [numerous]”; “no one requested it and the judge would not have”; “justice unwilling to do so [16+]”; “justice didn’t offer it [several]”; “justice did not feel it was his/her role; takes away from transparency of process”; “I don’t think it is appropriate”; “Binding JDR - not appropriate”; “mini-trial [several = not part of mini-trial options]”; “would impair his appearance of impartiality and undermine the other side’s confidence in the judge’s impartiality”; “... to promote JDR’s usefulness to all (fair process); “it’s never done that way in Edmonton ...”; “best that everything said is said openly - no opportunity for either side to bias the judge”; and, similar (K1, ranking 5) “... better not to caucus - avoids one side biasing the Justice with no opportunity to respond to what was said”; and “didn’t realize it was an option”. From N3 (*infra*) on a similar point, as to whether caucusing was helpful in discussing the strengths and weaknesses of the case, the negative responses were not of significant

length or value - one merely indicating that if the JDR justice had stayed “involved until the end of negotiations that day”, 24 saying it was “not necessary”, 4 saying not appropriate because a Binding JDR, and one of the last saying “I don’t believe it is appropriate”. In N4, of the 9% of lawyers that said they did not wish caucusing available for their next JDR, they added these points of view: “justice should speak before both parties”; “keep all discussions out in the open”; “not if Binding - too sensitive”; “don’t believe it is appropriate”; “I believe the process must be transparent”; and “in family matters, good for both sides to hear law - good and bad”. The “no answer” group of lawyers (18%), had one important content “depends on the dispute”.

When asked (G1.a) if caucusing was or might have been useful, 54% answered “Yes” and 20% answered “No”. When asked “why” some of the more telling responses of the first group included: “almost always useful”, “helped clients to be realistic”; “we re-evaluated our position - so did the other side”; we got a perspective of where we were vulnerable”; “was able to move the parties together gradually”; “useful because parties very antagonistic towards one another”; “to brainstorm alternatives...”; “sometimes easier than direct negotiations”; “set stage for proper dialogue”; “less conflict, more candor, more resolution orientated”; less adversarial/confrontational for client”; “kept their emotions in check”; “...(face saving)[several]”; “justice was better able to mediate”; “gave a chance for client to vent”; “could not have settled in the same room...”; “client feels freer to speak his mind”; “because client got reassurance that I knew what I was doing”; “assists client to commit ... to ...counsel’s advice”; “allows for discussion on matters that would not be appropriate to discuss in full group”; and “allowed negotiation without face to face nasty comments”.

Of those who said that caucusing was not or would not be helpful, some useful comments include the following: “success achieved without need to caucus”; “not what the parties wanted”; “... better that all issues got aired before

both parties and by both parties”; “not appropriate”; “not appropriate in mini-trial format”; “my client would not have heard what was being said”; “most Justices will not caucus separately”; “low degree of trust between the parties”; “in most cases, process should be transparent”; “there should be no side-conferences with justice - potential to manipulate litigants if they do”; “I prefer to have the judge maintain a “judge” role”; “I prefer not to be strong armed into settlement for the sake of settlement”; “fairness and appearance of fairness”; “best that everything is said ‘in the open’”; and “authority of judge was in being impartial”.

H. Judicial Qualities

A number of the Survey questions in this section (H) and in other sections (see references to them *infra*) were directed to measure (collectively) judicial performance, to see what they disliked and what they liked, and what, in the end, made of the excellence of judicial qualities that they wanted in the JDR in question and in the future. Without looking at the all negatives and positives of these qualities (often the mere opposite of each other) and noting that they can be reviewed in detail in Appendix 4, I will merely try to summarize a list of what counsel expect by way of JDR judicial qualities (some of which will have to be stated in the negative to make the point, and sometimes phrased as in advice to JDR justices). They include (in no particular order), but are not limited to the following: judicial wisdom - knowledge of the law, experienced but creative in approach; formal mediation training and/or experience; have read the briefs; be more than a messenger in mediation - indeed, in section G, one respondent made the point fairly succinctly - “pro-active judges get settlements, aloof judges just maintain uncertainty”; be prepared (- in P1, one respondent said “a JDR judge needs to be better prepared than a private mediator”); be genuinely interested, attentive and enthusiastic, and “engaged”, formal but approachable, flexible and helpful in the process - not in an apparent “hurry to leave” (in I2 (ranking 5), one respondent said “I sometimes get the sense judges wish to be

done by noon”) or “merely going through the motions”; don’t just seek the mid-point of any evaluation, but call it as you believe is the case (on respondent on O8 put it this way - “the ability to render a tough [opinion or evaluation, even] knowing that it might negatively affect settlement”); don’t be “too chummy” with anyone in the room; don’t be too “overly invested” or “pushy” (coercive) for a (or any particular) settlement, but do be assertive and forceful in not allowing the parties to give up on apparent impasse too quickly - (in P1, one respondent said “I think we all ‘gave in’ too early to ‘not settling’ ... I wish we’d stuck it out a bit longer at the JDR” and another said “the Justice must want the process to succeed and stay with it - not just say “if you don’t agree, I don’t care and I’m going home”); remember that it is the parties right to settle (or not) in a certain way, not your judicial view of what they should do; possess apparent mediation training; be willing to share your evaluation or opinion, but only *if and when* counsel want it - premature evaluation can be devastating to negotiations, although, sometimes, an early opinion is what counsel wish - (in P1, one respondent said “opinions should only be given when agreed to and required of counsel and at the appropriate stage”); maintain a safe, relaxed, informal, but “judicial” process, while shunning any pretentiousness; references to formality and informality require a balance (one respondent in O8 said “need some formality to have weight, but informal enough to keep clients comfortable; another added “a JDR justice is still a judge, not a buddy”) - a balance which many call “gravitas”; be articulate and communicative with good people skills; have a good friendly, but not chummy “manner” in dealing with people - in other words, be fair, respectful, courteous, kind, polite, patient (but focused on relevance and time) and friendly, but “no nonsense”, and yet be “judicial”; try to address and have a direct rapport with the parties and put them at ease (declare a “stress free zone”), but never appear to be driving a wedge between them and their counsel; trust counsel to do their job; be frank and candid in evaluations and opinions (knowing when to merely intimate risks, and when to be more decisive, assertive and opinionated - but (K1, ranking 5) “do not give opinion ‘off the cuff’ or provide a broad range” -

rather be as specific as possible and provide simple reasons, but do so in a way that does not give a perception of “bias” or partiality; encourage parties to be reasonable, not extreme in their positions and needs; ability to read and assess situation and interests; be aware of vulnerabilities and power imbalances, and be sensitive to the needs of some parties, and be empathetic to the plight of plaintiffs, without appearing partial to them - simply, be empathetic, but even handed, sincere and honest; instill a sense of confidence in the client that his/her interest is being treated appropriately by the court system; help the parties focus, by asking open ended clarification questions; bring a positive calm to the mediation table; allow constructive venting; be prepared to openly change your evaluation if new information leads you there; focus discussions to the purpose - settlement, not just a discussion of the issues; tailor your style and tone to the need of the parties - be more forceful if a reality check is really needed, but more empathetic with more gentle understanding is necessary (one respondent in O8 stated “gently persistent is an apt description for a good JDR Justice - s/he should be decisive but not overly opinionated UNLESS one side takes an unrealistic position”); be fair, balanced, neutral and even as to the process, but take process leadership and maintain order and control and keep counsel and the parties, civil to each other, goal orientated and “on agenda”; allow people to express themselves with limits only as to relevance and time, and listen to what they have to say (let the parties “have their day in court”) - you and they need to hear each other, more than they need to hear you; work hard⁶⁰ to find ways to help the parties resolve apparent impasses - but demand participation and commitment by the parties to work at settlement; work hard at satisfactory conclusion - go beyond the allotted time if necessary, but use the clock as a strategic ally; be careful to ensure that the parties understand what is being said and the implication (do not allow counsel or yourself to talk over the heads of the parties, or any of them); continue throughout to look for options, opportunities and alternatives to settlement - be insightful; allow the parties an opportunity to negotiate, without you dominating the agenda - intervene when helpful, but stay in the background

when not; encourage repairing relationships in addition to specific settlements when relevant; maintain confidential information and require others to do so too; provide negative assessments kindly and allow parties to retreat from positions in a way that saves face; and if settlement is reached make certain that the terms are clear (and envision ancillary terms (e.g. time for payment, and interest, etc.) that may be necessary to include in a judgment if that is required) and a memorandum thereof is in writing and signed by all participants⁶¹; there is a need to balance between getting directly to the point and giving the parties process time - a couple of views (K1, ranking 4) - "straight to the point - justice didn't permit unnecessary posturing"; and "quicker to the point", but (K1, ranking 5) both, JDR justice spent considerable time on the issues (positive) v. "quicker - got right to the point" (positive); best to deal with "one issue at a time" (several, but see K2) rather than glaze over all issues .

I2 - I3. What other Changes/Improvements Like to See

In I2, counsel were invited to advise of "what, if any changes would you like to see if you used JDR again?" and in I3 "Do you believe the JDR program can be improved - if so, how?". Many of the responses are included in "judicial qualities" and other criteria discussed *supra*. However, some others of relevance include the following: I2. (ranking 5) - "for a Binding JDR, more clarity regarding evidence expected to come directly from my client, as opposed to the materials"; "consistency in Binding JDR process" (see also similar comment in I3 and P1); "cost penalty if brief not provided on time"; "more judges available for JDRs at an earlier time"; "start at 9:00 am; "coffee available on JDR floor and water in rooms"(similar comment in I3); "sometimes it is easier to get a trial date than JDR date - the new booking system means it is harder to et a date than before"; "outside Calgary and Edmonton, we have justices rotating in every week ... need a wider selection of justices in rural areas..."; and "... have other side come to JDR and bargain in good faith".

J. JDR Timing & Next Steps

Note that Section J. is the commencement of “Additional Questions”. While some are new areas of pursuit, others seek more in-depth information from questions asked earlier, or are intended to test earlier answers.

The qualitative comments for Section J, as contained in Appendix 4, are quite short and, I believe, no useful purpose would be achieved from commenting on them further here.

K. Comparison to Other JDRs

Most of the comments here relate to judicial qualities (or others) that I addressed *supra* in relation to section H, and need not address further here. Throughout, the importance of a judicial presence and evaluation or opinion is paramount.

L. Extent of Judicial Participation

This section deals with the JDR justice’s willingness to provide an opinion, and the extent to which and helpfulness of a choice of JDR justice.

In L1., 68% offered to provide an opinion on his/her own initiative and an additional 7% (total 75%) agreed to provide an opinion when asked to do so. In mini-trials (L2) only 1 JDR justice in 3 participated in negotiations after giving an opinion - this was an issue with a number of counsel. In L3 a Binding JDR decision was required in about ½ the Binding JDRs.

However, it was L4, on the choice of JDR justice that focused on qualitative answers. It is to be noted that the importance of this issue was

addressed *supra* under “Common Themes”. In 73% of cases a choice was sought and in 92% of those cases, counsel got the JDR justice they chose. Of the 19% who did not seek a choice: about 1/3 did not care; about 10% did not know they could choose; another 1/3 did not know who to choose; and the rest did not answer.

It was in L5 where lawyers were asked whether the choice of JDR justice was helpful and 89% felt it was and expressed reasons why - only 3% felt it was not important and 8% did not answer. Of the 89%, they were very definite about the reasons why they thought it was important - see description of reasons in “Common Issues”, *supra*.

M. Role of JDR Justice in Success or Lack of Success

This (M1 and M2) are impact assessment - the role of the JDR justice in the success of the settlement - quite high, at 79%, according to the lawyers. The 5% for which the JDR justice did not have a positive impact was because the clients were “intransigent”. There was 12% that were not sure, and 4% that did not answer. Returning to the 79%, many of the reasons reflect the judicial qualities identified *supra*. The common feature, however, is the importance of a judicial assessment, evaluation or opinion in providing a “reality check” of the strengths and weaknesses of the parties, and the importance of respect for the judiciary (I would use the term “gravitas” - discussed both *supra* and *infra*) and judicial involvement - often to break impasse otherwise existing, or to deal with conflicting emotions. A couple of representative comments make the point: “the independence of the justice and the sanctity of the office assisted in the resolution because emotions were strongly felt...”; “the presence of a justice adds a sense of knowledge and credibility to the process”; and, slightly condescending “lawyers are impotent - judges are revered and respected”; “we needed an opinion of a Justice to break a deadlock”; “the client would not have been willing

to settle without hearing a justice's views"; "needed judicial influence"; "parties were too emotional to be rational"; "clients and issues emotionally charged and unbiased arbitrator helpful with parties needing to be heard"; "animosity between clients"; "needed judicial opinion to close gap"; and "too much posturing by one side, and lack of sophistication by the other".

M2 was really another way of asking M1, with 73% of lawyers ranking the JDR justice at 73% (in rankings 4 and 5) for improving the prospects or achievement of settlement. Most of the extensive reasons are similar to those in M1 - with emphasis on lawyers "managing client expectations and risk analysis".

M3 asked whether the JDR was of assistance even where there was no success. 20 % (presumably those not successful) answered and only 12% of the total cases thought the JDR process was successful, and then the reasons mostly related to: clarifying and narrowing issues for trial; seeking further evidence; educating the parties on the process; and what other steps to resolve the matter short of trial.

N. Judicial Participation

N1 to N3 deal with whether there was caucusing and who initiated it. This is an expansion on the issue of whether caucusing took place and why (or why not) in G1. N3 shows that 63% of cases involved caucusing 75% of those felt it was helpful. The reasons why (and why not) were similar to G1. 71% felt that it was important for future JDRs (only 9 % disagreed and 18% did not answer). Again the reasons were similar to G1.

O. Judicial Qualities

Section O was an elaboration on Section H. The judicial qualities or the absence of them is similar, and any traits missed in H, have been added to the list under Common Trends *supra*.

P. Other

P asked for any other comments. Some are referenced in Common Trends *supra*. Some others, including those that had a specific recommendation or were merely complementary, include: “more available dates for JDR”; “perhaps adding some requirement in [JDR] proceedings early on ... especially in family law matters” and “ JDR earlier in the process”(what I consider to be a reference to ENE); “I can’t speak highly enough of the JDR process”; “very glad this option is available”; “thank you for the opportunity to comment”; “keep the process open for the parties to decide the usefulness and timing”; “the JDR program is essential to civil litigation as it markedly reduces the need for trial” - one day JDR eliminated 10 days of trial; “thank you for the opportunity to participate in this process”; “the JDR process provides a valuable mechanism for litigants to access actual judges in a much lower risk environment - it is a very valuable program”; “have more judges available who are prepared to participate in Binding JDRs”; “we wish more judges would do Binding JDRs (we rarely do non-binding ones in our family law practice given the costs involved)”; “the JDR program currently is, I believe, effective”; “JDRs are the wave of the future ... I think this is the new reality in the court system... more cases going to JDR, and less going to trial”.

TABLE 6.16 - CLIENTS' SURVEY QUALITATIVE HIGHLIGHTSSection-By-Section Observations

Contained below are some of the more significant - thus, highlighted - qualitative comments of clients - only loosely edited - sometimes with my added comments.

I2 - I3. What other Changes/Improvements Like to See

The significant comments to the Section I3. question asking for additional client input regarding the JDR process include: "more information on the process given to the individuals"; "have someone explain the differences between case management and JDR process"; "JDR and mediation have largely supplanted negotiation (direct), adding a larger financial cost to claims"; "thought the process was time-consuming and repetitive - maybe if each party could sit and talk with the justice separately it could have been improved - the justice would say that it is my lawyer's turn to talk and the other lawyer could respond after, but justice kept interrupting the comments in the middle - dragged everything on longer"; "sometimes the judges leaves you with the impression that he/she does not want to be there or has better things to do (golf game?) - these are the JDR's that usually fail - a positive attitude from the judge "we can get this done" would be more helpful"; "our system should have either mandatory mediation or JDR"; "this is a great tool to move a file forward"; "some parties just want to be heard, whether it makes a difference in the solution or not - it is an informal way to "vent"; "I think the process works because of the respect the participants have for our justices"; "I think more domestic specials in chambers should have this option available to them"; "important that the process remain open and transparent and not leave participants feeling that issues were merely "split down the middle";

“more Justices so the wait time can be reduced”; “until I walked in I had no idea what a JDR was about”; “we need to educate our lawyers - both plaintiff and defense - about JDR/mediation - the posturing by both sides needs to drop when they go through the security gate at the Court House”; “can meet the judge without lawyers present should be stressed”; “I think that many people do not even know there is an option for JDR”; “before the JDR began, the justice spoke to both counsel privately and said we were too far apart for the JDR to be successful - frankly, if we were closer in our positions, we could have likely settled without JDR - even if we are far apart we still appreciate the justice's opinion - maybe one side needs to reconsider their position - for the justice to say the parties are too far apart for the JDR to work is silly and useless for both sides - if we are far apart we need the justice's help to point out problems with either argument”; “after about 6 hours it was evident the representative for the defendant did not have the authority to negotiate a settlement, thereby delaying the settlement for another month - perhaps a more senior representative would have been beneficial”; “the opportunity for JDR provides valuable insight to trial risk, from a judge's perspective, and provides settlement opportunity before the expense and the stress of trial”; “a JDR needs to be suggested to clients sooner in their litigation process - the event took place 9 days shy of 9 years from the date of the accident in question” - representing both the 95%/5% issue and supporting the recommendation of time to disposition analysis, apart from the JDR Program; “ while it is more desirable than cost and finality of trial, in some ways it has become a barrier to settlement earlier in the process - there has become a reluctance to placing offers before the JDR” - this demonstrates that some of the 95% are using the JDR Program without negotiating first; “and “I think more domestic specials in chambers should have this option available to them”.

J. JDR Timing & Next Steps

Some representative comments sufficiently significant to highlight in this section include: “time lapse had nothing to do with my schedule, only that of lawyers”; “this was dragged out too long by other side and JDR would have stopped that”; “this matter could have been resolved much sooner than it was set down for”; the examinations are very expensive but are necessary”; “one of the issues is that one a case 9 years old the interest is huge”; “old files take on a life of their own and the older it gets, the more difficult it is to resolve”; “my case was prolonged with no sign of settlement for years - we should have done this long ago”; “it’s good to have all the evidence that would be presented at trial”; “it would have possibly shortened the time things dragged on - six years was unbearable”; “I believe this claim could have been settled reasonably if all parties met and discussed the case prior to taking it this far”; “most, if not all, available evidence had been gathered - but from a cost point of view it would be preferable to have the JDR prior to examinations for discovery”; “unfortunately I was not prepared to attend JDR until several years after first broached idea”; “did not know that JDR was a viable option until much later ... seemed like this was used as a last resort but should have been the first”; “at this point there is a decent trade off between wanting information and cost”; and “case goes on too long - there should be a time limit”.

M. Role of JDR Justice in Success or Lack of Success

Some comments of significance to the role of the JDR justice in the success of the JDR include: “other side is unreasonable - it took 9 years, 4 months 7 days to get them to the table”: “because the two lawyers have positioned themselves to death - to the detriment of the clients”; “there was abuse (physical and emotional) involved in this matter - justice was aware of all court proceedings and helped maintain a ‘spirit’ of formality to proceedings - kept

abusive party controlled”; and “while successful, the process did open settlement discussions that were previously unsuccessful - the JDR gave both sides a better understanding of the action and risks”.

Some of the comments regarding the differently worded follow-up question as to why involvement facilitated movement to settlement include: “helped us based on circumstances - also helped me look beyond some issues on which I was stuck as well”; “both parties wanted to settle and the JDR justice facilitated it with a non-biased evaluation”; “keeping the lawyers on track to resolution”; “the fact it was a judge providing info and running the process”; “had a calming effect on parties”; “providing neutral ground and order”; “told consequences of no agreement”; “justice was a third party indifferent to each side, just an honest opinion with knowledge”; and “active participation with effective caucusing”.

O. Judicial Qualities

Comments relative to the JDR justice’s role in how settlement was achieved and the degree of pressure exerted on the parties to settle include: “the justice gave a very detailed and thorough explanation of the issues and why the quantum was what the justice recommended”; “I strongly feel the role of a justice in a non-binding JDR process is to clarify the issues for all and to offer an opinion and assessment but not to exert pressure on any of the participants”; “never felt pressure but still felt reassured in my own understanding and estimate of situation”; “justice’s opinion was a primary requirement as negotiations were stalled”; “exerted some pressure on both sides - fair but realistic”; “I had to remind myself that the justice did not have my best interests at heart, but rather wanted a settlement to call it a success”; and “justice was fairly neutral in this regard - except he did say he didn’t plan on doing a lot of back and forth between rooms so I was worried that if I did not compromise further he would become irritated with us”.

**APPENDIX 7 -
GUIDELINES FOR JUDICIAL
DISPUTE RESOLUTION**
June, 1996

GUIDELINES FOR JUDICIAL DISPUTE RESOLUTION

1. The purpose of judicial dispute resolution is to reach a settlement on all issues, or to resolve as many issues as possible, with the assistance of a Justice of the Court of Queen's Bench.
2. Generally all counsel and partes must agree to judicial dispute resolution, although exceptions may be made in special circumstances.
3. Most frequently the process will be initiated when a matter has been or is ready to be set down for trial. However, the Chief Justice may approve judicial dispute resolution at an earlier stage, where appropriate.
4. To arrange judicial dispute resolution, counsel should contact the Trial Co-ordinator to select a judge and date, which must be confirmed in writing to the Trial Co-ordinator.
5. Counsel should meet with the named judge to discuss and agree upon the materials and procedures required for the judicial dispute resolution process, Counsel may request and with the consent of all parties the judge may agree to give an opinion or make a decision, in the event that a settlement is not reached.
6. Parties with authority to make settlement decisions must be present and participate in the process.
7. Judicial dispute resolution is normally conducted informally in a conference room setting. Gowning is not required.
8. The process is confidential. Statements made by counsel or by the parties are confidential and without prejudice and cannot be used for any purpose or referred to at trial, should the matter proceed to trial. After judicial dispute resolution, all briefs, submissions, notes and papers in the judge's possession will be destroyed.
9. Unless the parties consent, the judge will not hear any applications or the trial of the matter. The judge will not discuss the judicial dispute resolution process with the trial judge, should the matter proceed to trial.
10. In the course of judicial dispute resolution, parties and their counsel may meet privately, with or without the judge. If the judge meets privately, anything said by a party or counsel to the judge in confidence will remain confidential and will not be disclosed to the other parties unless the confidentiality of the communication has been waived.
11. The only document which will survive a successful judicial dispute resolution process will be a Memorandum of Agreement. Various terms of the Agreement may require Consent Orders, Discontinuances, Releases and other documents which will be prepared and filed by counsel.
12. The judge is non-compellable as a witness in any proceedings.

June 14, 1996

(Unsigned)

**Division 3
Dispute Resolution by Agreement**

***Subdivision 1
Dispute Resolution Processes***

Dispute resolution processes

4.16(1) The responsibility of the parties to manage their dispute includes good faith participation in one or more of the following dispute resolution processes with respect to all or any part of the action:

- (a) a dispute resolution process in the private or government sectors involving an impartial 3rd person;
- (b) a court annexed dispute resolution process;
- (c) a judicial dispute resolution process described in rules 4.17 to 4.21 [*Judicial Dispute Resolution*];
- (d) any program or process designated by the court for the purpose of this rule.

(2) On application, the court may waive the responsibility of the parties under this rule, but only if

- (a) before the action started the parties engaged in a dispute resolution process and the parties and the court believe that a further dispute resolution process would not be beneficial;
- (b) the nature of the claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties;
- (c) there is a compelling reason why a dispute resolution process should not be attempted by the parties;
- (d) the court is satisfied that engaging in a dispute resolution process would be futile;
- (e) the claim is of a nature that a decision by the court is necessary or desirable.

(3) The parties must attend the hearing of an application under subrule (2) unless the court otherwise orders.

Information note

Note that under rule 8.4(3) [*Trial date: scheduled by court clerk*], the court clerk cannot schedule a trial date unless satisfactory evidence is produced that the parties have participated in a dispute resolution process or the court, by order, waives this requirement under rule 4.16(2). If the court sets a trial date under rule 8.5 [*Trial date: scheduled by the court*] the court could, if the conditions of rule 4.16(2) are met, give a waiver of this rule at that time.

Subdivision 2
Judicial Dispute Resolution

Purpose of judicial dispute resolution

4.17 The purpose of this Subdivision [*Judicial Dispute Resolution*] is to provide a party-initiated framework for a judge to actively facilitate a process in which the parties resolve all or part of a claim by agreement.

Judicial dispute resolution arrangement

4.18(1) An arrangement for a judicial dispute resolution process may only be made with the agreement of the parties in dispute and, before engaging in a judicial dispute resolution process, the parties must agree to at least the following ground rules:

- (a) that every party necessary to participate in the process has agreed to do so, unless there is sufficient reason not to have complete agreement;
- (b) the following matters that relate to the proposed process:
 - (i) the nature of the process;
 - (ii) the matters to be the subject of the process;
 - (iii) the manner in which the process will be conducted;
 - (iv) the date on which and the location and time at which the process will occur;

- (v) the role of the judge and any outcome expected of that role;
- (vi) any practice or procedure related to the process, including exchange of materials, before, at or after the process;
- (vii) who will participate in the process, which must include persons who have authority to agree on a resolution of the dispute, unless otherwise agreed;
- (viii) any other matter appropriate to the process, the parties or to the dispute.

(2) The parties who agree to the dispute resolution process are entitled to participate in the process.

(3) The parties to a proposed dispute resolution process may request that a judge named by the parties participate in the process.

Information note

The parties to a jdr process cannot, of course, bind a judge to participate in the process. The parties should find out in advance whether their proposed process gives a judge any difficulty. If the judge is not willing to participate in the process agreed by the parties, the parties are free to seek the assistance of another judge.

If the parties agree and a judge is willing, the judge may assist the parties in working out a jdr process.

Documents resulting from judicial dispute resolution

4.19 The only documents, if any, resulting from a judicial dispute resolution process are to be

- (a) an agreement prepared by the parties, and any other document necessary to implement the agreement, and
- (b) a consent order or consent judgment resulting from the agreement.

Confidentiality and use of information

4.20(1) A judicial dispute resolution process is a confidential process intended to facilitate the resolution of a claim.

(2) Consequently, unless the parties otherwise agree in writing, statements made or documents generated for or in the judicial dispute resolution process with a view to resolving the dispute

- (a) are privileged and are made without prejudice,
- (b) must be treated by the parties and participants in the process as confidential and may only be used for the purpose of that dispute resolution process, and
- (c) may not be referred to, presented as evidence, or relied on, and are not admissible in a subsequent application or proceeding in the same action or in any other action, or in proceedings of a judicial or quasi-judicial nature.

(3) Subrule (2) does not apply to the documents referred to in rule 4.19 [*Documents resulting from judicial dispute resolution*].

Involvement of jdr judge after process concludes

4.21(1) The judge facilitating a judicial dispute resolution process in an action cannot hear or decide any subsequent application, proceeding or trial in the action without the written agreement of every party and the agreement of the judge.

(2) The judge facilitating a judicial dispute resolution process must treat the judicial resolution process as confidential and all the records relating to the dispute resolution process in the possession of the judge or in the possession of the court clerk must be returned to the parties or destroyed except

- (a) the agreement of the parties and any document necessary to implement the agreement, and
- (b) a consent order or consent judgment resulting from the process.

(3) The judge facilitating a judicial dispute resolution process is not competent to give evidence nor compellable to give evidence in any application or proceeding relating to the judicial dispute resolution process in the same action, in any other action, or in any proceeding of a judicial or quasi-judicial nature.

Evaluation Report Note:

The Rules of Court Committee has recommended to the Alberta Minister of Justice that proposed new rule (NR) 4.18(1) be amended after “process” to add “and subject to the directions of the presiding judge”. No decision has been announced by the Minister as to either the Proposed New Rules, or this proposed amendment as at June 1, 2009.

RECOMMENDATIONS

My recommendations, that follow from and are based on the information contained in the Survey of lawyers and clients in the year ending June 2008, as reviewed and analyzed in conjunction with valid literature on the subject of dispute resolution, and for the reasons articulated in detail in this Evaluation Report, are set out below.

It is recommend that:

Program

1. The Court maintain the JDR Program, as mandated by the Court's Guidelines for Judicial Dispute Resolution of June 1996 ("Guidelines"), to be replaced by Rules 4.17 - 4.21 of the New Alberta Rules of Court ("Rules of Court").

Branding/Labeling/Name

2. The Court continue to call the Program the "Judicial Dispute Resolution Program" or "JDR Program".

Management

3. The JDR Program be managed by the Court under the recommendations of the "Judicial Dispute Resolution Committee" ("JDRC").

JDR Services, Names and Information

4.
 - a. The Court continue to offer JDR Program services by the names “Mini-Trials”, “Judicial Mediation” (including alternatives : “Facilitative Mediation” and “Evaluative Mediation”), or a hybrids of any of them, and “Binding JDR”, potentially open to all non-criminal cases. These JDR Program be as equally available in each judicial centre throughout Alberta consistent with the general level of judicial facilities and service provided to that centre.
 - b. A JDR Program Pamphlet, focused on the information that clients need to know to access and participate in the JDR Program, be prepared by the JDRC to explain these services, the JDR process, and other relevant aspects of the JDR Program.
5. To avoid confusion with branding/labeling, and while recognizing generically the JDR Program offers settlement conference services, the Court encourage its justices not to use the term “Settlement Conference” as the name for the JDR Program.
6.
 - a. The Court do not, at this time, provide a formal “Early Neutral Evaluation (ENE)” service.
 - b. The Chief Justices, or their designates, may, however, authorize an ENE in the appropriate case on request of counsel, with the caveat that a confidential process evaluation report (not identifying the case, the parties or counsel, except by a control number) from the ENE Justice be prepared and provided to the JDRC for future evaluation purposes following the ENE.

- c. The Court, including through the JDRC, work with Alberta Justice to encourage an ENE service, not managed by the Court or staffed by its justices or staff, through a “Court-Annexed” program, using fee for service and *pro-bono* neutral experts.
 - d. The Court continue to provide the case management aspects of ENE programs through one-off (in motions court) or systematic (assigned) case management.
7. The Court, on the recommendation of the JDRC, prepare and make available to the public such information and booking and scheduling mechanisms as are appropriate to carry out the JDR Program. To that end:
 - a. JDR Justices should be requested to complete and make available through the JDR Coordinator a JDR Justice Profile, setting out the JDR services that they are prepared to provide, similar in content to the sample set out in Appendix 8, Table 8.1.
 - b. Once the judicial assignment schedule for JDRs is available from time to time, all parties and their counsel should have an open and equal right to choose the JDR Justice and timing consistent with that schedule.
 - c. The basic unit of scheduling for JDRs be one day or a multiple thereof as appropriate, as determined by the parties in coordination with the JDR Coordinator and JDR Justice.
 - d. A province-wide JDR Booking Confirmation form - a sample of which is started in Appendix 8, Table 8.2 - be prepared by the JDRC and JDR Coordinators to be completed and filed by the parties and/or their counsel in each case to confirm the booking and to provide all the material and

relevant information appropriate for a successful JDR and for assessment of the JDR Justice in preparing such JDR, including determining whether a Pre-JDR conference is necessary.

8. In light of the technical requirements for Binding JDRs as created by recent court decisions, the JDRC make recommendations to the Court as to best practices, and, consistent therewith, take pro-active steps to make Binding JDR services more available.

Timing of JDR Services

9.
 - a. While the timing of providing a JDR service should be largely in the hands of the parties and their counsel, as proposed under the New Alberta Rules of Court, in consultation with the proposed JDR Justice, if parties are not essentially ready (of very close to being ready) for trial at the time proposed for a JDR, as required by paragraph 3 of the Guidelines, they be required to submit reasons in the JDR Confirmation form for a JDR at the time proposed for review and consideration by the JDR Justice on behalf of the Chief Justices of the Court. The JDR Justice may exempt the proposed JDR from the timing prerequisite or defer it to a more appropriate time.
 - b. The timing of a JDR should be such that a minimum of a two week interval be in place between a JDR and the scheduled trial commencement, to permit the trial judge that would otherwise take that trial to be reassigned if the JDR results in a settlement.

Prerequisites to a JDR

10. a. Prerequisite to a JDR, the parties (or counsel on their behalf) must certify that: their case is substantially ready for trial, or seek an exemption under Recommendation 9a; they have either tried to negotiate a settlement and have been unsuccessful, or have exchanged bona-fide offers to settle, which have been rejected (the nature of those offers must be disclosed in the JDR brief); that they and their clients undertake to attempt to negotiate a settlement of the subject action in good faith in accordance with the policies pertaining to the JDR Program; the requirements of Recommendation 10c., if applicable have been met; and such other prerequisites as the Court may reasonably require, on the recommendation of the JDRC.
- b. A proposed JDR is subject to the presumptions and requirement of Recommendation 11.
- c. A Binding JDR shall only proceed on the certification (in the JDR brief) that all evidence relevant to the proceeding that the party wishes to provide has been filed in affidavit (or other permissible form) on the court file, with analogy to the non-*viva voce* evidence to be provided for a summary trial.

Judicial Approval for a JDR to Proceed

11. a. If the Prerequisites to a proposed JDR have been established, except for Binding JDRs and proposed JDRs involving self-represented litigants, there should be a *prima facie* (default) presumption of a right for the JDR to proceed.
- b. Notwithstanding a., nothing prevents the Chief Justices, or their designate, or the proposed JDR Justice, from ruling, at any time (preferably an optimum time), that a proposed JDR is not appropriate for

any reason (including timing) to proceed at the proposed booking date or at all - granting a waiver in the latter case, if appropriate or required, under the Rules of Court.

c. Further to a., by analogy to b., the Chief Justices, or their designate (normally the proposed JDR Justice), shall rule on the appropriateness to proceed to JDR in the case of Recommendation 9a., proposed Binding JDRs, or proposed JDRs involving self-represented litigants.

d. Recognizing that the suitability of a JDR for any case will be primarily determined on the consent of the parties, or the requirement of the Rules of Court (and independent judicial discretion to rule on waivers thereunder), the JDRC is encouraged to consider, and if appropriate, prepare advisory guidelines to assist the Chief Justices, their designates, or other justices of the Court to whom an application for waiver may be made (and through such guidelines to assist the parties and their counsel) as to when and under what circumstances a waiver of a dispute resolution process (including a JDR) should be permitted under the Rules of Court, including the steps that might be taken or conditions that might be imposed to ameliorate circumstances that might otherwise recommend waiver.

Pre-JDR Conferences

12. The proposed JDR Justice, before the JDR, may on his/her own motion direct, and must make available to the parties and their counsel the opportunity on request for, a pre-JDR conference ("Pre-JDR"), in person and/or by telephone (with preference to the latter), involving the counsel (and their clients if they wish, but on notice) to discuss the organization of, issues to be addressed at, the material for, and any other matter (including confidential information) relevant to the success of the JDR.

JDR Instruction Letter

13. a. In any event of Recommendation 12, before the JDR, the proposed JDR Justice shall provide counsel with a JDR Instruction Letter setting out all of the material and relevant terms of the agreement of the parties, as concurred in by the JDR justice, relating to the parties, counsels and JDR Justice's expectations for the JDR process.

b. The JDRC advise initially and from time to time on best practice as to such a JDR Instruction Letter, and a sample form thereof proposed for the consideration JDRC and JDR justices, able to be amended by the proposed JDR justice as appropriate, is attached in Appendix 8, Table 8.3.

JDR Justice Training and Education

14. a. Except for any necessity, the Chief Justices not assign any justice to conduct a JDR who does not possess the requisite training or experience to competently conduct same, and make reasonable and continuing efforts to permit - indeed, encourage - justices to obtain such judicial and personal training and education (both entry level and advanced), either within the Court (including mentoring with experienced JDR justices), or externally.

b. The JDRC make appropriate recommendations to the Chief Justices and Council of the Court as to the standards of requisite training and experience, and, in conjunction with the Continuing Education Committee of the Court, provide, or prescribe, judicial education programs relevant to
a.

c. The JDRC is encouraged from time to time to recommend best practices for consideration by JDR justices in procedures leading up to and during the conduct of a JDR.

Recording JDR Proceedings

15. a. On the request of any party the JDR justice shall, and on the JDR justice's own motion the JDR justice may, require Alberta Justice Court Services to record, but only for conduct evaluation purposes, a JDR proceeding, provided that the electronic or transcribed record therefrom shall be sealed and not be available to any party without the order of the JDR justice or the Chief Justices or their designate.

b. In the case of self-represented litigants, the JDR justice is encouraged to require a recording as contemplated in a.

Judicial Conduct during JDR

16. In conducting a JDR the JDR Justice shall be guided by the following relative to appropriate principles of judicial ethics and conduct:

a. at all times to conduct him/herself in accordance with the high standards expected of a justice of the court in any judicial role or function;

b. follow the letter and spirit (including, specifically, those provisions relating to judicial conduct) of legislated enactments, binding court decisions, and, pending implementation of the New Alberta Rules of Court, the Guidelines, all as pertaining to JDRs;

c. conduct a JDR in a process manner that is one of fairness in all its aspects, respectful of the parties and consistent with the confidentiality required by the process, including that prescribed by law, and ensure that justice is not sacrificed at any time for expediency;

d. while reasonably encouraging settlement in a prompt, efficient and fair manner, not in any way coerce the parties to settle, but rather permit the parties, based on informed express consent, to settle a dispute on any lawful basis, without any judicial intervention, except to ensure that it is by both informed and express consent;

e. on the JDR Justice's own motion, or on request, the JDR Justice may (but is not required to) meet with a party and his/her/its counsel, or counsel alone (but not any represented party without counsel), separate from other party(ies) and their counsel, for the purpose of discussing settlement, but shall not do so without the express oral consent of all parties and counsel;

f. may give guidance and evaluation on, help the parties assess the risk of, and give opinions on, possible trial outcomes if the dispute were to proceed to trial;

g. may consider interests of the parties that are connected or relevant to, even if not within the four corners of, the dispute as litigated in the pleadings;

h. at all times maintain his/her impartiality, and withdraw or recuse him/herself if, at any time, s/he cannot so maintain that impartiality or concludes that there is a reasonable belief or perception by affected parties, or their counsel, of a lack of impartiality; and

- i. while encouraged to do so only as a matter of last resort, a JDR Justice should not hesitate to withdraw if s/he cannot continue a JDR having regard to maintenance of proper judicial decorum and conduct, or the actions of the parties and/or counsel make the JDR proceeding unfair or having the potential prospect of unfairness.
17. To assist the parties in the post-JDR enforcement, pursuant to the Rules of Court, of any settlement reached by the parties at a JDR, the JDR justice should, prior to concluding the JDR, beseech the parties and/or their counsel to, or on his/her own motion, prepare a written memorandum of the terms of the settlement.

Party and Counsel Good Faith regarding JDR

18. The JDR justice insist on good faith by parties and their counsel in conducting JDRs, and take steps to correct or punish (by costs) extreme examples of bad faith.

Rules of Court, Practice Notes and Notices to the Profession

19. The JDRC is authorized and directed to make recommendations to the Chief Justices and/or the Council of the Court, and, after acceptance thereof, to carry those recommendations through to other bodies (including the Rules of Court Committee) as necessary or appropriate, in respect of the Rules of Court, Practice Notes and Notices to the Profession, regarding the above, or any other, provisions pertaining to JDRs.

EVALUATION

20. Including the requirement in Recommendation 6.b., the JDRC take active steps to be educated as to, to develop, and to utilize, appropriate methodology and statistical mechanisms to continually, and/or periodically (not less than every 10 years), monitor and evaluate the JDR Program and its components and make recommendations to the Chief Justices and the Council of the Court that arise therefrom.

ANCILLARY RECOMMENDATIONS

21. a. such other ancillary (and sometimes minor, but important) recommendations as are contained within the Evaluation Report, whether related specifically to the JDR Program or other Court functions, but which are not specifically included in this summary, as JDRC may endorse in whole or in part.
- b. recognizing that there is evidence within the Survey that the time to disposition rate is excessive in many cases (cases seem to be in the court system for an unusually long time), that targeted case management be used by the Court, through case management officers to determine the reason therefor, and to make recommendations for active case management or some form of dispute resolution - with emphasis on cases with a non-disposition rate of more than 5 years.

June 1, 2009

Justice John D. Rooke

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APPENDIX 8

TABLE 8.1 - SAMPLE JDR JUSTICE PROFILE

JUDICIAL JDR PROFILE

Date: June 2009
 Justice: John D. Rooke
 Call to Bar: 1971
 Practice: Civil Litigation, Regulatory Law, and Arbitration
 Call to Bench: April 1991
 JDRs Conducted: 100+
 JDR Type, Availability, Style, Preferences, Requests and Comments:

JDR TYPE	AVAILABILITY			Style, Preferences, Requests and Comments
	YES	NO	DEPENDS	
Pre-JDR			√	<ul style="list-style-type: none"> - always for self-represented litigant or Binding JDR - otherwise depends on case - always at the request of counsel (especially if they wish to relate any matters absent their clients), and if anything leading up to the JDR or in the briefs suggests itself
Facilitative Mediation	√			- almost always, unless a "pure" mini-trial opinion is requested, without added mediation
Rights Based	√			- it is rights that is the basis for the filed litigation
Interests Based			√	- Depends on: the wish of the parties; identification of interests by the parties; and interests must have a relevant relationship to the rights being litigated
Evaluative Mediation			√	<ul style="list-style-type: none"> - an added component to a facilitative mediation - Depends on request of parties - risks to be assessed as mediation progresses, but no non-binding opinions unless and when requested - usually only if settlement not reached
Mini-Trial	√		√	- only upon specific request and parties to advise if "pure" (opinion only), or "hybrid" mini-trial with mediation (facilitative and/or evaluative) before or after opinion

JDR TYPE	AVAILABILITY			Style, Preferences, Requests and Comments
	YES	NO	DEPENDS	
Pre-JDR			√	<ul style="list-style-type: none"> - always for self-represented litigant or Binding JDR - otherwise depends on case - always at the request of counsel (especially if they wish to relate any matters absent their clients), and if anything leading up to the JDR or in the briefs suggests itself
Self-Represented Parties			√	<ul style="list-style-type: none"> - depends on Pre-JDR (Justice will assess willingness to negotiate in good faith, power imbalances, etc. - will be recorded
Binding JDR			√	<ul style="list-style-type: none"> - must be specifically requested and a copy of binding mediation agreement must be executed - must be preceded by a Pre-JDR to determine willingness to negotiate in good faith, etc. - evidence must be provided by affidavit (using summary trial procedure format) - in light of <i>L.N. v. S.M.</i> 2007 ABCA 258 will only provide an opinion at the end, not a judgment - thus the parties have to convert to a judgment
Caucusing			√	<ul style="list-style-type: none"> - only at the request of all parties, or, on the justice's motion only with the consent of all parties
Other - Early Neutral Evaluation, etc.			√	<ul style="list-style-type: none"> - only on specific request and only if consistent with the role of the Court's JDR Program

TABLE 8.2 - JDR BOOKING CONFIRMATION

(TO BE COMPLETED)

TABLE 8.3 - SAMPLE JDR INSTRUCTIONAL LETTER

(TO BE COMPLETED)

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Roth, Bette J., Wulff, Randall W., and Cooper, Charles A. *The Alternative Dispute Resolution Practice Guide* (Looseleaf)(New York: Lawyers Cooperative Publishing, 1993).

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Delgado, Richard, "ADR and the Dispossessed: Recent Books About the Deformalization Movement" (1988) 13 *L. & Soc. Inquiry* 145.

Delgado, Richard et al., "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution", [1985] *Wis. L. Rev.* 1359.

Minow, Martha, "Justice Engendered" (1987) 101 *Harv. L. Rev.* 10.

Herman, Candace, "Understanding Gender and Negotiation", Research Paper on file with CFCJ 2005.

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Wan, Philip F., "Mediating Family Property Disputes in New Zealand" (1999) 54 *Dispute Resolution Journal* 79.
(which discusses culture in a family context at 77-9 violence and power imbalance at 76-7.)

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Religion and Spirituality

Various, "Dialogue on the Practice of Law and Spiritual Values" (2000-1) 28 *Fordham Urb. L.J.* 992 - 1087.

Challenges to mediation settlement based on duress, mistake, undue influences, etc.:

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Cohen, J. and Thompson, N., "Disputing Irony: A Systemic Look at Litigation about Mediation" (2006) 11 Harvard Negotiation Law Review 43.

Welsh, N., "The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalisation?" (2001) 6 Harvard Negotiation Law Review 1, at 87.

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1. JDRs held were measured for Calgary and Edmonton from July 1, 2007 to June 30, 2008 and the remainder from September 1, 2007 to June 30, 2008.
2. C = client; L = lawyer; and T = total.
3. Red Deer refused to participate, a fact only communicated after the Survey period had ended.
4. Except as noted % are rounded to the closest number - total might not be exactly 100% due to rounding - note that in some cases more than 1 answer is possible (e.g. type of Family Law JDR) such that the % is more than 100%.
5. Red Deer (which conducted 4 JDRs in the Fall and 14 JDRs in the Winter terms) refused to participate, a fact only communicated after the Survey period had ended.
6. Peace River and Fort McMurray did not have any JDRs during the Survey Period.
7. While care has been had to make sure that the substance is maintained, all examples and comments have been edited to, *inter alia*: delete duplication (often a word is used to give a qualitative description of the frequency of use - e.g. "[several]"); make generic (e.g. use of "justice" rather than "she" or "he"; "other side" rather than "plaintiff"; etc.); standardize terminology (e.g. use of "opinion" instead of "decision" - see below); make comment more clear; etc.
8. Note that some disability claims were categorized here and some may have been categorized as "insurance" claims.
9. This is an example where more than 1 selection could be made and the total is more than 100% - i.e. some Family Law disputes involved more than 1 issue - e.g. of the 73 Family Law JDRs, 78 % had an issue of matrimonial property, 34% had an issue of parenting, etc.
10. In many cases in the participants comments there is reference to the "justice's "decision", when, as we know, a "decision" only arises in these cases if it is a binding JDR - what is really meant is an "opinion", but it shows the need to be careful to advise the participants that it is a non-binding opinion only that is being delivered.
11. Note that on this and some other questions, more than 1 choice could apply, so % is more than 100% - see the principle in end-note #6.
12. This is a % of the total sample - when the 374 would go to trial.
13. Answers were to be in relation to the 24 "No" responses in the earlier question - answers actually given demonstrate that the question was not clear enough and/or not read carefully enough.
14. Except as noted % are rounded to the closest number - total might not be exactly 100% due to rounding - note that in some cases more than 1 answer is possible (e.g. type of

- Family Law JDR) such that the % is more than 100%.
15. Red Deer (which conducted 4 JDRs in the Fall and 14 JDRs in the Winter terms) refused to participate, a fact only communicated after the Survey period had ended.
 16. Grande Prairie had 2 JDRs surveyed, but no clients responded.
 17. Peace River and Fort McMurray did not have any JDRs during the Survey Period.
 18. While care has been had to make sure that the substance is maintained (except where the comments related to substantive matters of no relevance to the purpose of the Survey), all examples and comments have been edited to, *inter alia*: delete duplication (often a word is used to give a qualitative description of the frequency of use - e.g. "[several]"); make generic (e.g. use of "justice" rather than "she" or "he"; "other side" rather than "plaintiff"; etc.); standardize terminology (e.g. use of "opinion" instead of "decision" - see below); make comment more clear; etc. In some cases in the participants comments there was reference to the "justice's "decision", when, as we know, a "decision" only arises in these cases if it is a binding JDR - what is really meant is an "opinion", but it shows the need to be careful to advise the participants that it is a non-binding opinion only that is being delivered.
 19. This is an example where more than 1 selection could be made and the total is more than 100% - i.e. some Family Law disputes involved more than 1 issue - e.g. of the 73 Family Law JDRs, 78 % had an issue of matrimonial property, 34% had an issue of parenting, etc.
 20. One comment was added to make the point: "9 years, 4 months, 7 days".
 21. All %s are out of 193, unless indicated.
 22. This % is out of 161.
 23. This % is out of 180.
 24. Note that on this and some other questions, more than 1 choice could apply, so % is more than 100% - see the principle in end-note #6.
 25. This is a % of the total sample - when the 193 would go to trial.
 26. This % is out of 169.
 27. This % is out of 62.
 28. This % was out of 107.
 29. This % was out of 84.
 30. This % was out of 71.
 31. This % was out of 183.

32. Assumptions: No trials or JDRs in July and August = time not counted. In fact starting in 2007 there was 1 JDR justice available in both Calgary and Edmonton each week, and Lethbridge by arrangement. 41 trial weeks per year in Edmonton and Calgary and 27 in Lethbridge.
33. On some of the following measures, often the middle ground is most/more or significantly positive, not the extremes, so, in those cases, I have added the measure for the middle rating (#3).
34. I have not included analysis on exertion of pressure of the other side, as this will need more careful analysis, as much of that is based on speculation by the reporting party.
35. The numbers below do not equal 85, as 3 have some combination with binding JDRs.
36. The totals don't add up to the number of JDRs conducted because, it appears, one participant did not complete the success fields.
37. These are the totals for these 3 judicial districts only. If an explanation is necessary this row references: "# Rept." = number reported; "#/% Success" is, in the first line of the items the number of successful cases ("All" = 100% successful; "0" = 0% successful; and "S" = some % successful), followed in the second line by the % of the cases with that amount of success to the total reported for the judicial district in that category - e.g. in Calgary 98 (83%) of 118 personal injury cases were successfully "JDRed", and 11 (9%) of 118 had no success at all, whereas 8 (7%) of 118 had some success. While separation of # from % success has been apparent in most of the first line, it has not been carried throughout - it is hoped that the reader will get the "picture".
38. The fact that the sub-total amounts of the personal injury sub-categories do not equal the total of the category, means that there was an under-reporting of the breakdown by the participants.
39. As participants were allowed to select more than 1 issue of family law dispute, the % is not calculated for these numbers.
40. If an explanation is necessary this row references: "# Rept." = number reported; "#/% Success" is, in the first line of the items the number of successful cases ("All" = 100% successful; "0" = 0% successful; and "S" = some % successful), followed in the second line by the % of the cases with that amount of success to the total reported for the judicial district in that category - e.g. in Calgary 98 (83%) of 118 personal injury cases were successfully "JDRed", and 11 (9%) of 118 had no success at all, whereas 8 (7%) of 118 had some success. While separation of # from % success has been apparent in most of the first line, it has not been carried throughout - it is hoped that the reader will get the "picture".
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42. As participants were allowed to select more than 1 issue of family law dispute, the % is not calculated for these numbers.

43. These are the totals for these 3 judicial districts only. An explanation is necessary - this row references: "# Rept." = number reported total for 3 judicial districts and then by specific judicial district and total; for each judicial district, those that had a Pre-JDR Conference (Pre-JDR) and/or Instruction Letter (IL); those that did not have a Pre-JDR and/or IL.
44. This row indicates, respectively: the number that had a Pre-JDR (number followed by % of total reporting as to Pre-JDRs for that judicial district); whether or not they received a IL; the number that did not have a Pre-JDR (number followed by % of total reporting as to Pre-JDRs for that judicial district); and whether or not they received a IL - e.g. in Calgary 36 (31% of 118 (36 + 82, as all reported)) had a Pre-JDR, of which 12 received a IL, whereas 82 (69%) did not have a Pre-JDR, of which 44 received a IL, and 8 did not - meaning that of the 82 that did not have a Pre-JDR it may be (due to unreporting that as many as 38 did not receive any information. To the extent that the numbers don't total it means that the participants did not answer (report) some part of the question.
45. This answer suggests, as I have recommended herein, that a better knowledge of the JDR justice's approach is appropriate.
46. This is an important comment - the circumstances should dictate whether a Pre-JDR is necessary or not - not one size fits all, and no blanket presumption should apply.
47. The issue of surveillance video has been raised *supra*, and also in I2 (ranking 5) and N3. (where the respondent said "we asked him to advise of value fo surveillance evidence), but, as stated *supra* (footnote *), I believe there is no difficulty with it.
48. This is a classic example (there are others) of what should be put in the JDR Booking Confirmation Form, and it might preclude the need for a Pre-JDR.
49. Much of this could be provided in the JDR Justice Profile.
50. This should be a prime objective of the JDR Instruction Letter.
51. This might be provided in an addendum to the JDR Booking Confirmation Form.
52. Note that in Northern California Federal District Court, Pre-JDRs are conducted by telephone: see Brazil, "**", at *.
53. For this comment, I have added in brackets "[]" the steps that I recommend herein that accord with the very useful suggestion. Indeed, the initial contact on-line to book a JDR could set out the steps to be followed.
54. I believe that this is a sound recommendation as, in my experience, each JDR justice has a different standard.
55. This can be largely done in the JDR Justice Profile, but supplemented in the JDR Instruction Letter as required.

56. Parties and counsel should understand that it is normal for the JDR justice to be provided with the Court's file, containing pleadings and all previous filings, but if they are being relied upon copies should be filed with the briefs so the JDR justice can write on them, etc., and not affect the Court's file.
57. And/or the JDR Justice Profile.
58. I will address Opening Statements, *infra*, but I believe that, even with experienced counsel and parties (at least one party is usually not experienced) brief opening statements by the JDR justice that remind the parties about the "rules" and get them into the right mood to settle are a good idea, and opening statements by counsel that focus on the big picture and respond to the JDR justice's opening accordingly are helpful - the latter is often the place for the client to provide their views. Thus, rather than avoiding them, I believe they should be more effectively used.
59. Whether or not this perception between Edmonton and Calgary is accurate, the relevant point is that counsel should know who does or does not caucus, so s/he can pick one that accords with his/her way of doing JDRs.
60. In section I3 of the Lawyers' Survey, one respondent said " JDRs take a great deal of work and it is important to have justices that will roll up their sleeves and do a good job...". In section K1 (ranking 4), a respondent said "tremendous constant - consistent presence (not pressure of justice [made the difference])".
61. This is essential, because, as the New Rules make clear (NR 4.*) the only information from a JDR for which confidentiality will be waived is a memorandum of settlement *in writing*.