

**MEDIATION AND THE COURTS ON SETTLEMENT  
OF DISPUTES: AN ANALYSIS ON LEGISLATING COURT-  
DIRECTED MEDIATION IN MALAYSIA**

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**FACULTY OF LAW  
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KUALA LUMPUR**

**2017**

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DISPUTES: AN ANALYSIS ON LEGISLATING COURT-  
DIRECTED MEDIATION IN MALAYSIA**

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**THESIS SUBMITTED IN FULFILMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF  
DOCTOR OF PHILOSOPHY**

**FACULTY OF LAW  
UNIVERSITY OF MALAYA  
KUALA LUMPUR**

**2017**

**UNIVERSITY OF MALAYA**  
**ORIGINAL LITERARY WORK DECLARATION**

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Matric No: LHA 100001

Name of Degree: DOCTOR OF PHILOSOPHY

Title of Thesis ("this Work"): MEDIATION AND THE COURTS ON  
SETTLEMENT OF DISPUTES: AN ANALYSIS ON LEGISLATING  
COURT-DIRECTED MEDIATION IN MALAYSIA

Field of Study: MEDIATION (ALTERNATIVE DISPUTE RESOLUTION)

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## ABSTRACT

Today court-directed mediation practice in Malaysia is not governed by Mediation Act 2012 which came into operation on August 1, 2012. The said Mediation Act 2012 is only applicable to private mediation where mediators are not judges or judicial officers. In the absence of such legislation, judges and judicial officers are mainly guided by Practice Direction No. 5 of 2010 and Rules for Court Assisted Mediation. This study attempts to examine whether court-directed mediation should be legislated in Malaysia to ensure consistency in mediation practice based on one common set of mediation process, governance and standards for all mediators in Malaysia. To this end, this study analyses a number of aspects, namely, the current court-directed mediation practice in Malaysia, whether current mediation guidelines are sufficient to serve their purposes, and the role of the courts and the judiciary in promoting court-directed mediation as an alternative dispute resolution (ADR) mechanism to facilitate settlement of disputes. A qualitative research was undertaken using data collection methods involving interviews, analysis of documents, and observations. Through semi-structured interviews which were conducted in 2011 through 2013, views and thoughts were gathered from a total sample of 61 mediators across the nation, comprising members of the Malaysian judiciary, and the Malaysia Mediation Centre Panel of Mediators. The findings from this study identified that the current practice of court-directed mediation in Malaysia, and the role of the courts and the judiciary in promoting court-directed mediation in Malaysia could be examined from several aspects: *whether judges and judicial officers have adequate skills and experience to act as mediators; the extent current mediation guidelines, rules, procedures, standards and professional ethics are standardised; whether the public is aware of and is educated on court-directed mediation; and the challenges faced by judges and*

*judicial officers when they act as mediators.* The findings also revealed that the current mediation guidelines on court-directed mediation are inadequate and need to be reviewed. Further, the findings raised the need to have a common set of the said guidelines, rules, procedures, including, introducing a common set of standards and professional ethics, for all mediators, whether they are judges, judicial officers, or private mediators. This study also revealed that it may not be justifiable for court-directed mediation to be legislated in Malaysia given the extent such legislation could and could not achieve in addressing *all* of the eight areas of concerns on the practice of court-directed mediation. The key implication of the findings centred on legislation as *only* a possible solution to achieve the intended objectives. In the final analysis, this study raised a number of potential alternatives to legislating court-directed mediation in Malaysia which could promote further debates relating to the practice of court-directed mediation in Malaysia.

## ABSTRAK

Hari ini amalan mediasi mahkamah di Malaysia tidak dikawal oleh Akta Mediasi 2012 yang berkuatkuasa pada 1hb Ogos, 2012. Akta Mediasi 2012 tersebut hanya berkenaan dengan mediasi persendirian di mana pegawai mediasi bukan seorang hakim atau pegawai kehakiman. Tanpa perundangan mediasi tersebut, hakim dan pegawai kehakiman kebanyakannya berpandukan kepada Practice Direction No. 5 Tahun 2010, dan Rules for Court Assisted Mediation. Kajian ini bertujuan untuk menganalisis samada mediasi mahkamah seharusnya dikawal oleh undang-undang di Malaysia untuk memastikan keseragaman dalam amalan serta praktis mediasi berdasarkan satu set yang sama dari segi proses mediasi, urus tadbir mediasi dan standard untuk kesemua jenis mediasi di Malaysia. Berdasarkan tujuan tersebut, kajian ini menganalisis beberapa aspek, iaitu, amalan semasa mediasi mahkamah di Malaysia, sama ada garis panduan mediasi kini adalah mencukupi untuk mencapai matlamat-matlamat yang ditetapkan oleh garis panduan tersebut, dan peranan mahkamah dan badan kehakiman dalam menggalakkan mediasi mahkamah sebagai satu mekanisme resolusi alternatif pertikaian (ADR) untuk memudahkan penyelesaian pertikaian. Satu penyelidikan kualitatif telah dijalankan melalui kaedah pengumpulan data yang melibatkan temubual, analisis dokumen, dan pemerhatian. Melalui temubual separa berstruktur yang telah dijalankan pada tahun 2011 sehingga 2013, pandangan dan pemikiran dikumpulkan daripada jumlah sampel 61 pegawai mediasi di seluruh negara, yang terdiri daripada ahli-ahli badan kehakiman Malaysia, dan ahli panel Malaysia Mediation Centre. Hasil daripada kajian ini telah mengenalpastikan bahawa amalan kini mediasi mahkamah, dan peranan mahkamah serta badan kehakiman dalam menggalakkan mediasi mahkamah di Malaysia boleh diteliti daripada beberapa aspek: sama ada hakim dan pegawai kehakiman

mempunyai kemahiran dan pengalaman yang mencukupi untuk memainkan peranan sebagai seorang pegawai mediasi; sejauh mana garis panduan kini mediasi, kaedah-kaedah, prosedur, standard dan etika profesionalisme adalah seragam; sama ada orang ramai mempunyai kesedaran dan pendidikan yang seawajarnya mengenai mediasi mahkamah; dan cabaran-cabaran yang dihadapi oleh hakim-hakim dan pegawai-pegawai kehakiman apabila mereka bertindak sebagai pegawai mediasi. Hasil daripada kajian tersebut juga menunjukkan bahawa garis panduan kini mediasi mahkamah adalah tidak memadai dan perlu dikaji semula. Di samping itu, hasil kajian juga menampilkan perlunya satu set garis panduan yang sama, peraturan yang sama, prosedur yang sama, termasuk memperkenalkan set standard dan etika profesionalisme untuk kesemua pegawai mediasi, tidak kira sama ada mereka adalah hakim, pegawai kehakiman, atau pegawai mediasi swasta. Kajian ini juga mendedahkan bahawa ia mungkin tidak wajar untuk menggubal undang-undang untuk mediasi mahkamah di Malaysia memandangkan sejauh mana perundangan itu boleh dan tidak boleh mengatasi kesemua lapan perkara-perkara yang perlu diatasi dalam amalan mediasi mahkamah. Implikasi utama dalam kajian ini bertumpukan kepada penggubalan undang-undang hanya sebagai satu penyelesaian yang mungkin dapat mencapai objektif yang ditentukan. Dalam analisis terakhir, kajian ini menimbulkan beberapa alternatif yang berpotensi untuk menggubal undang-undang mediasi mahkamah di Malaysia, yang boleh menggalakkan perbincangan selanjutnya berkenaan dengan amalan mediasi mahkamah di Malaysia.

## ACKNOWLEDGEMENTS

It has been a six-year long journey for me to complete this research and to write this thesis. Without the willing support of practising mediators in Malaysia, including select judges and lawyers, who shared their mediation views, thoughts and experiences in mediation and court-directed mediation, I would not have been able to complete this research. My utmost thanks goes to these true professionals. I also want to express my sincere gratitude and appreciation to both my thesis supervisors from the Faculty of Law, Professor Dr. Choong Yeow Choy and Professor Dr. Tie Fatt Hee for their continuous advice, support, guidance and encouragement during this research process; they helped me stay on track from start to finish, and worked so patiently with me every step of the way in this incredible journey. I have indeed learned a great deal from you. My own years of academic pursuit in the field of law generally, and in mediation specifically, have provided valuable insight and learning that helped shaped my perspectives for this research. For that, I thank all my past and present research supervisors, lecturers and tutors. I owe special appreciation to the Dean of the Faculty of Law, and the administrative teams, both at the Faculty, and the Institute of Graduate Studies, University of Malaya, for their kind assistance.

On the personal front, I feel a sense of deep gratitude to my family for their patience and undying support, especially to Mum and Dad, who have instilled the sense of perseverance and determination in me, and to Dad who introduced to me the love for the law all these years. Thank you so much, my dearest parents, for standing by me throughout this period, and for trusting me to bring my dream to life. You have such great confidence in me! To my husband, K. K. Ng and our two children, Xuan Xian and Jia-Tern, thank you all for being my pillars of mental strength and encouragement in this journey. Hopefully, I have shown you the path to believe in yourself and to live your dream!



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## LIST OF SYMBOLS AND ABBREVIATIONS

ADR	Alternative dispute resolution
KLCMC	Kuala Lumpur Court Mediation Centre
CMCKL	Court Mediation Centre Kuala Lumpur
KLRCA	Kuala Lumpur Regional Centre of Arbitration
MMC	Malaysia Mediation Centre
CPR	Civil Procedure Rules
ABA	American Bar Association
NADRAC	National Alternative Dispute Resolution Advisory Council
BATNA	Best Alternative to a Negotiated Agreement
SMC	Singapore Mediation Centre
UMA	Uniform Mediation Act
PDRC	Primary Dispute Resolution Centre
KPI	Key Performance Indicator
NMAS	National Mediator Accreditation System
AAA	American Arbitration Association



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## CHAPTER 1: INTRODUCTION

### 1.1 Introduction

Mediation as an alternative dispute resolution (ADR) mechanism has grown in its popularity and is recognised by the courts in developed countries.<sup>1</sup> Described as being “at the heart of today’s civil justice system,” and “an unofficial, non-binding and non-authoritative process,” the simple meaning of mediation is that it is a means of settling dispute which involves an independent individual to assist the parties in dispute to reach a settlement (Murdoch & Hughes, 2008; Silbey, 1993, p. 351).<sup>2</sup>

As opined by Datuk Wira Low Hop Bing (2010), “the enthusiasm for mediation is global, and the increase in mediation is universal.”<sup>3</sup> With this positive global and universal growth, it is important to examine it as an ADR mechanism in facilitating settlement of mediated disputes. However, the extent of how mediation as an ADR mechanism has contributed to or facilitated settlement of disputes remains to be seen. Proponents have identified mediation as a less adversarial alternative to adjudication that is capable of resolving disputes and facilitates settlement. In fact, in one case, the court said that “skilled mediators are now able to achieve results satisfactory to both parties...which are quite beyond the power of lawyers and courts to achieve.”<sup>4</sup>

According to Lim (1994), there are many reasons why mediation has gained its popularity, which include increasing concerns over cost, delays, loss of management time, litigation time, including damage to commercial goodwill and

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<sup>1</sup> Naughton, P. (2003). Mediators are Magicians – A Modern Myth? *Society of Construction Law*, London.

<sup>2</sup> Murdoch, J. & Hughes, W. (2008). *Construction Contracts Law and Management*, 4<sup>th</sup> edition, Abingdon, Oxon: Taylor and Francis. See *Hurst v Leeming* [2002] EWHC 1051 (Ch), and Silbey, S. S. (1993). Mediation Mythology. *Negotiation Journal*, October.

<sup>3</sup> Datuk Wira Low Hop Bing. (2010). Retired Court of Appeal Judge, Malaysia. Paper on Mediation: The Way Forward, Challenges and Solutions, in Seminar on Mediation *The Navigation of Malaysian Mediation – Route to Resolutions*, on October 25, Tan Sri Abdul Kadir Hall, Attorney General’s Chambers, Putrajaya, Malaysia, p. 2, and in *Persidangan Tahunan Majlis Hakim-Hakim Malaysia Year 2010*, December 12-15, on December 14, p. 2.

<sup>4</sup> *Dunnett v Railtrack* [2002] All ER 850.

relationship.<sup>5</sup> These are some of the reasons that have encouraged the use and development of this new option for ADR.<sup>6</sup> In fact, one author opined that “the legal authority of the courts may be the single most important cause of the growth of mediation across the country” (Senft and Savage, 2003, p. 333).<sup>7</sup>

In Malaysia, mediation is still at an infancy stage, and has not yet been a widely-accepted ADR mechanism, be it private mediation or court-directed mediation.<sup>8</sup> There have been attempts and efforts made by both the judiciary and the Bar Council to promote parties in dispute to opt for mediation as outlined in the foregoing section in this chapter. With the legislation of private mediation which expressly excludes court-directed mediation, it is in this context that the researcher outlines a research strategy to investigate the extent court-directed mediation is to be legislated as well. Hence, the focus of this study is to examine whether court-directed mediation should be legislated so that all types of mediation in Malaysia are legislated to ensure that mediation is practised in accordance with the required mediation process, governance and standards by competent mediators.

## 1.2 Background

It is evident that efforts have been made by the courts and the judiciary to introduce mediation in the legal system in Malaysia. On February 14, 2010, it was reported in a local newspaper that the then Chief Justice Tun Zaki bin Tun Azmi was quoted to have said that the judiciary was in discussions with the Bar Council to draft a Practice Direction for parties in dispute to be encouraged to mediate instead of

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<sup>5</sup> Lim, L. Y. (1994). ADR – A Case for Singapore. 6 *SACLI*.

<sup>6</sup> *Ibid*.

<sup>7</sup> Senft, L. P. and Savage, C. A. (2003). ADR in the Courts: Progress, Problems, and Possibilities. 108 *Penn St. L. Rev.* 327.

<sup>8</sup> The term “court-directed mediation” is used interchangeably with “court-initiated mediation” or “court-annexed mediation” or “court assisted mediation” or “court-referred mediation” for purposes of this thesis. However, there are differing views in that “court assisted mediation” refers to cases where the court assists by directing disputing parties to a third party mediator, while “court-annexed mediation” refers to cases where a judge acts as a mediator in the mediation process. For purposes of this thesis, “court-directed mediation” refers to mediation which is conducted by a judge or judicial officer.

going to trial where mediation should be the “preferred” way for parties to resolve their disputes in Malaysian courts.<sup>9</sup> The Practice Direction No. 5 of 2010 (Practice Direction on Mediation) came into effect on August 16, 2010.<sup>10</sup> As reported in a local newspaper, the said Practice Direction was issued by the then Chief Justice Tun Zaki bin Tun Azmi to the judiciary to encourage mediation, where the said Practice Direction had formalised the ad hoc practice of some judges asking parties in certain cases whether they would like to opt for mediation.<sup>11</sup>

In fact, the Bar Council had called out to seek support from the judiciary and lawyers to position Malaysia as an international hub for mediation and arbitration.<sup>12</sup> It was reported then that the then Chief Justice Tun Zaki bin Tun Azmi had shared that the judiciary was also committed to promoting mediation in Malaysia in its effort to resolve more cases through mediation. He was also reported in a local newspaper to have said that the judiciary had played a role in promoting mediation since 2010 with the said Practice Direction which was issued to judges at all levels for suitable cases to be referred for mediation before trial.<sup>13</sup> In the same news report, he had further elaborated that “Judge-led mediation, sometimes called court-assisted mediation, seems to be more successful because parties are more confident when judges become their mediators.”<sup>14</sup>

Based on the said Practice Direction, all Judges of the High Court and its Deputy Registrars and all Judges of the Sessions Court and Magistrates and their Registrars may, at the pre-trial case management stage as stipulated under Order 34 rule 2(2) (a) of the revamped Rules of Court 2012, give such directions that the parties

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<sup>9</sup> As reported by Shaila Koshy (2010). Opt for mediation, people told. *The Star*, February 14. [www.thestar.com.my](http://www.thestar.com.my).

<sup>10</sup> See Appendix A on Practice Direction No. 5 of 2010 (Practice Direction on Mediation).

<sup>11</sup> As reported by Shaila Koshy (2010). CJ pushes mediation option. *The Star*, October 29. [www.thestar.com.my](http://www.thestar.com.my).

<sup>12</sup> As reported by Anuja Ravendran (2011). Mediation is a plus factor in dispute settlement rather than a civil suit. *The Malaysian Reserve*, January 27. Press briefing to announce the 2<sup>nd</sup> Asian Mediation Association Conference, “Rediscovering Mediation in the 21<sup>st</sup> Century, Kuala Lumpur, Malaysia, February 24-25, 2011. See section on Corporate Malaysia.

<sup>13</sup> As reported in *The Star* on February 25, 2011, “CJ: More cases being resolved through mediation,” p. N8.

<sup>14</sup> *Ibid*.

facilitate the settlement of the matter before the court by way of mediation.<sup>15</sup> Further, in an effort to supplement the said Practice Direction, in the absence of statutory provisions on mediation, a set of mediation rules, written by a Judicial Commissioner, High Court, Kuching, Sarawak, referred to as Rules for Court Assisted Mediation, operates as guidelines, and is used by all judicial officers who act as mediators in court assisted mediation.<sup>16</sup>

Even as far back as 2005, mediation was viewed by the judiciary as an alternative mode to clear the backlog of cases where it was stated in its 2005/2006 annual report that “the absence of [a] critical provision such as the power of the court to direct parties to go for Alternative Dispute Resolution (ADR) is another reason [for the delay in disposing of cases].<sup>17</sup> In fact, one author suggested that mediation would be more popular if it is placed on a statutory footing (Lee, 2006).<sup>18</sup>

The then Bar Council President, Mr. Rangunath Kesavan echoed the same sentiment when he stressed that the Bar Council’s position was that mediation must be court-mandated or it would be difficult to convince parties in dispute to opt for it.<sup>19</sup> He further stressed that a joint effort by both the Bar Council and the judiciary was crucial for mediation to finally take off in Malaysia.<sup>20</sup> Therefore, the underlying question is whether mediation could be successfully assimilated into our judicial and legal system. As summarised by US Senior Judge and Chief Judge Emeritus J. Clifford Wallace of the United States Court of Appeal (Ninth Circuit) that “what we

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<sup>15</sup> P.U.(A) 205/2012, [http://www.malaysianbar.org.my/index.php?option=com\\_docman&task=doc\\_view&gid=3766](http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=3766) [Accessed 20 March 2016]. See Appendix A, *supra* note 11, Section 1.1 states that the term “Judge” includes a Judge or Judicial Commissioner of the High Court, Judge of the Sessions Court, Magistrate or a registrar of the High Court.

<sup>16</sup> The Honourable Justice Ravinthran N. Paramaguru, “Rules for Court Assisted Mediation” as posted on March 18, 2011 in official website of The High Court in Sabah and Sarawak. See Appendix B. [http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt\\_web/mediation.php](http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/mediation.php).

<sup>17</sup> 2005/2006 Annual Report of the Superior and Subordinate Courts in Malaysia entitled “Enhancing Efficiency” as reported by Aniza Damis (2007). Go Mediate! Mediation may be ordered to clear cases. *New Straits Times*, June 18.

<sup>18</sup> Lee, S. S (2006). Mediation in Construction Contracts: Mediation, Adjudication, Litigation and Arbitration in Construction Contracts. *Current Law Journal*.

<sup>19</sup> As reported by Shaila Koshy (2010). Bar Council pushes for concerted effort. *The Star*, February 14. Mediation seminar conducted by US Senior Judge, J. Clifford Wallace on February 2-3, 2010, Kuala Lumpur, Malaysia. [www.thestar.com.my](http://www.thestar.com.my).

<sup>20</sup> *Ibid*.

are dealing with in Malaysia is court-annexed mediation, that is, what do you do to mediate after you have filed in court...”<sup>21</sup>

On August 25, 2011, a press release from Bernama announced that the then Chief Justice Tun Zaki bin Tun Azmi “opened Kuala Lumpur Court Mediation Centre, and said court-annexed mediation is a free mediation programme using judges as mediators to help the disputing parties in a litigation find a solution.”<sup>22</sup> It was also reported that Kuala Lumpur Court Mediation Centre (KLCMC) was established as a pilot project, and that the said court annexed mediation programme would be integrated into the court process.

KLCMC which has since been renamed as the Court-Annexed Mediation Center Kuala Lumpur (CMCKL) is situated inside the Kuala Lumpur Court Complex where facilities such as mediation rooms, caucus rooms and telecommunications are provided for mediation parties’ use, and as such, mediation sessions need no longer be conducted in judges’ chambers but at the CMCKL premises.<sup>23</sup> When KLCMC was first established in 2011, an eight-page document entitled “Kuala Lumpur Court Mediation Centre, Pioneer Court-Annexed Mediation in Malaysia” containing a set of Mediation Procedures, and Organization Structure listing the panel of mediators from the High Court, Sessions Court, and Magistrates Courts, was issued as guidelines for parties’ use and reference.<sup>24</sup>

Subsequent to that, the renamed CMCKL has since issued a two-fold brochure which contains general information and guidelines about the court-annexed free programme which is offered by CMCKL, which replaces the previous eight-page

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<sup>21</sup> As reported by Shaila Koshy (2010). The case for mediation. *The Star*, February 14. Mediation seminar conducted by US Senior Judge, J. Clifford Wallace on February 2-3, 2010, Kuala Lumpur, Malaysia. [www.thestar.com.my](http://www.thestar.com.my).

<sup>22</sup> Per press release from Bernama entitled “Court Annexed Mediation a Free Programme – Chief Justice” dated August 25, 2011. The said press release was subsequently reported in Malaysian Law under <http://malaysianlaw.my/news/court-annexed-mediation-a-free-programme-says-cj-1745.html>. A similar report was posted online in BorneoPost Online on August 26, 2011 entitled “Chief Justice says court annexed mediation a free programme.” <http://www.theborneopost.com/2011/08/26/chief-justice-says-court-annexed-mediation-a-free-programme/>.

<sup>23</sup> CMCKL is located on Level 2, Kuala Lumpur Court Complex, Jalan Duta, 50506 Kuala Lumpur, Malaysia.

<sup>24</sup> See Appendix C-1 for a copy of the said eight-page document entitled “Kuala Lumpur Court Mediation Centre, Pioneer Court-Annexed Mediation in Malaysia.”

document.<sup>25</sup> Since then similar court-annexed mediation centres (CMCs) have been established in cities outside of Kuala Lumpur in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country.<sup>26</sup>

Almost a year later, on August 1, 2012, Mediation Act 2012 came into operation.<sup>27</sup> It was shared that this enactment indicates the Government's desire to promote mediation as an ADR mechanism besides indicating the Government's move towards the international trend.<sup>28</sup> It was further elaborated that there are a number of reasons why the Mediation Act was enacted, namely:

1. It is acknowledged that the mediation legislation can provide a predictable legal framework within which mediation can be conducted in Malaysia;
2. It could serve as the Government's and the legislature's stamp of approval to the mediation process;
3. It serves to educate the public at large as well as professionals who are involved in mediation as an ADR mechanism;
4. It serves to promote mediation to the general public at large and the legal profession; and
5. It could further promote Malaysia through Kuala Lumpur Regional Centre of Arbitration (KLRC) as an International Dispute Resolution Centre.<sup>29</sup>

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<sup>25</sup> See Appendix C-2 for a copy of the said two-fold brochure entitled "The Court-Annexed Mediation Center Kuala Lumpur – a positive solution."

<sup>26</sup> As reported in *Business Times* on February 28, 2014. Mediation can help court reduce case backlog. See <http://www.nst.com.my/business/latest/mediation-can-help-court-reduce-case-backlog-1.495150>. Also reported in *New Straits Times* on March 1, 2014. Use mediation to resolve disputes, urges CJ. See <http://www.nst.com.my/opinion/letters-to-the-editor/use-meditation-to-resolve-disputes-urges-cj-1.495431>. See speeches delivered by The Right Honourable Tun Arifin bin Zakaria, Chief Justice of Malaya at the opening of the *Legal Year 2012* on January 14, 2012, *Legal Year 2013* on January 12, 2013, and *Legal Year 2014* on January 11, 2014, <http://www.kehakiman.gov.my/sites/default/files/document3/Penerbitan%20Kehakiman/KetuaHakim.pdf>, <http://www.kehakiman.gov.my/sites/default/files/document3/Penerbitan%20Kehakiman/OLY2013%20SPEECH%20BY%20THE%20RT.%20HON.%20TUN%20ARIFIN%20ZAKARIA%20CHIEF%20JUSTICE%20OF%20MALAYSIA.pdf>, and [http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/UcapanTUN2014\\_15JAN.pdf](http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/UcapanTUN2014_15JAN.pdf) respectively.

<sup>27</sup> See Appendix D for Mediation Act 2012 (Act 749). See CLJ Law on Latest Malaysian Acts. <http://www.newcljlaw.com/public/?page=latestmyact>.

<sup>28</sup> Lee, L. C. (2012). Deputy Commissioner of Law Revision, Law Revision and Reform Division in the Attorney General's Chambers. Overview of Malaysian Mediation Act 2012. Paper presented at the Seminar on *Malaysia's New Mediation Act*, organised by the Law Revision and Reform Division, Attorney General's Chambers, Putrajaya, Malaysia, July 3.

<sup>29</sup> *Ibid*.

However, under Section 2(a) the said Mediation Act does not apply to “any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in court.”<sup>30</sup> This would mean that court-directed mediation which is conducted by judges and judicial officers still rely on the said Practice Direction, which is intended to be a guideline for parties to come to a settlement, and the said Rules for Court Assisted Mediation.<sup>31</sup>

Hitherto, little focus has been made to evaluate the current practice in court-directed mediation where this is further complicated by the said non-application of the said Mediation Act. This begs the question whether such a situation could pose a set-back to the future of court-directed mediation and settlement prospects of parties. Therefore, the researcher questions whether in the absence of statutory provisions or legislation, the courts and the judiciary are required to rely on the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and CMCs in other parts of the country.

Hence, the focus of this study is examine whether court-directed mediation should be legislated in the light of the said Mediation Act which does not cover the judiciary as mediators, nor does it provide for the role of the courts and the judiciary in court-directed mediation in Malaysia. In other words, the said Mediation Act is applicable to all mediators other than those who are judges and judicial officers who conduct court-directed mediation. For purposes of this study, the researcher also explores the role which the courts and the judiciary play in promoting court-directed mediation as an ADR mechanism to facilitate settlement of disputes during the case management stage after the cases have been filed in the courts. The current practice of court-directed mediation in Malaysia would also be examined.

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<sup>30</sup> Appendix D, *supra* note 27, Section 2 on Non-application of the Mediation Act 2012 (Act 749).

<sup>31</sup> See Appendix A, *supra* note 10, Section 2.2 for the said Practice Direction, and Appendix B, *supra* note 16 for the said Rules for Court Assisted Mediation.



Lastly, this study examines whether the current guidelines as stipulated in the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and CMCs in other parts of the country under their free court-annexed mediation programmes, are sufficient to serve their purposes in court-directed mediation in Malaysia. Further, based on the findings in this study, the researcher aims to shed more light on whether court-directed mediation should be legislated as the way forward in Malaysia. Potential alternatives to such legislation would also be covered in the discussion.

### **1.3 Rationale of Research**

#### **1.3.1 The Statement of the Problem**

The researcher notes and observes that mediation is in its infancy stage, and has not been widely accepted as an ADR mechanism in Malaysia. Insofar as legislation is concerned, the only such legislation is the said Mediation Act which came into operation on August 1, 2012, which governs private mediation, but is not applicable to judges and judicial officers who act as mediators, nor does it provide for the role of the courts and the judiciary in conducting court-directed mediation in Malaysia. Instead, court-directed mediation in Malaysia draws guidance from three different sources of mediation guidelines, namely, the said Practice Direction, the said Rules for Court Assisted Mediation which are used as guidelines by all judicial officers who act as mediators in Sabah Law Court and Sarawak Law Court, and the general guidelines as issued by CMCKL and CMCs in other parts of the country under their free court-annexed mediation programmes.

### **1.3.2 The Purpose of the Study**

In the light of the above observations, the purpose of this study is to examine whether court-directed mediation should be legislated in Malaysia. In that respect, it is important to understand the role of our courts and the judiciary in promoting court-direction mediation as an ADR mechanism in Malaysia to facilitate settlement of disputes.

The specific purpose of this research is aimed at achieving the following three objectives, namely:

1. To examine the extent court-directed mediation has been practised under the said Practice Direction, the said Rules for Court Assisted Mediation which is used as guidelines by all judicial officers who act as mediators in Sabah Law Court and Sarawak Law Court, and the general guidelines as issued by CMCKL and CMCs in other parts of the country under their free court-annexed mediation programmes.
2. To gather views and thoughts of current mediators from both Peninsular Malaysia and East Malaysia on the role of the courts and the judiciary in promoting court-directed mediation in Malaysia.
3. To examine whether court-directed mediation should be legislated in Malaysia based on the said views and thoughts.

### **1.3.3 Research Questions**

#### *1.3.3.1 Main research question*

In the light of the said Mediation Act which does not govern court-directed mediation, should court-directed mediation be legislated in Malaysia?

### 1.3.3.2 Sub- questions

1. What is the current practice of court-directed mediation in Malaysia?
2. Are the current guidelines (as stipulated in the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and CMCs in other parts of the country, sufficient to serve their purposes in court-directed mediation practice in Malaysia?
3. What is the role of the courts and the judiciary in promoting court-directed mediation as an ADR mechanism to facilitate settlement of disputes? What is the extent of this role?

Of key consideration on the main research question are reasons whether court-directed mediation should be legislated today in the light of Section 2(a) of the said Mediation Act which stipulates that the said Mediation Act does not apply to “any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in court.”<sup>32</sup> In other words, mediation which is conducted by mediators who are not judges and judicial officers is legislated under the said Mediation Act thereby leaving court-directed mediation unlegislated. Hence, the key research question is whether court-directed mediation should also be legislated in Malaysia.

On the first sub-question on the current practice of court-directed mediation in Malaysia, the researcher outlines the views and thoughts gathered from the said participating mediators on their professional experiences in dealing with the courts and the judiciary on the current practice of court-directed mediation. In this respect, such views and thoughts attempt to shed light on the extent to which fundamental mediation principles have been put to practice by judges and judicial officers who act

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<sup>32</sup> Appendix D, *supra* note 28, Section 2 on Non-application of the Mediation Act 2012 (Act 749).

as court mediators. Further, the researcher's analysis covers identified areas in the said guidelines and procedures which could be considered, which could be adopted for use and practice in Malaysia. These are identified areas which the researcher hopes to find answers to through this study.

On the second sub-question, this study attempts to showcase the views and thoughts of the said participating mediators in this study on whether the current guidelines for judicial officers as mediators are sufficient to serve their intended purposes, namely, the said Practice Direction, the said Rules for Court Assisted Mediation, and general guidelines as issued by CMCKL and CMCs in other parts of the country. In this respect, this study also explores alternative solutions, suggestions and ideas as potential options to legislating court-directed mediation in Malaysia, including suggested or recommended improvements and amendments to the current sets of guidelines in the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and CMCs in other parts of the country.

Lastly, on the third sub-question, the researcher outlines the views and thoughts gathered from participating mediators in this study, comprising those from the panel of mediators as accredited by Malaysia Mediation Centre (MMC) (hereinafter referred to as "the MMC Panel of Mediators"), and judicial officers who act as mediators in court-directed mediation, on the role of the courts and the judiciary to promote court-directed mediation as an ADR mechanism to facilitate settlement of disputes. Also of consideration are their opinions on judges and judicial officers taking on the role of court mediators. Where they are court mediators themselves, this study also unveils the kind of challenges or dependencies faced by the courts and the judiciary in their extended role as mediators.

#### 1.4 Research Delimitations

This study focuses on the understanding, exploring and examining whether court-directed mediation should be legislated in Malaysia in the light of the said Mediation Act which came into operation on August 1, 2012. The said Mediation Act does not apply to judges and judicial officers who act as court mediators where cases have been filed in the courts. In other words, all other mediators are governed by the said Mediation Act, except court mediators in Malaysia, as well as legal officers from the Legal Aid Department who conduct mediation.<sup>33</sup> For purposes of this qualitative study, the said participating mediators are referred to as “respondents.” The respondents, who are located in both Peninsular Malaysia and East Malaysia, are mediators who have conducted mediation sessions, either private mediation or court-directed mediation.

In the researcher’s effort to showcase a rich mix of perspective of this study, a collection of views, thoughts, and mediation experiences on the research questions were gathered from the respondents, comprising the MMC Panel of Mediators who practise private mediation, and judges and judicial officers who act as court mediators in Malaysia. In this respect, such views and thoughts attempt to shed light on the extent to which fundamental mediation principles have been put to practice by these court mediators. In essence, the scope of this study has been framed by the researcher in an attempt to offer a new perspective on whether court-directed mediation should be legislated as the way forward in Malaysia. This question on whether there should be a similar legislation has been triggered by the legislation of private mediation which took effect on August 1, 2012 under the governance of the said Mediation Act.

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<sup>33</sup> See Legal Aid Act 1971 (Act 26) which provides for mediation under Part VIA under Section 29A (Provision of mediation services), Section 29B (Dispute), Section 29C (Mediation to be voluntary), Section 29D (Settlement or agreement to be reduced in writing), Section 29E (Confidential communications with a mediator), and Section 29F (Mediator).

## 1.5 An Overview of the Chapters

This study is organised into eight chapters with the aim to achieve its research purpose and to shed some light on the main research question, and three sub-questions in the following manner, namely:

1. Chapter 1 covers an introduction to the fundamentals of this study which explores whether court-directed mediation should be legislated in Malaysia in the light of the Mediation Act 2012 which came into operation on August 1, 2012, where it does not cater for judges and judicial officers who act as court mediators. This chapter discusses the rationale of this study where it introduces the statement of the problem, the research purpose and research questions which form the basis of this study within the described delimitations and scope of this study.
2. Chapter 2 introduces and reviews definitions of relevant terms and concepts on:
  - a. A brief introduction and overview of what constitutes ADR and various definitions;
  - b. Mediation as an ADR mechanism, in general, and in the Malaysian context;
  - c. The concept of settlement in terms of settlement rate as a measure of successful mediation, including the concept of fair treatment;
  - d. Confidentiality in mediation from the common law and statutory perspectives, “without prejudice” privilege, exceptions to that privilege, and limitations and exceptions to confidentiality;
  - e. Impartiality and neutrality as two key traits of the mediator, and their importance stressed in mediator model standards and ethics;
  - f. Mediator capabilities and skills in terms of competence and experience, and the role of the mediator in the end-to-end mediation process; and
  - g. Culture as a key factor in the settlement of disputes in our multi-cultural society.

In the researcher's attempt to link these key terms and concepts to the scope of this study, this chapter also discusses the views and thoughts of the MMC Panel of Mediators and the judiciary in terms of the said relevant terms as depicted in chapter 6 on "Research Findings and Commentary." The extent to which such views and thoughts are consistent with the said relevant terms is also discussed and commented.

3. Chapter 3 is devoted to review relevant studies and researches on court-directed mediation which were conducted in Malaysia and abroad. The said review also covers mediation legislation or the lack of it in other jurisdictions, namely, the United States of America (USA), Australia, Hong Kong and Singapore. Based on the said review on the studies and researches, this chapter attempts to provide insight into the respective research findings and their contribution to court-directed mediation, and to identify limitations in the said studies and researches, which could be overcome by this study. In the same respect, the said review provides deeper understanding of the extent of mediation legislation or the lack of it in the said jurisdictions by tracing its growth and development, which forms the basis for this study to establish whether court-directed mediation should be legislated in Malaysia. Where court-directed mediation has not been legislated, the researcher discusses how it has been practised in the said jurisdictions.
4. Chapter 4 covers an insight into court-directed mediation in Malaysia in terms of current practices within a handful of mediation rules, guidelines and procedures which govern judges and judicial officers who act as court mediators, such as the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and CMCs in other parts of the country. The review on the CMCs also includes an overview of its settlement rates and other relevant statistics to give a fuller perspective on this newly-introduced

programme by the courts. Also discussed in this chapter is the contrast and comparison of clauses from the said sources on mediation rules, guidelines and procedures, including a review on the said Mediation Act.

In respect of the mediation rules and guidelines which apply to court-directed mediation, this chapter also reveals the perspectives shared by the MMC Panel of Mediators and the judiciary as respondents in this study. Such perspectives covered identified areas for suggested improvements to the said rules and procedures. It is also in this chapter that the researcher attempts to link the views and thoughts of the MMC Panel of Mediators and the judiciary on whether court-directed mediation should be legislated in Malaysia, including the advantages and disadvantages of such a position.

Also discussed in this chapter is the role of the courts and the judiciary in Peninsular Malaysia, and in Sabah and Sarawak in the current ecosystem of court-directed mediation in Malaysia in promoting court-directed mediation as an ADR mechanism to facilitate settlement of disputes. The chapter closes with the ethics of court-directed mediation insofar as to the extent this has been provided for in the said sources of mediation rules, guidelines and procedures.

5. Chapter 5 describes the research methodology which entails three methods of gathering data for purposes of this study, namely, qualitative study through semi-structured interviews which were conducted in 2011, 2012 and 2013 on a sample of mediation practitioners who were from the MMC Panel of Mediators and the judiciary, analysis of documents, and observation. Based on two sets of interview questions, a total of 61 respondents agreed to share their views and thoughts in this study. Included in the chapter are key areas on the research methodology which is adopted for this study in terms of operationalizing the research questions, data collection methods and respective procedures, sample size and selection,



data analysis, and reliability and validity of data. This chapter ends with a discussion on the various aspects of limitations faced by the researcher in this study.

6. Chapter 6 features the research findings from this study, and the researcher's commentary on the said findings in an attempt to answer the main research question, and three sub-questions in this study. Based on the analysis of the data collected, this chapter captures the views and thoughts of the MMC Panel of Mediators, and the judiciary who are mediators in court-directed mediation, and who have agreed to be interviewed as respondents for this study. The first part of this chapter provides details on the composition of the respondents who were interviewed in this study from Peninsular Malaysia and East Malaysia, and a profile of the mediated cases which they had conducted.

This chapter also provides an overview on the general views and thoughts of these respondents on whether mediation is capable of resolving disputes, and whether it is an effective ADR mechanism to facilitate settlement of disputes in Malaysia; why mediated cases settled, and why some did not settle; what factors contribute to effectiveness or ineffectiveness in the settlement of disputes; whether mediation is an effective ADR mechanism to facilitate the settlement of disputes in Malaysia. Based on these revelations, the researcher provides an analysis on the extent the respondents have practised court-directed mediation in accordance with mediation principles and mediation process.

The second part of this chapter shares the findings from this study in an attempt to provide answers to the main research question and the three sub-questions in this study. A collection of these views and thoughts shed light and provide insights into whether court-directed mediation should be legislated in Malaysia, where judges and judicial officers, act as court mediators at the case

management stage of the cases filed in court. This chapter concludes with the identification of eight areas of concern in the current practice of court-directed mediation in Malaysia as revealed in the findings from this study.

7. Chapter 7 focuses on the extent legislation in court-directed mediation in Malaysia could or could not be achieved in addressing the said eight concerns as raised in the previous chapter, with commentaries on each of the said concerns. The researcher also discusses the specific areas in the respective areas of concern which remain unresolved should legislation be adopted for court-directed mediation in Malaysia. In this respect, the researcher raises the question whether legislating court-directed mediation could be one possible solution, and that it may not be the only identified solution. In addition, the researcher highlights various areas of consideration should legislation be introduced in Malaysia. The chapter ends with the researcher's assessment on which areas of concern remain unresolved if legislation were to be adopted accordingly.
8. Chapter 8 is the last chapter which covers the conclusion of this study. To that end, the researcher reveals potential alternatives to legislation where legislation is to be viewed as one possible alternative to address the said areas of concern. In this commentary, the researcher suggests four such potential alternatives to legislating court-directed mediation with a view to address some of the said eight areas of concern, and the extent each of the said potential alternatives contribute to the main research question of this study. It is here that the researcher shares the researcher's own opinion on whether court-directed mediation should be legislated in Malaysia. To the extent that it should be or not, the researcher offers a tangible and practical recommendation as a realistic contribution to the way forward for court-directed mediation practice in Malaysia. As a further contribution to this area of research, the researcher presents a set of draft proposed

amended mediation guidelines on court-directed mediation, and a set of draft proposed mediation standards and code of conduct for mediators, as an attempt to provide a common set of mediation guidelines, rules and standards for all mediators in Malaysia, namely, court mediators and private mediators.

## **1.6 Chapter Summary**

This chapter sets out the fundamental framework for this study in terms of laying down the crux of the research rationale and the research purpose with a view to find out whether court-directed mediation should be legislated in Malaysia within the described scope of this study. The researcher intends to set these out in a total of eight chapters as described in the earlier section of this chapter. In the researcher's attempt to introduce the background of court-directed mediation in Malaysia, this chapter also traces the growth and development of mediation as an ADR mechanism in Malaysia, and how court-directed mediation was subsequently introduced by the courts and the judiciary, and the extent of its evolution since its inception in 2010.

The next chapter provides an introduction and review of relevant terms used in mediation, and fundamental mediation concepts for a better understanding of the scope of this study. Core principles and definitions are provided for each of the said terms and concepts where their textbook definitions have been juxtaposed with the views and thoughts which have been gathered from the respondents of this study. This is an attempt on the researcher's part to enrich the understanding and appreciation of the said terms and concepts for purposes of this thesis.

## **CHAPTER 2: REVIEW OF RELEVANT TERMS AND CONCEPTS**

### **2.1 Introduction**

This chapter covers key terms on the fundamental principles of mediation and the mediation process. The said terms include the following:

1. Alternative dispute resolution (ADR)
2. Mediation
3. The concept of settlement
4. Confidentiality in mediation
5. Impartiality and neutrality
6. Mediator capabilities and skills
7. Culture

### **2.2 Alternative Dispute Resolution (ADR)**

When parties have a dispute which they are unable to resolve on their own, they would naturally seek the assistance of third parties, be it family members or friends, in the form of advice and guidance, to settle their differences between them. In fact, “dispute processing” is not a new phenomenon, having been around as early from the 7<sup>th</sup> through the 11<sup>th</sup> centuries, A.D. (Sanchez, 1996).<sup>34</sup> In other words, such acts of resolving disputes take the form of “mediation” which is an informal way of resolving disputes as compared to the formal legal process.

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<sup>34</sup> Sanchez, V. A. (1996). Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today. *Ohio State Journal of Dispute Resolution* 1.

Such “alternative” methods have become increasingly popular and have been referred to in place of litigation (Goldberg, Sander & Rogers, 1999, p. 7).<sup>35</sup> “Alternative dispute resolution (ADR)” has since become an acronym which was coined to cater for “methods which will complement and/or replace litigation as the ultimate mode for resolving disputes” (Othman, 2002, p. ccxxiv).<sup>36</sup> This term is defined in the Glossary to the Civil Procedure Rules (CPR) of England and Wales as a “collective description of methods of resolving disputes otherwise than through the normal trial process.”<sup>37</sup> In fact, the ADR movement started with the call for legal education and law curriculum to be reviewed “for gentler arts of reconciliation,” and for people to start thinking about moving away from the courts to “new voluntary mechanism” because law students have traditionally been trained for legal combats (Bok, 1983).<sup>38</sup>

It is in the researcher’s opinion that in the Malaysian context, the word “alternative” in the term “ADR” presumably refers “ADR” as alternative to the formal court process and system. This means that the parties look for informal methods to resolve their dispute. The researcher views that one such informal method is through mediation which has been strongly encouraged by the Malaysian judiciary.<sup>39</sup> In fact, Professor Frank Sander labelled mediation as “the sleeping giant” of ADR.<sup>40</sup> The emergence of mediation as an ADR mechanism could be traced to one negotiation theory which focused on approach to generate creative solutions in a conflict towards mutually beneficial outcome based on a set of rules and principles.<sup>41</sup>

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<sup>35</sup> Goldberg, S., Sander, F. & Rogers, N. (1999). *Dispute Resolution: Negotiation, Mediation and Other Processes*. 3<sup>rd</sup> edition, New York: Aspen Law and Business.

<sup>36</sup> Othman, A. (2002). Introducing Alternative Dispute Resolution in Malaysia: Prospects and Challenges. 2 *Malayan Law Journal*.

<sup>37</sup> Kallipetis, M., QC. and Ruttle, S., Q.C. (2006). *Mediation in Commercial Disputes*. Paper presented as a training course for the Hong Kong Judiciary.

<sup>38</sup> Bok, D. (May-June 1983). A Flawed System. *Harvard Magazine*, p. 38, reprinted in *N.Y. St. B. J.*, Oct 1983, p. 8, *N.Y. St. B. J.*, Nov 1983, p. 31; excerpted in 33 *J. Legal Educ.* 570, 1983.

<sup>39</sup> *Supra* note 9.

<sup>40</sup> Chan Sek Keong (1997). Retired Singapore Chief Justice, Keynote Address at *International Mediation Conference*, Singapore International Convention & Exhibition Centre, Singapore, August 18.

<sup>41</sup> Fisher, R., & Ury, W. R. (1999). *Getting to Yes: Negotiating Agreement without Giving In*. Rev. ed. New York: Viking Penguin, where an example was cited of a librarian who acted as a mediator to two students in dispute over whether to keep the window open or shut, who generated an alternative solution by opening the window in the next room.

The researcher's thought is consistent with the views of the respondents in this study, specifically those from the judiciary who had shared that they have been continuously encouraging parties in dispute to seriously consider mediation as an ADR mechanism to litigation when they act as mediators in court-directed mediation.<sup>42</sup> There were also views that many lawyers in Malaysia have not fully embraced mediation as an ADR mechanism, and many of them have not taken sufficient efforts to fully understand the mediation process and what could be achieved through it in resolving their clients' disputes.<sup>43</sup>

### 2.3 Mediation

Mediation has been viewed by many as the anchor to the ADR movement (Landerkin and Pirie, 2001, p. 9).<sup>44</sup> Mediation is slowly gaining popularity in Malaysia as an ADR mechanism (Xavier, 2003, p. xxiv-xxv).<sup>45</sup> It was shared that in recent times the "most frequently encountered process is that of mediation" (Gould, 2003, p. 1).<sup>46</sup> Many have defined mediation in various forms and versions.<sup>47</sup> The most commonly used definition is that mediation is a process by which "the participants, together with the assistance of a neutral third person or persons, systematically isolate dispute issues, in order to develop options, consider alternatives and reach consensual

<sup>42</sup> These were views of 6 out of 7 respondents from the judiciary in Mediation Interview – Part 1.

<sup>43</sup> These were views of 9 out of a total of 61 respondents in this study, where 6 were from the judiciary and 3 were from the MMC Panel of Mediators.

<sup>44</sup> The Honourable Hugh F. Landerkin Q.C., & Professor Andrew Pirie. (2001). Judicial Dispute Resolution: A Canadian Perspective, December 1.

<sup>45</sup> Xavier, G. (2003). Globalization and International Dispute Resolution. 2 *MLJ* xxii.

<sup>46</sup> Gould, N. (2003). The Use of Mediation to Settle Construction Disputes. Paper presented to supplement an Einstein Network television programme, December.

<sup>47</sup> Gulliver, P. H. (1979). *Disputes and Negotiations: A Cross-cultural Perspective*, San Francisco: Academic Press, p. 214. See Henry, J. F. & Lieberman, J. K. (1986). *The Manager's Guide to Resolving Legal Disputes*; Silbey, S. E. & Merry, S. E. (1986). Mediator Settlement Strategies. 8 *Law & Policy* 1, January, p. 7; Pirie, A. J. (1985). The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems? 63 *Canadian Bar Review* 378; Kressel, K. and Pruitt, D. G. & Associates. (1985). *Mediation Research: The Process and Effectiveness of Third-Party Intervention*, San Francisco: Jossey-Bass Publishers; Moore, C. W. (1986). *The Mediation Process – Practical Strategies for Resolving Conflicts*, San Francisco: Jossey-Bass Publishers; Coulson, R. (1987). *Business Mediation – What You Need to Know*, American Arbitration Association, Boulle, L. & Teh, H. H. (2000). *Mediation: Principles Process Practice*, Singapore: Butterworths; Kovach, K. (2005). "Mediation" in Moffitt, M. L., & Bordone, R. C. (2005). *Handbook of Dispute Resolution*, Jossey-Bass, p. 304; Gould, N., *op. cit.*; Goodin, R. A. (1999). Mediation: An Overview of Alternative Dispute Resolution. Mediation and the Courts, 4 *Issues of Democracy* 3, December, p. 13.

settlement that will accommodate their needs. Mediation is a process which emphasises the participants' own responsibilities for making decisions that affect their lives" (Folberg and Taylor, 1984, p. 7).<sup>48</sup>

According to the American Bar Association (ABA) definition of mediation, it is described as a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute.<sup>49</sup> On the other hand, the Australian National Alternative Dispute Resolution Advisory Committee's (NADRAC, 1997) defines mediation in a more descriptive manner. It says that:

"Mediation is a process in which parties to a dispute, with the assistance of a neutral third party (the mediator), identify disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement" (NADRAC, p. 9).<sup>50</sup>

In fact, the International Institute for Conflict Prevention and Resolution (CPR, 1998) has established ground rules for mediation which cover the process as non-binding, voluntary, and "any party may withdraw at any time after attending the first session, and before execution of a written settlement agreement."<sup>51</sup>

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<sup>48</sup> Folberg J. P. and Taylor, A. (1984). *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation*, San Francisco: Jossey-Bass Publishers.

<sup>49</sup> American Bar Association, *Alternative Dispute Resolution: A Primer*, 1987.

<sup>50</sup> Policansky, S. (2001). Workplace Conflict Resolution – Issues and Dilemmas for Practitioners. *Asia Pacific Mediation Forum*, Papers and Reports: Workplace Mediation. See also National Alternative Dispute Resolution Advisory Council (NADRAC), fn 2, p. 9. <http://www.nadrac.gov.au>.

<sup>51</sup> This is a US-based independent resource missioned to help global businesses and their lawyers resolve commercial disputes. See *Mediation Procedure*, CPR Model ADR Procedures and Practices ("MAAP") Series, 1998 on

What this means to the researcher is that mediation is a process where parties who are in dispute voluntarily come together to the table with an end in mind – to reach a voluntary and mutually agreed settlement or solution – assisted by a neutral third party who is a total stranger to the parties. The neutral third party who plays the role of a “mediator” is neither a judge nor a lawyer nor an arbitrator, nor anyone who has any interest in the dispute. In other words, the mediator is a dispute facilitator who introduces techniques to help the parties negotiate to settle their differences in order to arrive at an agreed solution with a view to resolve the dispute at hand.

It is also opined by the researcher that mediation is a private affair behind closed doors which is managed by a mediator who is the neutral third party. The parties control the result where the results are not decided nor adjudicated by the mediator although the mediator may provide suggestions or avenues for possible dispute resolution, or point out common interests between the parties. Yet the mediator’s responsibility is to ensure that the process is both impartial, unbiased and that there is a balance of power between the parties. Hence, parties are guided and assisted by the mediator through various processes such as exploring various options and solutions, exchanging information, bargaining and negotiating between the parties, and decision-making.

It is in the researcher’s understanding that throughout the entire mediation process, the mediator is expected to allow the parties the opportunity to tell their respective sides of the story; they want to feel that the mediator has heard and considered their story, and that the mediator has treated them fairly, and with dignity and respect. This means that the mediator is required to ensure that there is fairness of the mediation process and procedures that are used to arrive at the agreed outcome.



Therefore, the researcher opines that the practice of mediation is essentially focused on the mediator's ability to help the parties resolve their dispute by assisting the parties to identify common interests and to generate options for settlement. The mediator is only empowered to assist the parties with their own negotiations, facilitated by the mediator, to arrive at an agreed resolution which they can both accept and live with. In fact, it has been stated that "if the parties make their own agreement they are more likely to abide by it, and it will have greater legitimacy than a solution imposed from without" (Menkel-Meadow, 1995).<sup>52</sup>

Hence, the idea of mediation is not for the parties to use the adversarial and combative approach to defeat the other party. In other words, important factors to consider in mediation which could contribute to the parties being able to reach an agreed settlement would be the capabilities and skills of the mediator besides his or her ability to maintain impartiality and neutrality throughout the process.

As suggested by Professor Lon Fuller (1971), mediation is:

"always directed toward bringing about a more harmonious relationship between the parties, whether this be achieved through explicit agreement, through a reciprocal acceptance of the 'social norms' relevant to their relationship, or simply because the parties have been helped to a new and more perceptive understanding of one another's problem...central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception what will redirect their attitudes and dispositions toward one another" (p. 305).<sup>53</sup>

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<sup>52</sup> Menkel-Meadow, C. (1995). Whose Dispute is it, Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases). 83 *Georgetown Law Journal*.

<sup>53</sup> Fuller, L. L. (1971). Mediation – Its Forms and Functions. 44 *Southern California Law Review*.

Based on the various definitions and descriptions of mediation, this begs the question on whether such definitions and descriptions have been incorporated in the practice of court-directed mediation in Malaysia, or whether court-directed mediation has been differently defined from that of private mediation. In this respect, the researcher sought to validate from relevant sources on guidelines and procedures on court-direction mediation in Malaysia.<sup>54</sup> The researcher also attempted to draw references from other jurisdictions where the definition and description of mediation is included in appropriate documents such as sourcebook for judges and mediation training material.<sup>55</sup>

In fact, it could be said that there are benefits and advantages of mediation as an ADR mechanism.<sup>56</sup> One such view was that mediation allows the judge or judicial officer who acts as a mediator to participate early in the mediation process unlike a formal trial.<sup>57</sup> It was explained that one benefit which the parties could gain from a failed mediation, that is, where the dispute may not be resolved through mediation, is that the mediation process would have paved the way for the parties to look at settlement in a more positive light.<sup>58</sup>

In other words, the mediation process allows the parties to realise the strengths and weaknesses of their dispute; gives them the opportunity to find alternative options to resolve their dispute; and for them to realise that their dispute could be resolved much faster when the parties are willing to accommodate each other's interests and needs by looking at the issues from a wider perspective.<sup>59</sup> Other

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<sup>54</sup> See Appendix A, *supra* note 10; Appendix B, *supra* note 16; and Appendix C-2, *supra* note 25.

<sup>55</sup> As an example, see Plapinger, E. & Stienstra, D. (1996). ADR and Settlement in the Federal District Courts. *A Sourcebook for Judges and Lawyers*, Joint Project of the Federal Judicial Center and the CPR Institute for Dispute Resolution, where mediation is described as a "flexible, non-binding dispute resolution procedure in which a neutral third party – the mediator – facilitates negotiations between the parties to help them settle...its capacity to help parties expand traditional settlement discussions and broaden resolution options..." The other example is in the training material of *Singapore Mediation Centre* which defines mediation as "the voluntary process by which the parties to a dispute engage the assistance of a neutral person (called the mediator), to facilitate the negotiations between them with a view to resolving their dispute privately in an amicable manner."

<sup>56</sup> All 61 respondents in this study shared this view.

<sup>57</sup> This was the view of a judiciary respondent from Sarawak.

<sup>58</sup> *Ibid.*

<sup>59</sup> This was the view from another judiciary respondent from Sarawak.

views echoed the same in that the emphasis of mediation is really on communication and understanding the other party's interests and positions which could provide the parties with the opportunity to view reasons behind the other party's actions.<sup>60</sup>

In this respect, the researcher is of the view that the mediator plays a crucial and instrumental role as the "go-between" in mediation. In the capacity as the "go-between" the mediator has the capabilities and skills to encourage and promote information exchange, promote understanding between the parties, and to encourage the parties to explore creative options.<sup>61</sup> Based on this view, it can be said that mediation is a process which "resembles therapy in its focus upon exploring and enunciating feelings" (Silbey & Merry, 1986, p. 7).<sup>62</sup>

It was felt that mediation is one quick solution to resolve disputes or to provide options to the parties because they explained that it could be counter-productive for the parties to proceed to trial which might take longer for an amicable settlement to be reached.<sup>63</sup> The view was that they are supportive of the amicable "win-win" approach through mediation as an ADR mechanism as compared to the adversarial "win-lose" approach through the litigation process.<sup>64</sup> One interesting observation was that mediation allows the parties to share their emotions, differing expectations, and underlying interests and needs, which could not be captured or contained in legal documents.<sup>65</sup>

In the humble opinion of the researcher, this is interesting to note that legal documents which are filed as part of the litigation process are incapable of totally capturing such real emotions of the parties which they shared at the mediation

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<sup>60</sup> This represented views of 5 out of 27 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>61</sup> The term "go-between" is from the works of Edmund Burke 189-190, 1904, "An Appeal from the New to the Old Whigs," 1791, where Burke said "The world is governed by go-betweens. These go-betweens influence the persons with whom they carry on the intercourse, by stating their own sense to each of them as the sense of the other; and thus they reciprocally master both sides."

<sup>62</sup> Silbey, S. E. & Merry, S. E. (1986). Mediator Settlement Strategies. 8 *Law & Policy* 1, January.

<sup>63</sup> This view was shared by 4 of the 34 respondents in Mediation Interview – Part 1.

<sup>64</sup> This view was shared by 9 of the 34 respondents in Mediation Interview – Part 1.

<sup>65</sup> This view was shared by 4 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

session. By this, the researcher refers to the tone of their voices, their demeanour, their body language, and their facial expressions, including other non-verbal communication elements. This means that the informal and flexible session where parties meet face-to-face allows such non-verbal communication elements to be observed and experienced by both parties and the mediator. In this very context, it was said that the description that mediation helps the parties to resolve disputes through mutual concessions and face-to-face bargaining becomes relevant (Coulson, 1987).<sup>66</sup>

In short, mediation as an ADR mechanism allows for the parties' active and direct participation in the communication and negotiation which occur during the mediation session. The parties are given the opportunity to tell their stories themselves, that is, to have a voice, and to be heard by the other party and by the neutral third party, that is, the mediator. This is the crux of the fundamental principle of mediation which emphasizes on parties' preservation of their relationship by focusing on their "underlying interests" instead of their "legal rights." Thus, mediation allows the mediator as a neutral third party to assist and guide the parties to resolve their dispute through the mediation process.

Based on the facts and information shared by the parties, the mediator is educated on the parties' respective positions, their underlying needs and interests, helps the parties to work out potential solutions and to explore possible and practical options, with the aim to shift the parties' positions, and to provide a forum for parties to settle disputes between them. In other words, the mediator attempts to regenerate party-to-party discussions where there are communication breakdowns or where unrealistic expectations have been set by the parties, reopen communication channels between the parties, and to help the parties re-evaluate the reasonableness of their

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<sup>66</sup> Coulson, R. (1987). *Business Mediation – What You Need to Know*, American Arbitration Association.

respective positions. The mediator is seen to act like an orchestrator who guides the parties in the right direction and let them decide what is best for them.

At this point, the researcher is reminded of the relevance of the statement made by a judicial officer that “the parties to find a solution to their problems that they ‘can live with’ ” (Wong, 2006, p. 100).<sup>67</sup> Indeed, the parties decide what they want as an outcome, one which each of them can assent as the key underlying principle of mediation is party autonomy or self-determination (Bush, 1992).<sup>68</sup> Fundamentally, the philosophy of mediation is to empower the parties to structure their own agreements, to influence the final terms to be agreed upon, and take total control of the outcome of the settlement of their dispute.

Hence, the researcher submits that the parties own the mediation process, and they take on the major responsibility to resolve their dispute together with the help of the mediator who plays a neutral and impartial role during the entire course of the process. The parties are free to decide the outcome of their dispute, one which is mutually agreed and which both parties can accept. By this, it means that the said outcome may not be on a 50-50 compromise by both parties although the parties had participated in the mediation session with a view to arrive at a mutually agreed solution on their own, without any persuasion, influence, cajoling, duress, fear or coercion from any one, including the mediator, during the entire mediation session. In a nutshell, this is the fundamental guiding principle on party autonomy.

On this point, one view was that the parties must first have the genuine desire to resolve their dispute, and that they must be willing to put aside their “egos”.<sup>69</sup> It was also stated that mediation as an ADR mechanism allows the parties to vent out

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<sup>67</sup> Wong Yan Lung SC, JP. (2006). The Benefits of Mediation. Paper presented at *Hong Kong Mediation Council* conference, July.

<sup>68</sup> Bush, R. A. B. (1994). Symposium: The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications. 1 *Journal of Dispute Resolution*, pp. 1-55. First published (1992) “The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications.” *A Report on a Study for the National Institute for Dispute Resolution*, Washington, D.C.: National Institute for Dispute Resolution, pp. 1-36.

<sup>69</sup> This is the view shared by 4 respondents from the MMC Panel of Mediators out of the total 34 respondents in Mediation Interview – Part 1.

their feelings and emotions to clear any misunderstanding or misconception which could have brought about the dispute in the first place.<sup>70</sup> It was felt that this is where the mediator plays a very vital role in the entire mediation process.<sup>71</sup>

On the role of the mediator, the view focussed on the need to have a capable mediator who has the stature and the respect of the parties, where the mediator is required to play a neutral, facilitative and effective role to ensure the success of the mediation session.<sup>72</sup> In this opinion, the mediator must allow the parties the opportunity to share their true emotions behind their positions in the informal setting of the mediation session, as compared to a formal courtroom setting, where the parties do not have direct communication with the judge during trial if they are represented by their lawyers, and the parties are not allowed to voice their opinion or ideas during trial, not even through their lawyers.

In the researcher's opinion, such thoughts are consistent with the philosophy and fundamental principles of the mediator's role which is to first observe the parties' positions and expectations through their vented feelings and emotions demonstrated during the mediation session; and based on these, to identify gaps in such expectations, and subsequently, to attempt to close these gaps as much as possible through the use of mediation.

In essence, an experienced mediator could only increase the chances of such an achievement because the final agreed outcome, whether a win-win or otherwise, lies with the parties. As aptly put by The Honourable Mr Justice Lightman (2007), what mediation:

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<sup>70</sup> This view is shared by 6 of the 34 respondents in Mediation Interview – Part 1. Of the 6 respondents one of them was a respondent from the judiciary in Sarawak.

<sup>71</sup> This majority view is shared by 15 of the 34 respondents in Mediation Interview – Part 1. Of the 15 respondents, 4 of them were from the judiciary in Sabah and Sarawak.

<sup>72</sup> This point was raised by 50% of the 34 respondents in Mediation Interview – Part 1. Of these, 3 respondents were from the judiciary in Sabah and Sarawak.

“...can do and does do is to open previously locked doors to a settlement. What it can afford is a mechanism through the efforts of trained intermediaries for opening the eyes of parties to the merits of the opponent’s case, the issues involved, the risks and costs of litigation and the attractions of a settlement.”<sup>73</sup>

### **2.3.1 The Styles of Mediation**

In the researcher’s mind, essentially, there are two distinct styles of mediation which could be described as facilitative, and evaluative. In fact, it has been said that the functions of a mediator are two-fold, namely, in a facilitative role to facilitate the mediation process, and in an evaluative role to assist the parties to evaluate the case to arrive at a settlement.<sup>74</sup>

Under the facilitative role, the mediator creates an environment which is conducive for the mediation process to take place. This includes facilitating communication between the parties, encouraging and assisting the parties to generate various creative solutions and options, identifying and understanding the parties’ underlying needs and interests, identifying obstacles to communication between the parties, facilitating negotiations between the parties on available and feasible solutions and options, and guiding the parties to arrive at an agreed outcome.

In contrast, the evaluative style of mediation sees the mediator taking on a more “involved” role where he or she helps and guides the parties to evaluate their options, or steers the parties towards a decision or solution which the mediator thinks is best for the parties (instead of allowing the parties to do so). In evaluating the case,

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<sup>73</sup> The Honourable Mr. Justice Lightman (2007). Mediation: An Approximation to Justice. Speech at *Mediation Summer Drinks Reception*, June 28. Article dated July 6, 2007 in Centre for Effective Dispute Resolution (CEDR). <http://www.cedr.com>.

<sup>74</sup> See chapter VII on “Role of Mediators” in Mediation Training Manual of India, Mediation and Conciliation Project Committee, Supreme Court of India, Delhi, pp. 36-38.

the mediator-evaluator may check whether the parties are being realistic about the viability of the tabled proposals and the strength of their positions through reality testing. This is to help ensure that the parties have fully understood the said proposals, the related discussions, the implications and consequences.

Although each style has its own advantages and disadvantages depending on the circumstances of each dispute, the researcher believes that the mediator could apply appropriate styles in different mediation sessions. One set of authors concedes that there are three styles of mediation, namely, substance-oriented, process-oriented, and relationship-oriented (Brunet and Craver, 1997).<sup>75</sup> The authors described substance-oriented mediators as those who typically interact with the parties who may lack certain elements and experiences where these mediators tend to feel that they need to “control” or “take charge of” the activities of bargaining and negotiating interaction between the parties.

The authors contended that most mediators are process-oriented as they seek to re-open blocked communication channels, and to encourage direct inter-party negotiations that will enable the parties to formulate their own final terms. According to the authors, other mediators who are innovative adopt the relationship-oriented style where “...they endeavour to empower the participants and generate mutual respect that will enhance the ability of individuals to solve their own problems” which is akin to playing the role of “orchestrators” where they point the parties in the right direction, and then let them decide what is best for them.<sup>76</sup>

Yet another set of authors viewed styles of mediation by describing regular patterns of dealing with problems rather than categorising mediators where they identified two ideal types of mediation styles, namely, the bargaining, and the

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<sup>75</sup> Brunet, E. and Craver, C. B. (1997). *Alternative Dispute Resolution: The Advocate's Perspective*, Virginia: Michie Law Publishers, pp. 187-189.

<sup>76</sup> *Ibid.* See Bush, R. A. B. and Folger, J. P. (1994). *The Promise of Mediation*, Jossey-Bass Publishers, San Francisco.



therapeutic, based on their observation on over 40 mediators and typifying their characteristics (Silbey and Merry, 1986, at p. 19).<sup>77</sup> Other authors opined that a mediator can take either of the two styles, namely, being directive, which is an evaluative approach with more robust procedural moves and intervention made by the mediator on the substance, that is, the dispute itself, or being a non-interventionist, which is establishing and maintaining contact between the parties, providing a physical forum in which they can meet, being a neutral form of support for the parties' negotiations, and stimulating a two-way flow of information (Boulle and Teh, 2000).<sup>78</sup>

Based on the above revelations, the researcher contends that the mediator could be facilitative or evaluative, or be facilitative and evaluative in the same mediation session but at various stages of the mediation process depending on the situation. In the facilitative style, the researcher views this mediator style as suitable where parties have the ability to negotiate, who have prepared and have done their homework on possible solutions and options, and could have thought through their list of alternatives, including their Best Alternative to a Negotiated Agreement (BATNA). Hence, the mediator plays a more "inclusive" role by involving both parties with emphasis on self-determination and party autonomy, preserving party relationship and encouraging positive communication between the parties.

In essence, the mediator as a facilitator would help each party to hear and understand the other party's position. The mediator-facilitator could also prioritise the issues and guide the parties to focus on those issues which can be dealt with first, and then help them through the whole range of issues which have been raised at the mediation. The parties also need help to generate and explore options for resolving

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<sup>77</sup> Silbey, S. E. and Merry, S. E. (1986), *op. cit.*

<sup>78</sup> Boulle, L. and Teh, H. H. (2000), *op. cit.*

the issues, and to be encouraged to brainstorm these options. This is one function which the mediator-facilitator would do.

In his or her role as the mediator-facilitator, he or she would also examine common interests and aspirations, and possibilities for future relationships between the parties, and to seek common ground between the parties which will facilitate resolution of their dispute. At the same time, the mediator in playing the role as a facilitator would also examine mutual concerns, including underlying issues and anxieties, and explore how to deal with these effectively.

Whenever negative comments or statements are made by the parties, the mediator would reframe such comments and statements in a more understandable context so that the judgment placed on that event takes a different meaning or perspective. The term “re-frame” is understood as “a technique which assists people to change the frame of reference against which an event is viewed by a person.” Alternatively, re-framing may be seen as a form of re-wording what has been said to the mediator without distorting the meaning of the words” (Morris, 1997, p. 257).<sup>79</sup>

On the other hand, the evaluative style tells of a mediator who gets involved in considering and expressing his or her views on the range of the issues which have been tabled in mediation. The mediator-evaluator’s views could be based on his or her own expertise, knowledge or experience in relation to the issues at hand. It is to be noted that the mediator-evaluator may be asked by the parties to make an evaluation of their positions or to give an indication of the strong and weak aspects to help guide the negotiations.

Hence, the mediator would need to take extra caution and care when using the evaluative style of mediation because such an evaluation provided by the mediator could compromise his or her perceived neutrality. When using this style of mediation,

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<sup>79</sup> Morris, C. The Trusted Mediator: Ethics and Interaction in Mediation. In Macfarlane, J. (ed.)(1997). *Rethinking Disputes: The Mediation Alternative 1*.

the mediator would be required to assess and consider the circumstances of each case in terms of whether it would be appropriate or helpful to provide his or her evaluative comments and opinion on the parties' positions.

In terms of court-directed mediation practice in Malaysia, it was shared that the facilitative style of mediation may not be adopted by judges and judicial officers when they conduct mediation.<sup>80</sup> The view was that in their experience court-directed mediation is highly unregulated where mediation practice is inconsistent amongst these court mediators, and that each mediator may adopt his or her own mediation style. It was felt that a large majority of court-directed mediation is practised using the evaluative style of mediation where parties could have been "pressured" by the mediators to settle their disputes.

In the researcher's opinion, such views seemed to imply that these mediators may be tempted to push forward their views, or they may exert extra pressure on the parties to reach a quick settlement.<sup>81</sup> For example, where the mediator did not listen to the parties' stories, the parties felt compelled to reach a settlement, and to accept the offer for fear of the escalating cost in litigation, and damages to be paid in the event they lost the case.<sup>82</sup> Hence, it was opined that there is a dire need to educate and to train judges and judicial officers who conduct court-directed mediation to adopt the facilitative style of mediation which empowers the parties to negotiate an amicable solution which they both can accept.<sup>83</sup> Other views specifically stated that the issue is more prevalent amongst these court mediators as they are deemed to be persons of higher authority because they sit on the bench.<sup>84</sup>

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<sup>80</sup> This view was shared by 5 out of the total 17 respondents from the MMC Panel of Mediators in Mediation Interview – Part 2.

<sup>81</sup> This view was shared by 3 respondents from a total of 44 MMC Panel of Mediators in this study, where 1 was from 27 such respondents in Mediation Interview – Part 1, and 2 were from 17 such respondents in Mediation Interview – Part 2.

<sup>82</sup> One of the 17 respondents from the MMC Panel of Mediators in Mediation Interview – Part 2 revealed this.

<sup>83</sup> The majority from the total 27 respondents in Mediation Interview – Part 2 shared this view where 11 were from the MMC Panel of Mediators, and one respondent from the judiciary in Sabah.

<sup>84</sup> This was revealed by 3 from the 10 judiciary respondents in Mediation Interview – Part 2 where 2 of them were from the judiciary in Peninsular Malaysia, and one respondent was from Sabah.

Based on these views, the researcher contends that mediation is an informal, voluntary and practical method to resolve dispute between two parties in dispute with the assistance of a neutral and impartial third party, and that the said method is outside of the court process. Further, at the end of the mediation session, the mediator is not empowered or authorised to hand over any award or decision to the parties. It is the parties who will eventually agree and decide their final outcome, whether it is a win-win resolution or no resolution at all. The mediator merely assists and guides the parties to reach that point, and subsequently, takes the parties' decision forward depending on whether the matter is settled or not.

In other words, the researcher suggests that perhaps mediation should not have a strict definition given its fluidity, voluntariness, practicality and informality as parties' underlying interests and needs are premised upon social and cultural aspects of the communities in which the parties live and exist. This is one area which the researcher suggests has a significant influence on how the mediation process works including the parties' behaviour, demeanour and perspectives. On this point, the researcher is reminded of an opinion by a judicial officer that:

“...the practice of mediation operates within a spectrum that defies a strict definition. A practical approach may be to adopt a working definition which encompasses both its operational characteristics as well as its underlying philosophy, depending on the social and legal contexts in which it operates” (Chan, 1997).<sup>85</sup>

## **2.4 The Concept of Settlement**

*My client is not interested in settlement. She wants her day in court.*<sup>86</sup>

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<sup>85</sup> Chan Sek Keong (1997), *op. cit.* See section on “Culture” in the later part of this chapter.

<sup>86</sup> Macfarlane, J. (2001). Why Do People Settle? 46 *McGill Law Journal*, p. 665. See also Williams, G. R. (1983). *Legal Negotiation and Settlement*, West Publishing, St. Paul, Minnesota.

*My client isn't interested in settlement because this is a matter of principle for her.*<sup>87</sup>

In the researcher's mind, settlement is an outcome of a series of compromises, negotiation, to-ing and fro-ing of discussions between the parties based on a voluntary dispute resolution process called mediation. It is during this process that options are tabled and offered by both parties for the other party to consider, review, counteroffer, and then agree on a solution, that is, a settlement. This is part of the negotiation and bargaining process where the parties are given the opportunity to explore more than one option, and with the assistance of a neutral and impartial third party as the mediator, with a view to arrive at a settlement.

This point is strengthened by professional views that "settlement typically involves arriving at a position between the original offers and demands of the parties. Thus, it involves a process of compromise in the sense that each has sacrificed some part of his claim in order to secure another part" (Galanter and Cahill, 1994, p. 1371).<sup>88</sup> Yet another author opined that settlement is "the process by which law created by adjudication is readjusted to meet the requirements of particular parties" but went on to state that settlement is "democratic, empowering, educative, and transformative for the parties," and therefore, settlement may possess values other than cost and time savings which make it a more appropriate ADR mechanism (Menkel-Meadow, 1995, p. 2666, 2678, 2693).<sup>89</sup> According to this author, these values include "consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice" (Menkel-Meadow, 1995, p. 2669, 2670).<sup>90</sup>

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<sup>87</sup> Macfarlane, J. (2001), *op. cit.* p. 689.

<sup>88</sup> Galanter, M. & Cahill, M. (1994). Most Cases Settle: Judicial Promotion and Regulation of Settlements, 46 *Stanford Law Review*, 1339.

<sup>89</sup> Menkel-Meadow, C. (1995), *op. cit.*

<sup>90</sup> *Ibid.*

In fact, the same author summarised that there are several aspects on settlement which was considered as the “best” eight. According to the author, some of these centred on the “concept of settlement which is consensual as they allow parties to choose processes and outcomes in their effort to resolve disputes, is based on a broader range of potential solutions....” (Menkel-Meadow, 1995, p. 2692).<sup>91</sup>

In the researcher’s opinion, the settlement process in mediation breeds higher participation of the parties, allows for more information exchange between the parties, opens up broader options thereby providing higher party autonomy when the parties make a decision which best suits them. In fact, this point is supported by findings in a study of 255 professional mediators that settlement is a useful outcome measure of mediation, which included “number of issues reduced,” “overall success,” and “lasting agreement reached” (Lim and Carnevale, 1990, p. 267).<sup>92</sup> As aptly pointed out by Palmer, J., “...the mediation process was intended to facilitate settlement between the parties not to provide them with another battleground.”<sup>93</sup>

Closely related to the concept of settlement is the debate on settlement rate which is, generally used as a measure of mediation effectiveness and mediation success. The aspect on settlement rate is relevant to this study because the researcher attempts to provide a perspective on the role of the courts and the judiciary in the current ecosystem of court-directed mediation in Malaysia in promoting court-directed mediation as ADR mechanism to facilitate settlement of disputes. Further, the researcher provides information on settlement rates achieved and recorded by CMCKL and CMCs in other parts of the country under their free court-annexed mediation programmes, as a measure of whether the said programmes have gained traction and have been successful since their inception.<sup>94</sup>

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<sup>91</sup> *Ibid.*

<sup>92</sup> Lim, R. G. & Carnevale, P. J. D. (1990). Contingencies in the Mediation of Disputes. 58 *J. Personality & Soc. Psychol.* 259.

<sup>93</sup> *Rajski v Tectran Corporation Ltd* [2003] NSWSC 476.

<sup>94</sup> See Table 4.3 on “Profile of Mediation Cases Conducted by CMCKL (2011 to 2013)” in chapter 4 on *Court-directed Mediation in Malaysia*.

Many criticisms have been lashed out on using settlement rates which typically are recorded in percentages of cases which were settled, cases which were not settled, and cases which were pending settlement. In fact, one author even questioned if people are obsessed with settlement rates when studies or researches are conducted on the effectiveness or success of mediation to the extent that there has been an “unquenchable thirst for settlement data in the mediation field” (Sander, 1995, p. 329).<sup>95</sup> One such criticism is that while settlement percentages focus on the outcome of the dispute, the question was on how the process of arriving at an outcome is measured, or is it even measured, because the said process is equally important as the outcome itself.<sup>96</sup>

On the contrary, the researcher begs to differ on this point because the process of arriving at the outcome is actually the mediation process itself. Depending on how the mediation process is conducted, the outcome of the dispute resolution process is the result of that very process. While it is equally important to understand how the said process is conducted, the researcher contends that the rate of settlement of the dispute is in itself the measure of how well the mediation process is conducted. Hence, the researcher humbly submits that there is no necessity to replace settlement rate as a measure on how the process of arriving at an outcome is conducted.

The other criticisms centre on the intangible aspects of the quality of mediated cases and party relationships in terms of how quality of resolution is taken into consideration as a measure of settlement rate, or how simple cases are compared with complex ones, or with various quanta of claims.<sup>97</sup> The argument is that settlement rates “do not, in, and of themselves, give any information about the quality of settlement” (Galanter and Cahill, 1994).<sup>98</sup> Further, of contention is the question

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<sup>95</sup> Sander, F. E. A. (1995). The Obsession with Settlement Rates. 11 *Negotiation Journal* 4, October, pp. 329-331.

<sup>96</sup> *Ibid.*, at p. 330.

<sup>97</sup> *Ibid.*

<sup>98</sup> Galanter, M. and Cahill, M. (1994), *op. cit.*

relating to how on-going relationships between the parties are factored into the success rate statistics where the current dispute is not successfully resolved but have prevented future disputes between the parties (Sander, 1995).<sup>99</sup>

In terms of the quality of the resolution, the researcher agrees that this is not a key measure of settlement rate. Where cases do settle, the parties would have had a hand in arriving at that outcome, and likewise, where cases do not settle, it is also the parties who would have decided that they are unable to reach an agreed settlement. However, it is non-conclusive that a higher quality of resolution reached denotes a higher settlement rate, and that a poor quality of settlement reached is taken to mean that the settlement rate is low. In fact, there is no evidence that higher settlement rates mean that the mediation process or the outcome reached by the parties is a better one (Kelly, 1996).<sup>100</sup>

On the aspect of future disputes between the parties, the researcher is reminded of the relationship-oriented style of mediation which primarily focuses on future party relationships.<sup>101</sup> It is contended by the authors that mediators who practise the relationship-oriented style of mediation prefer to help the parties to understand how they can effectively resolve their own future disputes, where focus is on two basic issues, namely, party empowerment and inter-party recognition (Bush and Folger, 1994, p. 20, 21).<sup>102</sup>

However, the researcher submits that it could be presumptuous to include the notion of future disputes as a factor in the whole equation of measuring mediation effectiveness or success. To say the least, the researcher views such a notion as a premature and narrow thought because current unresolved dispute could prevent future disputes from being resolved given the strained relationship between the

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<sup>99</sup> Sander, F. E. A. (1995), *op. cit.*

<sup>100</sup> Kelly, J. B. (1996). A Decade of Divorce Mediation Research. 34(3) *Family and Conciliation Courts Review* 373.

<sup>101</sup> Bush, R. A. B. and Folger, J. P. (1994), *op. cit.*

<sup>102</sup> *Ibid.*



parties in the current dispute. Any attempt to freeze these factors in such relationships in the future, and then comparing those situations with the dispute at hand, is not a fair comparison. Hence, the researcher disregards this criticism accordingly in the review of the measure of mediation effectiveness or success.

Be that as it may, it must also be recognised that settlement rate in percentages is just one aspect of mediation effectiveness or success because there are also other aspects to be considered, such as quality of the settlement reached, cost and time savings, satisfaction of the parties with the process and the outcome, and the extent of compliance with mediated settlements.<sup>103</sup> On this aspect, it is also to be noted that settlement rate *per se* may not shed any light on the effectiveness or success of mediation because the cases which settled might well have settled anyway.<sup>104</sup> The researcher appreciates this point as one may never know if the cases would have settled anyway even without mediation because these cases have already been subject to the mediation process. Certainly this is one very real consideration when discussing the concept of settlement.

Other criticisms on settlement rate as a measure of mediation effectiveness or success argue that very high settlement rates may involve dissatisfied parties, who could have felt pressured to reach a settlement (Kressel and Pruitt, 1989).<sup>105</sup> In the researcher's opinion, this is a fairly valid argument because unless the mediation session is conducted professionally in accordance with the process and procedures, the parties may be compelled to reach a speedy resolution. The researcher further reiterates that the measure of settlement rate *per se* cannot be taken into consideration devoid of the circumstances of how the settlement was reached by the parties.

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<sup>103</sup> Center for Dispute Settlement (1992). *National standards for court-connected mediation programs*, Washington: CDs. See also Galanter, M. and Cahill, M. (1994), *op. cit.*, at pp. 1339-1391.

<sup>104</sup> Keilitz, S. (1993). Civil Dispute Resolution Process in Keilitz, S. (ed.), *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings – Implications for Courts and Future Research State Justice Institute*.

<sup>105</sup> Kressel, K. and Pruitt, D. (eds.) (1989). *Mediation Research: The Process and Effectiveness of Third Party Intervention*, San Francisco: Jossey-Bass Publishers.

Be that as it may, there are different perspectives of settlement where it is viewed as one of the benefits of mediation to have parties resolve their dispute without much fanfare (the researcher understands this to mean “without much fuss”), which saves time and cost.<sup>106</sup> Based on their mediation experiences, settlement could occur when the parties are willing to reach a resolution by accepting less than what they originally had in mind so that they could move on, and to avoid taking the risk of proceeding to trials where they envisage they might have to pay higher settlement sums.

Yet others felt that mediated cases are settled because there is willingness on the part of the parties to resolve their dispute.<sup>107</sup> Based on their experiences, where the parties are ready for full and frank disclosure which is aimed towards settlement of their dispute through mediation, their dispute gets settled.<sup>108</sup> Others opined that the parties want to see closure of their dispute as quickly as possible, especially in commercial disputes where money is involved.<sup>109</sup> In addition, one view was that settlement which is reached through mediation instils a sense of satisfaction and achievement on the part of the parties for having resolved the dispute on their own under the guidance and assistance of a neutral third party, that is, the mediator.<sup>110</sup>

Where mediated cases did not settle, the views were that the parties should not have a negative attitude such as being antagonistic towards the other party, or are unwilling to agree to even mediate where they lack the sincerity or the keenness to resolve their dispute, or having the fear of “losing face” if the mediated case is finally settled.<sup>111</sup> In essence, it was opined that although the parties are keen to resolve their dispute via mediation as an ADR mechanism, they are hampered by their lack of

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<sup>106</sup> These respondents comprised 7 out of the total 34 respondents in Mediation Interview – Part 1, where 3 of them were from the judiciary in Sabah and Sarawak.

<sup>107</sup> This view was shared by 4 of the 34 respondents in Mediation Interview – Part 1, where 2 of them were from the judiciary in Sarawak.

<sup>108</sup> This view was shared by 6 of the 27 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>109</sup> This was revealed by 2 of the 34 respondents in Mediation Interview – Part 1.

<sup>110</sup> This was recorded in Mediation Interview – Part 1.

<sup>111</sup> This point was raised by 5 of the 34 respondents in Mediation Interview – Part 1.

understanding of the mediation process which consequently influences their attitude and reasoning capabilities.<sup>112</sup>

One such view was that pride often prevents the parties from reaching a settlement because the parties feel that they are entitled to more than what is tabled during the mediation session, especially where monetary settlement is involved.<sup>113</sup> When such a situation arises, the view was that the parties would not mind proceeding to the full trial to claim “their day in court.”<sup>114</sup> In other words, the opinion was that the parties would not initiate mediation as an ADR mechanism; otherwise they could be perceived by the other party as having the weaker case.<sup>115</sup> In addition, based on mediation experiences, it was opined that some judges and judicial officers who act as mediators may not be familiar with the mediation process, or they may lack mediator capabilities.<sup>116</sup> In such situations, this would result in mediators having to “analyse” or “adjudicate” the issues at hand instead of listening to the parties, and facilitating the court-directed mediation process.

By and large, the parties who have agreed to come to the mediation table would generally have a genuine interest to try out mediation as an ADR mechanism with a view to resolve their dispute as soon as practicable without incurring substantial expenses in the process. This point presumes that parties are aware of what mediation is, and what the benefits are, at least, generally. Thus, by bringing themselves voluntarily into the mediation process, this means that they do have some level of consideration to reach a settlement. This raises two questions – what is meant by a fair treatment and from whose perspective.

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<sup>112</sup> *Ibid.*

<sup>113</sup> This was one of the 17 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>114</sup> This was shared by 3 of the 34 respondents in Mediation Interview – Part 1, where 2 of them were from the judiciary in Sarawak.

<sup>115</sup> This was one of the 17 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>116</sup> This observation was made by 2 of the 34 respondents in Mediation Interview – Part 1, where one of them was from the judiciary in Sarawak.

### 2.4.1 Fair Treatment

In the researcher's opinion, what is of paramount importance on the concept of settlement is fair treatment of the parties. One of the key roles of the mediator is to ensure that the mediation process is conducted fairly. However, what standard of fairness should the mediator apply?

The researcher's view is that as a fundamental principle of mediation the parties are the negotiators and the mediator is the facilitator. Hence, undoubtedly the parties must be responsible for their own outcome, and for the decisions which they make together in arriving at an agreed resolution. Therefore, the mediator is responsible for ensuring the mediation session is conducted fairly and in accordance with the process. In other words, there seems to be two areas where fairness would be relevant, namely, in the outcome or settlement of the dispute, and in the mediation process.

On the aspect of outcome or settlement of the dispute, the parties would be in the best position to decide on the outcome they both agree to reach because they would be aware of their respective positions, underlying needs, considerations and circumstances which may affect the fairness of the outcome. As the neutral third party, the mediator whose role is to assist and guide the parties, would not be in any position to make a decision on behalf of the parties, let alone decide on what would be a fair outcome. Hence, the mediator's role is not to interfere or intervene, and not to make any judgement, but to allow the parties to exercise self-determination and to embrace party autonomy in the mediation process (Kovach, 1994).<sup>117</sup> The mediator ought to be aware of ethical dilemmas which could arise from time to time and the mediator would be required to grapple with them (Bush, 1994).<sup>118</sup>

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<sup>117</sup> Kovach, K. K. (1994). *Mediation: Principles and Practice*, Minnesota: West Publishing Co.

<sup>118</sup> Bush, R. A. B. (1994), *op. cit.*

When faced with an ethical dilemma, the mediator would be in a situation in which he or she felt some serious concern about whether it was proper for him or her as a mediator to take a certain course of action, that is, where he or she was unsure what was the right and proper thing for him or her as mediator to do. It has been said that it is about “how to maintain the integrity of the mediation process without letting the process be used to violate important interests of the community or of interested but unrepresented parties” (Lim, 1997, p. 211).<sup>119</sup> The researcher agrees to this very important point as it shows how principled a mediator ought to be insofar as ensuring that fairness is not compromised in the parties’ effort to reach an agreed outcome. For example, in power imbalance situations where one of the parties may not be represented by lawyers or where there is inequality in the respective positions and powers of the parties.

Hence, the mediator must necessarily be duly concerned with the terms of the settlement or outcome, and to ensure that the mediation process is fairly conducted. Mediators would need to be guided by provisions in court rules or mediation guidelines.<sup>120</sup> Where there is no rule governing mediator conduct, case laws have provided the required guidance to court mediators who will be held to the same ethical standards as judges.<sup>121</sup>

In addition to the outcome, the role of the mediator is also to ensure that there is fairness throughout the mediation process in that both parties fully understand the concept of settlement, and more importantly, why parties should resolve their dispute amicably. The mediator must also ensure that he or she has done everything a mediator ought to do within his or her role and responsibilities in an impartial and

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<sup>119</sup> Lim, L. Y. (1997). *The Theory and Practice of Mediation*, Singapore, FT Law & Tax, Asia Pacific.

<sup>120</sup> See Oklahoma Supreme Court Rules and Procedures for the Dispute Resolution Act, Rule 12; Code of Professional Conduct for Mediators, Oklahoma Supreme Court Rules and Procedures for the Dispute Resolution Act, Appendix A. In domestic relations mediation in Iowa, mediators must “assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiating techniques utilized by either of the participants” as stipulated in the Rules Governing Standards of Practice for Lawyer-Mediators in Family Disputes, as adopted by the Iowa Supreme Court.

<sup>121</sup> *Re Joint Eastern and Southern Districts Asbestos Litigation*, 737 F.Supp. 767 (E.D.N.Y. 1990).

neutral capacity with ethical standards fully observed in the end-to-end mediation process.

On the mediation process, specifically in the negotiation between the parties, fairness has been identified as having four components, namely, structural fairness, process fairness, procedural fairness, and outcome fairness (Albin, 1993, p. 225).<sup>122</sup> Of the four, the author opined that the mediator should focus on process fairness and procedural fairness, which include how the parties treat each other, the dynamics of the negotiation process, and the procedures used in arriving at an agreement (Albin, 1993, p. 230).<sup>123</sup> However, according to the author, as for structural fairness and outcome fairness, it was opined that these components cover the overall structure of the dispute, and the relations between the parties where the mediator has little control although the view is that the mediator should influence structural fairness of the dispute (Kovach, 1994).<sup>124</sup>

The researcher shares the same view as the author that the mediator ought to influence three of the four components on fairness, namely, structural fairness, process fairness and procedural fairness. These three components form the core of the role of the mediator where fairness in the structure, process and procedure of mediation cannot be compromised at any cost. In this respect, mediator neutrality and mediator impartiality are relevant where the mediator cannot possess any conflict of interest in any aspect of the third party relationship with the parties, and that the mediator is not biased or partial or possess any values or emotions which may interfere with the mediation process. In other words, the mediator is prohibited from influencing the mediation process as well as the outcome to be reached by the parties.

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<sup>122</sup> Albin, C. (1993). The Role of Fairness in Negotiation, 9 *Negotiation Journal* 223.

<sup>123</sup> *Ibid.*

<sup>124</sup> Kovach, K. K. (1994), *op. cit.*

Another author opined that both “outcome” and “process” objectives must be brought together in an ADR process such as mediation because mediators need to be mindful of whether the mediation process has been fair to both parties, and what desired outcomes would the parties likely to reach as a settlement (Sourdin, 2002).<sup>125</sup> Hence, the researcher contends that it is important for the mediator not be overwhelmed by or concerned with his or her own perception of the fairness of the outcome or the terms of the agreed settlement.

The one area on fairness which is related to the concept of settlement is mutual fairness where the objective of mediation is to enable parties to reach an agreement which they believe is mutually fair, where as a neutral third party, the mediator helps the parties to reach the said agreement but the parties have the responsibility to agree on what is fair (Pirie, 1985, p. 383, 384).<sup>126</sup> According to this author, there are three factors which are relevant from the mediation perspective, where firstly, mutual fairness requires that the needs of other party be understood and recognised by the other party, and to avoid having self-interests as the focal point.

Secondly, when deciding what is mutually fair, the parties are allowed to evaluate and weigh societal norms or values, including any unwritten customary rules when deciding what is mutually fair to them, where formal written laws, religions, community values, economic considerations, and the like may also be considered (Pirie, 1985, p. 384).<sup>127</sup> Lastly, the parties decide what is mutually fair and the mediator as the neutral third party does not impose his or her advice.<sup>128</sup>

The other aspect of fairness is the need for the parties to feel that they have been fairly treated because this has a significant influence on parties’ behaviour towards settlement during the mediation process in terms of how the parties feel, that

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<sup>125</sup> Sourdin, T. (2002). *Alternative Dispute Resolution*, Sydney, NSW: Lawbook Co., pp. 66-71.

<sup>126</sup> Pirie, A. J. (1985). The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems? 63 *Canadian Bar Review* 378, pp. 383-384.

<sup>127</sup> Pirie, A. J. (1985), *op. cit.*

<sup>128</sup> *Ibid.*

is, how they respond emotionally about the dispute (Macfarlane, 2001).<sup>129</sup> In other words, for parties to feel fairly treated, they must believe that their underlying interests and needs, and issues are given due and serious consideration where they must experience at least a minimal level of comfort with their roles in the mediation process.<sup>130</sup>

Hence, it is in the researcher's opinion that to ensure fairness is not compromised in the mediation process and for mediators not to influence the process, procedure, structure and the outcome, mediators must be guided by codes of conduct, and codes of ethics and standards on what they can and cannot do whenever such situations arise. For instance, there are guidelines for mediators to distinguish "impartiality toward the participants (parties in dispute)" from "neutrality on the issue of fairness."<sup>131</sup> Another example lies in a code of conduct for mediators which states that "...the mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle."<sup>132</sup>

Similar codes focus strongly on party autonomy and self-determination as "the fundamental principle of mediation" which recognises the "ability of the parties to reach a voluntary un-coerced agreement," and cautions mediators against providing professional advice, and suggests to mediators to recommend external professional advice instead.<sup>133</sup> In terms of mediation outcomes, the Mediation UK Practice Standards provide guidance to mediators that they should not "seem to recommend" any solution or settlement although options could be tabled for the

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<sup>129</sup> Macfarlane, J. (2001), *op. cit.*

<sup>130</sup> *Ibid.*

<sup>131</sup> Family Mediation Canada, *Code of Professional Conduct*, Guelph, Ontario: Family Mediation Canada, Article 9:4.

<sup>132</sup> Article III, American Arbitrators Association (AAA), ABA, and Society of Professionals in Dispute Resolution (SPiDR), 1995.

<sup>133</sup> *Ibid.*, Article I.



parties to consider. Instead, mediators provide for parties to control the content of their discussions and decisions which they ultimately make.<sup>134</sup>

As for judges and judicial officers who act as court mediators in Malaysia there is no mediation legislation governing their conduct. Instead, they rely on the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and CMCs in other parts of the country. Nonetheless, it is clear that all mediators must abide by the same ethical standards as mediator ethics is an important factor where the issue of fairness of a settlement outcome is concerned.

It is interesting to note that there were views which centred on the principle that a mediator who has a reputation of being fair would go a long way to a successful mediation, where it was opined that two key elements must be present in order for the parties to reach settlement, namely, the mediator's abilities to inspire confidence and trust, and to understand the parties' underlying needs and interests.<sup>135</sup>

Such views focused on the importance of communication with the parties, where the mediator must be able to "open up" discussions between the parties' and on their respective positions, and to clear misconceptions. It was opined that by doing so, the mediator would be able to ensure that fairness is practised and is seen to be practised throughout the mediation process in order to arrive at an outcome. Such good practice would be evident in the eyes of the parties, and that the mediator would first need to gain the trust from the parties, and to learn to handle emotions displayed by the parties.<sup>136</sup>

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<sup>134</sup> Summary, Article 6, Mediation UK, Mediation UK Practice Standards, Bristol: Mediation UK. See its Article 5 which stipulates for mediators to ensure voluntary participation by the parties.

<sup>135</sup> This was revealed by 21 of the 34 respondents where 6 of them were from the judiciary in Sabah, Sarawak and Peninsular Malaysia in Mediation Interview – Part 1.

<sup>136</sup> *Ibid.*

In this respect, it was stressed that mediators must be seen to maintain impartiality at all times in the way they carry themselves.<sup>137</sup> Hence, it was opined that mediators must not offer or provide any personal or professional opinion when conducting the mediation session although they may have the technical knowledge of the issues at hand, and they may have control over how the mediation session is conducted. It is in the researcher's humble submission that such views are consistent with the discussions on the two areas which are important to fairness, that is, the outcome and the mediation process.

## 2.5 Confidentiality

The word "confidential" is defined in the Oxford English Dictionary as "characterised by the communication of secrets or private matters" and "enjoying the confidence of another person; entrusted with secrets" (1989, p. 707).<sup>138</sup> Confidentiality is viewed as one of the fundamental tenets of mediation and other ADR processes (David, 1992, p. 9).<sup>139</sup> It has also been said that confidentiality "is one of the most important across-the-board unsettled issues in the field of alternative resolution" (Sander, 1987, p. 1).<sup>140</sup> It is also a defining characteristic at the heart of dispute resolution (Brown, 1991).<sup>141</sup>

Simply put, there must be protection of confidentiality in mediation in order for the parties and the mediator to have full trust in the mediation process. This is where the mediator, as a neutral third party must remain neutral in fact and in perception. The mediator guides and assists the parties to arrive at an agreed solution

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<sup>137</sup> *Ibid.*

<sup>138</sup> Clarendon Press, Oxford (1989), Volume III, 2<sup>nd</sup> ed.

<sup>139</sup> Professor David, J. (1992). Institutionalising Mediation. Reproduced in *Workshop Notes*, Masters of Laws and Masters of Dispute Resolution, University of Technology, Sydney.

<sup>140</sup> Professor Sander, F. (1987). *Alternatives: 1987. Annotated Index of Material Relating to Confidentiality*, Centre for Public Resources, New York, November.

<sup>141</sup> Brown, K. (1991). Confidentiality in mediation: Status and implications. 2 *Journal of Dispute Resolution* 307.

based on a range of options which are tabled by the parties according to their respective positions. The mediator encourages the parties to be candid with the mediator and with each other in terms of their willingness to mediate, and also their needs and interests which underlie their respective positions. The parties are also encouraged to think about alternatives, including their BATNA when deciding on a win-win solution.

It is also during the mediation process that the mediator conducts discussions with the parties with both parties present in joint meetings, and may hold private sessions with the parties separately. These private sessions are often referred to as caucuses where the mediator moves backwards and forwards between the parties in the form of shuttle diplomacy. This involves the mediator asking each party to confide in him or her who then uses the said information to help generate options for settlement.

During a caucus each party speaks more freely where the party may feel more at ease or comfortable to speak in the presence of the mediator where the other party is absent. The mediator may explore a party's expectations and motivations, and may act as a sounding board, engage in reality checking, and assist in identifying options (Moore, 1987).<sup>142</sup> However, it is to be noted that caucuses are not conducted in all mediation sessions, and are not mandatory in mediation. In situations where caucuses are held, the mediator has the responsibility to ensure that the confidentiality aspects in dealing with such separate private sessions are appropriately dealt with. It is for the parties to agree to maintain confidentiality in the said caucuses. This is a more common practice on the basis that confidentiality is considered as one of the fundamental tenets of mediation (David, 1992, p. 9).<sup>143</sup>

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<sup>142</sup> Moore, C. W. (1987). The Caucus: Private Meetings That Promote Settlement. 16 *Mediation Quarterly* 87.

<sup>143</sup> Professor David, J. (1992), *op. cit.*

Given the importance of confidentiality in mediation based on the above quotations from several authors on this subject, there are many aspects on the scope of confidentiality. These include the type of information which is considered confidential, the purpose of the said confidential information is shared, the person who asserts the said confidentiality, and the person against whom confidentiality can be asserted (Green, 1987).<sup>144</sup> The researcher opines that in the context of mediation, these aspects could be looked at from a simplistic perspective, that is, from two levels of confidentiality.

At the first level, the entire mediation process is a confidential event to the extent that all notes taken by the mediator on what transpired during the mediation session must be destroyed. It also means that the parties need to develop a sense of trust in the mediator due to the confidentiality nature of the mediation process from start to finish. The second level of confidentiality exists when statements, information and comments which are shared or made by the parties themselves either in the presence of the other party in joint meetings, or during caucuses with the mediator, are considered confidential.

This means that in principle the mediator is not allowed to disclose the said statements, information and comments to anyone outside of the mediation process. Further, the mediator is prohibited from disclosing the said statements, information and comments received during the caucuses to the other party. As caucuses involve private conversations between the mediator and one party without the presence of the other party, confidentiality is crucial to develop and to maintain mediator trust. It is to be noted that the mediator relies on the confidential information disclosed by the parties during the caucuses to get the parties to address their underlying interests and issues. Hence, mediators must emphasize to the parties that all information disclosed

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<sup>144</sup> Professor Green, K. (1987). A Heretical View of the Mediation Privilege. 2 *Ohio State Journal of Dispute Resolution* 1.

during such caucuses will remain confidential unless the party which discloses such information authorizes the mediator to convey that knowledge to the other party, or that disclosure is required under a stated legislation which is relevant to the circumstances of the dispute.

The researcher believes that both these levels of confidentiality are important in mediation as they facilitate or promote settlement of dispute between the parties. In fact, the researcher agrees with one author's view that mediation is a form of settlement negotiation and merits a degree of confidentiality in order to promote settlement.<sup>145</sup> It was stressed that the lack of confidentiality will deter the parties from using mediation as an ADR mechanism. Hence, it is important to ensure that the parties feel free to disclose all relevant information during the mediation session. This is because the parties will be encouraged to speak openly about their interests, concerns, and desires (Pirie, 1989, p. 47).<sup>146</sup> In short, the parties need to have sufficient candour for mediation to be effective or successful because confidentiality in mediation will encourage the parties to participate voluntarily and effectively (New South Wales Law Reform Commission, 1991, p. 63).<sup>147</sup>

Perhaps, the three principles which are covered in a handbook for mediators could provide some general guidance to all mediators in dealing with confidentiality in mediation (Charlton and Dewdney, 2004, p. 340).<sup>148</sup> According to the said handbook, the first principle applies to caucuses where the information disclosed to a mediator in a caucus is to be treated as confidential by the mediator unless the party states otherwise or allows the mediator to share it with the other party based on strict

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<sup>145</sup> Brunet, E. and Craver, C. B. (1997), *op. cit.*

<sup>146</sup> Pirie, A. J. (1989). The Lawyer as a Third Party Neutral: Promise and Problems. In *Commercial Dispute Resolution: Alternatives to Litigation*, (Ed. D.P. Edmond), Aurora Ontario: Canada Law Book, Inc.

<sup>147</sup> The New South Wales Law Reform Commission echoes the view that the effectiveness of mediation largely depends on parties' participation with openness and candour. Please see New South Wales Law Reform Commission, *Alternative Dispute Resolution – Training and Accreditation of Mediators*, Report No. 67 (1991).

<sup>148</sup> Charlton, R. and Dewdney, M. (2004). *The Mediator's Handbook: Skills and Strategies for Practitioners*, 2<sup>nd</sup> ed., Lawbook Co.

non-disclosure by the mediator. To the researcher, this is related to the second level of confidentiality, that is, pertinent to caucuses only.

The second principle is related to the first level of confidentiality, that is, which applies to the mediation session as a whole from end to end where the parties and the mediator will not disclose to anyone who are not involved in the mediation any information or document given to them during the mediation. However, the researcher would include the lawyers for the parties to be exempted from this principle.

Lastly, the third principle states that the parties and the mediator will not disclose to anyone who are not included in the mediation any information or document given to them during the mediation unless required by law to do so or except for the purpose of obtaining professional advice or where the person is within that party's household. The researcher opines that it applies to both levels of confidentiality as it deals with exceptions to the first two principles of confidentiality, which are also both levels of confidentiality in mediation.

The next aspects of the concept of confidentiality touch on exclusion and privilege which are important to be distinguished in the review of this concept. On exclusion, it only limits admissibility of information at a trial, but disclosures or testimony in other situations may still be possible, and it does not matter whose testimony is sought, whether it is the mediator's or the parties.<sup>149</sup> On the other hand, privilege in mediation covers a broader scope of confidentiality where it involves parties in a relationship, and information (may also include files, records, notes, and the like) and communication between the parties and the mediator and between the parties themselves shared or made during the mediation session would be covered under privilege (Rogers and McEwen, 1989, 1993).<sup>150</sup> As to whether such

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<sup>149</sup> Kovach, K. K. (1994), *op. cit.*

<sup>150</sup> Rogers, N. H. and McEwen, C. A. (1989). *Mediation: Law, Policy and Practice*, chapter 8, and Supp. 1993, 115.

information or communication is treated as privileged by the courts, the traditional Wigmore test could be applied even in the case where the said communication was shared in a confidential relationship (Wigmore, 1961).<sup>151</sup>

### 2.5.1 Modes of confidentiality in mediation

In the researcher's view, it can be said that confidentiality in mediation is governed by three modes, namely, by virtue of the common law, the agreement of the parties to mediate, and by mediation rules, guidelines and legislation.

Under common law, per Oliver, L. J. (1984), the rule on confidentiality is based on the "without prejudice" rule which states that:

"...parties should be encouraged so far as is possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in a course of such negotiations... may be used to their prejudice in the course of the proceedings. They should...be encouraged freely and frankly to put their cards on the table" (p. 306).<sup>152</sup>

As held in two old cases, the common law position is that evidence of any admissions made in an honest and genuine attempt to reach a settlement in a dispute is inadmissible in subsequent court proceedings relating to the same subject. This privilege extends to both oral and written admissions made in good faith to settle disputes in a situation where such settlement fails.<sup>153</sup> The courts' willingness to apply

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<sup>151</sup> Wigmore, J. H. (1961). *Evidence in Trials at Common Law*, reviewed by McNaughton, J. T., Little Brown, Boston, Vol. 8 at para 2285. The four-part Wigmore test requires that (1) communications must originate in confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; (4) the injury that would endure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

<sup>152</sup> *Cutts v Head* [1984] Ch. 290; see also [1984] All E.R. 597 and [1984] 2 W.L.R. 349.

<sup>153</sup> See *Field v Commissioner for Railways (NSW)* [1957] 99 CLR 285, and *Rodgers v Rodgers* [1964] 114 CLR 608. See also *Tracy v Bifield* [1998] WASC 150.

the “without prejudice” privilege on grounds of public policy can be seen in newer decisions.<sup>154</sup>

As seen in *Lukies*, Justice Young expressed his view that:

“if parties have attempted to settle the whole or part of litigation and if they have agreed between themselves expressly or impliedly that they will not give in evidence any communication made during those discussions, then public policy makes those discussions privileged from disclosure in a court of law or equity” (p. 287).<sup>155</sup>

In *Rush & Tompkins Ltd v Greater London Council and Another* the court took a broader look at the issue by balancing two different public interests, namely, the public interest in promoting settlements, and the public interest in full discovery between parties in litigation (p. 1300).<sup>156</sup> It was held that as a general rule the “without prejudice” rule “renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement.”<sup>157</sup>

In *AWA Ltd v Daniels (t/as Deloitte Haskins & Sells)* the “without prejudice” privilege was held to be applicable to mediation where express or implied admissions made in the course of mediation cannot be disclosed.<sup>158</sup> It can be surmised that the “without prejudice” rule ensures that the mediation process is conducted privately under the veil of confidentiality and on a “without prejudice” basis. This means that in the event mediation does not succeed, the parties have not prejudiced their legal positions when they proceed to have their dispute heard in a court of law.

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<sup>154</sup> *Lukies v Ripley (No 2)* [1994] 35 NSWLR 283; *Rush & Tompkins Ltd v Greater London Council and Another* [1989] 1 AC 1280.

<sup>155</sup> *Lukies v Ripley (No. 2)*.

<sup>156</sup> [1989] 1 AC 1280.

<sup>157</sup> *Ibid.*

<sup>158</sup> [1992] 7 ACSR 463.



However, there are exceptions to the “without prejudice” rule. Some view these exceptions to include situations where communication is made where there is a dispute or where there are on-going negotiations between the parties; or where the settlement reached at the end of the mediation session is not privileged in cases where the negotiations conducted without privilege had led to that settlement; and only parties to the “without prejudice” negotiations and their solicitors may enjoy this privilege (Boulle and Nessie, 2001).<sup>159</sup> Yet others cited other circumstances where communications involving threat, abuse of the rule and lack of good faith; or the admission of a fact independent of, or collateral to the subject matter of the dispute; or the situation where the “without prejudice” document would prejudice the recipient; and where there is no dispute between the parties (Foskett, 1991).<sup>160</sup>

The second mode of governing confidentiality in mediation is through a contractual agreement between the parties and the mediator where a mediation agreement is executed at the beginning of the mediation session. In general, the parties and the mediator agree not to disclose information and communication arising from the mediation. Simply put, such an agreement contains confidentiality provisions which bind the parties to preserve confidentiality in mediation, which prohibit the parties from calling the mediator to give evidence on admissions or communication made during mediation in any court proceeding, or which prohibit the parties from joining the mediator in any legal proceedings brought by third parties, or which prohibits the mediator from disclosure of information obtained during mediation or during caucuses without consent from the parties, unless such disclosure is required by law.<sup>161</sup> However, the researcher contends that such agreements must satisfy the requirements and principles of a valid contract.

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<sup>159</sup> Boulle and Nessie (2001). *Mediation*. Butterworths.

<sup>160</sup> Foskett, D. (1991). *The Law and Practice of Compromise*, 3<sup>rd</sup> ed. pp. 127-133.

<sup>161</sup> See examples of mediation agreements of the Australian Commercial Disputes Centre, the Law Institute of Victoria, Australia, the Law Society of New South Wales Model Agreement to Mediate, and the ABA Standards of Practice for Lawyer Mediators in Family Disputes (Section II.A).

The last mode which governs confidentiality in mediation is through mediation rules, guidelines or legislation. In Malaysia, the rule governing confidentiality can be found in Section 23 of the Evidence Act 1950 which provides that “in civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.” Be that as it may, for purposes of this study, confidentiality in mediation is studied from the perspective of court-directed mediation in Malaysia.

As such, the confidentiality clauses in the current guidelines for judicial officers as mediators are pertinent to be included in this chapter, namely, the said Practice Direction, the said Rules for Court Assisted Mediation, and general guidelines as issued by CMCKL and CMCs in other parts of the country. The said relevant confidentiality clauses in the current guidelines which are applicable to judges and judicial officers who act as court mediators can be found under the following documents, namely:

1. In the said Practice Direction, the confidentiality clause is in Clause 6.2 (a).<sup>162</sup>
2. In the said Rules for Court Assisted Mediation, the confidentiality clauses are in Clause 9.1 and Clause 9.2.<sup>163</sup>
3. In “Pioneer Court-Annexed Mediation in Malaysia” the confidentiality clause is in Clause 10.<sup>164</sup>
4. In “The Court-Annexed Mediation Center Kuala Lumpur – a positive solution” which is issued by CMCKL, the confidentiality clause is similar to that of its previous issuance under “Pioneer Court-Annexed Mediation in Malaysia.”<sup>165</sup>

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<sup>162</sup> Appendix A, *supra* note 10.

<sup>163</sup> Appendix B, *supra* note 16.

<sup>164</sup> Appendix C-1, *supra* note 24.

<sup>165</sup> Appendix C-2, *supra* note 25.

It can be seen from the above confidentiality clauses in the various mediation guidelines for mediators in court-directed mediation that they are almost similar if not identical in three out of the four sets of documents, namely, the said Practice Direction and those contained in the general guidelines which have been issued by CMCKL (previously known as KLCMC) and CMCs in other parts of the country.

The said three sets of mediation guidelines cover the general rule on confidentiality and privilege in mediation, and also included is the exception to the said rule where it gives *all* parties the right to waive such a rule in that “unless all parties to both the Court proceedings and the mediation proceedings consent to its inclusion in the record or to its other use.” The only version of the confidentiality clause which is differently worded and outlined in more detailed is the one in the said Rules for Court Assisted Mediation.

The researcher takes this to mean that *all* parties in *both* the court proceedings as well as the mediation sessions need to provide their consent for all disclosures, admissions and communications which were made in the mediation sessions to be divulged, shared, used or included in the mediation record or to be used for other purposes. It is the researcher’s submission that although such a waiver has been provided in the said confidentiality clause, however, such a waiver is conditional upon a relatively strict rule to be complied with, that is, to obtain the consent from *all* parties in *both* the court proceedings and the mediation sessions.

In the researcher’s mind, “*all*” parties imply that this would involve not only the parties who are in dispute because it could be construed to also include other parties who are involved in the court proceedings. In addition, such consent should also be obtained from all parties in the mediation session which generally covers both parties who have come to the mediation session. In short, the researcher views the

waiver to the rule on confidentiality and privilege as one which requires extremely strict conditions to be met. This could potentially be read as deterrent in nature for any party who has the intention to breach the said rule.

As for the confidentiality clause in the said Rules for Court Assisted Mediation, the researcher opines that this clause has been carefully crafted to include both the scope and the extent of confidentiality to cover two levels of confidentiality, namely, the first level which covers the entire mediation process from end to end, with the second level which covers caucuses between the mediator and the parties without the other party present. This perspective of confidentiality is akin to the researcher's review of how the concept of confidentiality in mediation could be seen from these two perspectives in the earlier section of this chapter.<sup>166</sup>

In the researcher's view, amongst the four sets of the said documents, this particular confidentiality clause is by far the most comprehensive one which governs judges and judicial officers who act as court mediators in Malaysia. In fact, this clause focuses more on the first level of confidentiality which covers the entire mediation process where it articulates the do's of the mediator under Clause 9.1(b), (d) and (e), and what the parties are prohibited to do under Clause 9.1(c).

However, it is observed that there is no express provision for any exception to the confidentiality clause as it relates to the first level of confidentiality, that is, which applies to the entire mediation process. The said confidentiality clause does not state any circumstances which may warrant such a confidentiality rule to be waived or exempted. However, the same cannot be said about the second level of confidentiality, that is, which relates to the caucuses in mediation. Here the confidentiality rule is waived with the consent from the parties. The researcher submits that such a provision for waiver is fair. This is because it is the parties who

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<sup>166</sup> See the earlier section in this chapter.

ought to be the ones to waive the confidentiality rule as they are the givers of such confidential information and communication. The mediator has no right or authority to grant such a waiver or exception.

In addition to the confidentiality clauses in the said current guidelines governing mediators in court-directed mediation, it is also pertinent to highlight the confidentiality clause found in the mediation legislation which governs non-court mediators, namely, in the said Mediation Act 2012.<sup>167</sup> Although the said mediation legislation is not applicable to judges and judicial officers who act as mediators, it is in the researcher's humble view that all mediators ought to be governed by the same mediation rules on confidentiality and its exceptions to allow disclosure of such confidential information and communication, if any.

Under the said Mediation Act, the pertinent clause on confidentiality is contained in Clause 15(1) and Clause 15(2). The said Clause 15(2) provides that while confidentiality in mediation is seen as important to encourage the parties to negotiate with each other, there are limitations and exceptions to confidentiality. Based on the said confidentiality clause, it is to be noted that four circumstances have been identified to allow a waiver or an exception to the confidentiality rule under the said Clause 15(2) (a), (b), (c) and (d).

However, the said circumstances are disjunctive in nature where any one of the said circumstances could allow disclosure of any mediation communication. Besides that comment, one other point is that other than the parties who are involved in the mediation session or requirements under any written law, there is no provision to allow the said disclosure with consent from other parties in the court proceedings other than the parties in the mediation session.

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<sup>167</sup> Appendix D, *supra* note 27.

The researcher also notes that Clause 15(2) does not cover circumstances which are applicable to exceptions to the “without prejudice” privilege, in which case disclosure is allowed and not protected by the veil of confidentiality in mediation. For example, there could be situations where communication is made where there is no dispute or where on-going negotiations between the parties have ended, or where the agreement reached at the end of the mediation session is not privileged in cases where the negotiations conducted without privilege had led to that settlement, or the issue of costs arises as to whether or not it was made in the course of the “without prejudice” privilege discussions.

In the case of *Unilever Plc. v The Proctor & Gamble Co.*,<sup>168</sup> Laddie J cited three circumstances which the “without prejudice” communication and negotiation could be disclosed, namely, where the entitlement to rely on the said privilege may be treated as waived, or where a court may come to a conclusion that the claim to the “without prejudice” privilege is not bona fide, or where the court may disallow the claimed privilege in the light of public policy considerations which favour disclosure to override the settlement of disputes.

Another area which Clause 15(2) does not cover is when there are clear statutory provisions on confidentiality to disallow disclosure. A case in point is *Foxgate Homeowners’ Association v Bramalea California, Inc.*, where the Supreme Court of California had to consider whether a mediator may report to the court a party’s failure to comply with an order of the mediator and to participate in good faith in the mediation process although there are express provisions on confidentiality protection under Sections 1119 and 1121 of the Evidence Code of California.<sup>169</sup>

The researcher brings to light another case, *Olam v Congress Mortgage Company* where the Supreme Court ruled that a mediator’s testimony about events

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<sup>168</sup> [1999] 2 All ER 691.

<sup>169</sup> 25 P.3d 1117 (2001).

during mediation did not enjoy the confidentiality protection, and therefore was ordered to be disclosed and admitted as evidence.<sup>170</sup> In this case, the plaintiff had waived confidentiality, and the agreement fell within the exception of Section 1123 to include settlement agreements from mediation provided the said agreement was enforceable, where it was distinguished by the Supreme Court in *Foxgate* on the basis that confidentiality was waived by the plaintiff.

In other jurisdictions such as the USA the courts have been forced to construe the coverage of statutes which protect the confidentiality of mediation. For example, in the case of *Newark Board of Education v Newark Teacher Union*, a rule which provided that information disclosed by a party to a mediator in the performance of his or her duties would not be divulged voluntarily or by compulsion, was held did not include the documents because the mediator did not read the documents.<sup>171</sup>

One other example is in the American case of *N.L.R.B. v Joseph Macaluso, Inc.*,<sup>172</sup> where it was held by the Ninth Circuit Court of Appeals that a mediator's testimony on whether the disputing parties had actually agreed to a settlement could not be compelled, and that confidentiality was only a means to an end – preserving the effectiveness of the mediator for future disputes.<sup>173</sup> Based on this decision in *Macaluso*, there seems to be a need to strike a balance between the need for confidentiality (which prevents admissibility of the mediator's testimony) and the need to enforce settlement (which is the ultimate objective of mediation).

Similarly, the Supreme Court of New South Wales, Australia held in *AWA Ltd v Daniels (t/as Deloitte Haskins & Sells)* that documents referred to in mediation were admissible under general law, and therefore, fell out of the confidentiality protection in the mediation process.<sup>174</sup> Rolfe J distinguished between seeking to prove

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<sup>170</sup> 68F.Supp.2D 1110.

<sup>171</sup> 152 N.J. Super. 51, 377 A.2d 765 (Ct. App. Div. 1977)

<sup>172</sup> 618 F.2d 51 [9<sup>th</sup> Cir. 1980].

<sup>173</sup> *Ibid*, at pp. 54-56.

<sup>174</sup> [1992] 10 ACLC 933 is the citation of the substantive judgement on liability.

either directly, or, indirectly what was said at mediation (which he considered inadmissible) and seeking to prove by admissible evidence “a fact to which reference was made at mediation, not by reference to the statement but to the factual material which sourced the statement.”<sup>175</sup>

While the decision in this case had affirmed that the “without prejudice” privilege did apply to mediation, there were two unsettled issues before the court, namely:

1. The extent to which the limitations of this privilege might be removed in the context of mediations or other ADR processes; and
2. Whether a mediator might, without the consent of the parties, be required to give evidence of what transpired at mediation.<sup>176</sup>

It could be surmised that an attempt was made to address the said unsettled issues in the AWA case where the Dispute Resolution Committee of NSW Law Society revised its guidelines requiring mediators to inform the parties generally that communications in mediation are confidential and cannot be used as evidence subsequently.<sup>177</sup>

The Law Institute of Victoria, on the other hand, is more cautious in its advice to mediators where it is recognised that “there may be limitations on the extent to which courts will protect all communications made during the mediation” (Law Institute of Victoria, 1995).<sup>178</sup> Gibson (1992) advised that for those mediators who

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<sup>175</sup> *Ibid.*

<sup>176</sup> *AWA Ltd v Daniels (t/as Delloite Haskins & Sells)* [1992] 7 ACSR 463.

<sup>177</sup> The Law Society’s revised guidelines for solicitors who act as mediators were approved by Council of the Law Society on 29 July 1993 and reproduced in Riley, *NSW Solicitors Manual*, Butterworths, Sydney, 1987 to date (loose leaf), at (13320). Clause 6.6 of the revised guidelines provides: “The mediator shall inform the parties that, in general, communications between them, and between them and the mediator, during the preliminary conference and the mediations, are agreed to be confidential. In general, they cannot be used as evidence in the event that the matter does not settle at the mediation and goes to a court hearing. The mediator shall also inform the parties that they should consult their legal representatives if they want a more detailed statement of the position or if they have any specific questions about it.”

<sup>178</sup> *In Mediation – A Guide for Victorian Solicitors*, Law Institute of Victoria, 1995.



“do not support a clear-cut rule for mediators to always keep their clients’ confidences.”<sup>179</sup> The author concluded that

“mediation confidentiality is only as strong as the justifications that can be made on its behalf...there are two (crucial) elements...one is the policy element which supports the institution of mediation and the related role obligation; the second is the mediator’s own ethical judgment” (Gibson, 1992, p. 65, 66).<sup>180</sup>

Looking back at the said Clause 15(2), there does not seem to be any provision which requires consent from *all* parties from *both* the court proceedings and the mediation session in order for such disclosures to be made, unlike that of the said waiver and exception under the said Rules for Court Assisted Mediation. Based on these observations, the researcher submits that the confidentiality rule in the said Mediation Act is relatively less strict than the confidentiality rule as provided in the said Rules for Court Assisted Mediation. Lastly, with the privilege of reviewing the confidentiality clauses in the said current guidelines governing court-directed mediation, and the said mediation legislation governing non-court-directed mediation, it is the researcher’s submission that perhaps standardisation of confidentiality clauses ought to be of sound consideration as they relate to all mediators and all types of mediation in Malaysia.

### **2.5.2 Preserving confidentiality in mediation**

Confidentiality in mediation is of paramount importance because it facilitates disclosure by the parties, and provides the cloak of protection under the veil of

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<sup>179</sup> Gibson, K. (1992). Confidentiality in Mediation: A Moral Re-Assessment. *Journal of Dispute Resolution* 25.

<sup>180</sup> *Ibid.*

confidentiality in mediation. In short, people will not disclose personal needs, strategies, and information if they feel it might be used against them (Rempel and Holmes, 1986).<sup>181</sup>

However, in preserving confidentiality in mediation, such an effort is not congruent with the Malaysian legal system where all relevant evidence must be considered in adjudication. While a mediator is concerned with getting the parties' revelations on their true positions, interests and needs, the courts are obligated to make public disclosures of all relevant evidence. Hence, where courts are concerned, mediation cannot be used to exclude relevant evidence which is admissible in any court proceedings, or to go under the rule of privilege or the veil of confidentiality to shut out probative evidence (Freedman and Prigoff, 1986-1987, p. 39).<sup>182</sup>

In order to address this dilemma of preserving confidentiality in mediation, courts have permitted limited disclosure of information and communication during mediation based on a need for the evidence, or they have barred all mediation information and communication, or they have treated the matter as how it should be treated in any other contract with relevant evidence.<sup>183</sup> Be that as it may, the real question on the table is this - if the rule of privilege takes priority over the rule on evidence, how do benefits of privilege stack up against potential unfairness to be experienced in the adjudicated case where relevant evidence is excluded through non-disclosure of confidential information and communication?

It is noted that where benefits of privilege are to be assessed in relation to confidential information and communication in mediation are concerned, the researcher submits that, perhaps the traditional Wigmore test could be applied.<sup>184</sup> Of

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<sup>181</sup> Rempel and Holmes (1986). How Do I Trust Thee? *Psychology Today*, February, pp. 28-34.

<sup>182</sup> Freedman, L. R. and Prigoff, M. L. (1986-1987). Confidentiality in Mediation: The Need for Protection. 2 *Ohio St. Journal on Dispute Resolution* 37.

<sup>183</sup> A variety of cases on confidentiality as discussed in Deason, E. (2001). Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality. 35 *UC Davis L Rev* 33.

<sup>184</sup> See details on the Wigmore test, *supra* note 151.

paramount importance is whether there is greater unfairness which affects the case by not disclosing the confidential information or communication in mediation. In other words, the court would have to weigh the benefits of protecting such confidentiality in mediation against the unfairness or harm which may potentially be suffered by any party in the adjudicated case as a result of the said non-disclosure.

In cases where the benefits of protecting confidentiality in mediation outweigh the rule of evidence, the courts have maintained complete confidentiality, including refusal to admit mediator testimony to drive home the point the importance of mediators maintaining confidentiality. For example, in one case, it was held that,

“...a mediator must be able to instil trust and confidence of the participants in the mediation process...that confidence is ensured if the participants trust that information conveyed to the mediator will remain in confidence. Thus courts should be especially wary of mediator testimony because no matter how carefully presented, it will inevitably be characterised so as to favour one side or the other.”<sup>185</sup>

However, from a practical point of view, it is good advice to mediators and to the parties that there could be limitations on the extent to which courts will protect all communications made during the mediation (Law Institute of Victoria, 1995, p. 41).<sup>186</sup> This point has been previously discussed in a number of case laws from various jurisdictions, and in the confidentiality clauses in the mediation rules and guidelines governing judges and judicial officers who act as court mediators, and the mediation legislation which govern private mediators in Malaysia.

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<sup>185</sup> *Lehr v Afflito*, 889 A 2d 462, 474-5 [NJ Super D 2006].

<sup>186</sup> In *Mediation – A Guide for Victorian Solicitors*, Law Institute of Victoria, 1995.

The researcher notes that there are other mixed views on how confidentiality in mediation is perceived, and the importance of confidentiality in mediation.<sup>187</sup> The general view was that confidentiality in mediation is a key contributor to the parties settling their disputes.<sup>188</sup> Some viewed confidentiality in mediation as being a key contributor was premised on their observations and mediation experience that the parties generally come to the mediation table with open minds, and with an expectation that confidentiality is assured in the mediation process.<sup>189</sup>

They were of the opinion that the parties would explore options in their discussions with the mediator and with the other party under the said assurance. As such, it was observed by the researcher that such an assurance on maintaining confidentiality throughout the mediation process would subsequently motivate and encourage the parties to try to resolve their dispute amicably.<sup>190</sup> Some felt that the parties want to conceal their “weaknesses” in their respective areas, and to avoid having to “wash dirty linen in public” they take advantage of the private and confidential elements in mediation.<sup>191</sup> Others opined that based on their mediation experiences they observed that many disputes had been resolved via mediation because of confidentiality in mediation, especially in an Asian society like Malaysia.<sup>192</sup> Yet others opined that the key question is how the parties create trust in the mediator where the parties must feel that the mediator is someone they can trust for any mediation to be effective.<sup>193</sup>

On the other side of the coin, some of the views centred on the point that confidentiality is a non-factor in the settlement of disputes via mediation, where confidentiality would not be seen as a factor for the parties to reach a settlement

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<sup>187</sup> The respondents comprised 7 from the judiciary and 27 from the MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>188</sup> *Ibid.*

<sup>189</sup> This view was shared by 5 out of 7 respondents from the judiciary in Mediation Interview – Part 1.

<sup>190</sup> Out of the 27 respondents from the MMC Panel of Mediators, 20 of them shared this view in Mediation Interview – Part 1.

<sup>191</sup> This point was revealed by 3 out of the 27 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>192</sup> This view was shared by 2 of the total of 34 respondents in Mediation Interview – Part 1 where one of them was from the judiciary in Sarawak.

<sup>193</sup> This question was raised by 3 of the 27 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

because most disputes would have commenced in the courts already where relevant information or evidence would have been disclosed in public.<sup>194</sup> On the question on confidentiality as a factor which contributes to mediation effectiveness in the settlement of disputes, it was opined that confidentiality in mediation has its limitations, and that such limitations should not get in the way of mediation because there is full and frank disclosure expected of the parties during mediation.<sup>195</sup>

One view on the limitations of confidentiality stated that the rule on confidentiality may be waived where the mediator is required to disclose by general law or with the consent of the parties information or communication which were shared during mediation, or if such disclosure is necessary to implement or enforce any settlement agreement.<sup>196</sup> However, it was felt that a lot would depend on the facts, circumstances and nature of the disputes at hand.<sup>197</sup> It was further noted that if the rule on confidentiality is to be fully observed that may impair any prospect of the parties to reach an amicable settlement.<sup>198</sup>

## 2.6 Impartiality and Neutrality

“Impartiality” and “neutrality” are defined in a number of dictionaries such as Webster’s and Oxford. In addition, there is a multitude of definitions offered by various authors and mediation professional organizations as they attempt to describe and distinguish mediator impartiality and mediator neutrality.<sup>199</sup>

<sup>194</sup> This revelation was made by 6 respondents, 2 of which were from the judiciary and 4 from the MMC Panel of Mediators, from the 34 respondents in Mediation Interview – Part 1.

<sup>195</sup> This view was shared by all 7 respondents from the judiciary from a total of 34 respondents in Mediation Interview – Part 1.

<sup>196</sup> This view was from one out of 27 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>197</sup> This was shared by one out of 27 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>198</sup> 4 out of 27 respondents from the MMC Panel of Mediators shared this view in Mediation Interview – Part 1.

<sup>199</sup> *Mediation UK Practice Standards*, Article 20 refers to the concept of non-partisan fairness as ‘impartiality’, which is defined as “attending equally to the needs and interests of all parties with equal respect, without discrimination and without taking sides.” See the definition by the Model Standards of Conduct for Mediators (a joint effort by the AAA, ABA and SPiDR, Washington DC: Society of Professionals in Dispute Resolution, Article II, 1995) on ‘impartiality’ which is described as even-handedness and lack of “prejudice based on the parties’ personal characteristics, background or performance at the mediation.” Other professional organizations such as the *Colorado Council of Mediation Organizations* (CCMO, 1992), *SPiDR* (1987), *National Association of Social Workers* (NASW, 1991), and *Academy of Family Mediators* (AFM, 1985) standards all define ‘impartiality’ as involving freedom from favouritism and bias in either word or action.

‘Impartiality’ refers to the way in which mediators conduct the process and treat the parties, while ‘neutrality’ refers to mediators’ prior knowledge about or interest in the outcome of disputes.<sup>200</sup> The essential criterion for neutrality is that there must be no conflict of interest in any aspect of the third party relationship with the parties in a dispute.<sup>201</sup> ‘Neutrality’ is defined as disinterest in the outcome of the dispute and absence of influence over the outcome, while ‘impartiality’ refers to absence of bias or preference in favour of one or other of the parties (Wolski, 2002).<sup>202</sup>

In some instances, neutrality is not specifically defined and mediators are referred to as “third party neutrals” (Society of Professionals in Dispute Resolution, USA).<sup>203</sup> Similarly, according to some professional organizations, neutrality is described and referred to as the relationship between the mediator and the parties or the issues, or both, involved in the mediation.<sup>204</sup> Others allude to neutrality in the sense that mediators should “have no relationship with parties or vested interests in the substantive outcome that might interfere or appear to interfere with the ability to function in a fair, unbiased, and impartial manner” (National Association of Social Workers, USA, 1991).<sup>205</sup>

However, it is asserted that impartiality is not the same as neutrality (American Bar Association, 1984).<sup>206</sup> It was explained that the mediator must be impartial and be seen to be impartial when dealing with both parties during the mediation process. In addition, it is the mediator’s duty to ensure that both parties are

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<sup>200</sup> Lim, L.Y. (1997), *op. cit.*

<sup>201</sup> *Ibid.*

<sup>202</sup> Associate Professor Bobette Wolski (2002). Mediator Settlement Strategies: Winning Friends and Influencing People. *Bond Dispute Resolution News*, Volume 12, June. This article is based on a paper given by the author at the Australasian Law Teachers’ Association Conference held in Vanuatu on July 2-4, 2001.

<sup>203</sup> Society of Professionals in Dispute Resolution (SPiDR) Model Standards of Conduct for Mediators.

<sup>204</sup> See Colorado Council of Mediation Organizations, “Code of Professional Conduct”. In *Dispute Resolution: Negotiation, Mediation and Other Processes*, (Eds. Goldberg, S.B., F.E.A. Sander, and N.H. Rogers) (1992)(2<sup>nd</sup> ed.), Boston: Little, Brown & Co.; National Association of Social Workers, *Standards of Practice for Social Work Mediators*. (1991). Washington, D.C.: National Association of Social Workers; Academy of Family Mediators, *Standards of Practice for Family and Divorce Mediation*. (1985). Eugene, Oregon: Academy of Family Mediators.

<sup>205</sup> National Association of Social Workers, *Standards of Practice for Social Work Mediators*. (1991). Washington, D.C.: National Association of Social Workers.

<sup>206</sup> American Bar Association (1984). *Standards of Practice for Family Mediators*. 17 *Family Law Quarterly*, p. 455.

treated fairly as they work towards reaching an amicable settlement. In the researcher's opinion, an impartial mediator is one who is unbiased and does not have any preference in favour of one party over the other throughout the entire mediation process, even during the caucuses where the mediator is alone with one party at different times, where the mediator has the opportunity to be partial.

Hence, an impartial mediator makes it very clear to the parties that he or she will not influence any party in arriving at any of the options tabled during the mediation process, and that he or she has no pre-conceived bias towards any of the options tabled or the agreed outcome by the parties. The impartial mediator does not allow his or her own values, opinions and emotions to interfere with the mediation process from start to end. On the other hand, a neutral mediator is one who has no prior or current relationships with either of the parties or both parties whether directly or indirectly, and that the mediator has no prior knowledge about or interest in the outcome of the dispute. It also means that a neutral mediator does not take sides (this means the mediator is not siding any party) in order to ensure there is fairness throughout the process.

The neutral mediator has high credibility with the parties, and focuses on the mediation process rather than the outcome or settlement where the mediator is disinterested in the outcome of the dispute and has no influence over the said outcome. The researcher submits that in order to protect mediator neutrality, if the mediator, or any of the parties feel that the mediator's background or experiences could prejudice the mediation process and its outcome, the right thing to do is for the mediator to withdraw himself or herself from the mediation session unless the parties agree to allow the mediator to proceed.

Taking mediator impartiality and mediator neutrality together, it is important to note that these elements are most evident in two aspects of mediation, namely, in

the balance and conduct of the negotiations which the mediator facilitates in the mediation process, and secondly, the ultimate result or outcome of the mediation (Kovach, 1994, p. 103).<sup>207</sup> In the researcher's humble opinion, these areas constitute difficult areas which test and stretch the mediator's impartiality and neutrality in the entire mediation process. In fact, the researcher views that the mediator must be mindful of ethical considerations and ethical dilemmas because on the one hand, the mediator's duty is to remain neutral, and on the other hand, the mediator has to ensure that all parties are treated fairly. This balancing act is not an easy feat as there seems to be a fine line which the mediator may find it difficult to cross.

The mediator would need to juggle the balancing act in a more delicate manner where there is power imbalance between the parties. How the mediator conducts himself or herself in the name of mediator impartiality and neutrality in the said balancing act speaks volumes because the mediator could put the parties' trust and credibility of the mediator at risk. In essence, the mediator cannot take sides, cannot influence the parties' deliberation on and negotiation of the available options even at caucuses, and cannot allow his or her own opinions, values and emotions to cloud his or her role as a mediator throughout the mediation process.

On the ultimate outcome of the mediation session, the mediator cannot interfere with the parties' decision on their agreed outcome in terms of providing his or her opinion about the said outcome. The mediator's role is to ensure that the process of arriving at the said outcome must not be impaired or influenced by the mediator, and that the parties are given full autonomy and control to determine the final result which they both agree to as a settlement, and one which they both can live with. In short, it is the parties who make the decision, not the mediator.

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<sup>207</sup> Kovach, K. K. (1994), *op. cit.*



## 2.7 Mediator Capabilities and Skills

It has been commented that “even the cases most suitable for mediation will not result in success if the mediator conducts them poorly” because there is correlation between experience of a mediator and effectiveness in reaching a settlement (Pearson and Thoennes, 1988, p. 117).<sup>208</sup> Another comment is that “common wisdom holds that mediation is only as good as the mediator” (Henderson, 1995, p. 113).<sup>209</sup> This is the part of the mediation process which constitutes the human element - mediator capabilities and skills - play an important factor in the effectiveness and success of mediation in the settlement of disputes. Simply put, the overall quality of mediators is critical in overall mediation success.

The Centre for Public Resources’ Commentary on its Mediation Rules provides a list of desirable attributes of mediators, which includes articulateness and persuasiveness, flexibility and patience, good listening, problem analysis and problem solving ability, creativity, and good negotiation skills (Boulle and Teh, 2000).<sup>210</sup> An Australian survey indicated that “patience” was ranked the most desirable attribute of a mediator, followed by “friendliness,” “sense of humour,” “good organization skills,” and “empathy.”<sup>211</sup>

The research conducted by Lim & Carnevale (1990) indicated that “mediators who facilitated communication and provided clarification and insights were most likely to achieve settlement” (p. 260).<sup>212</sup> Professors Pearson and Thoennes (1988) reported that the most important predictor of mediator behaviour was the “perceived ability of the mediator to facilitate communication between the parties” (p. 121).<sup>213</sup>

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<sup>208</sup> Pearson, J. and Thoennes, M. (1988). Divorce Mediation Research Results. In Folberg, J. P. and Milne (eds.) *Divorce Mediation: Theory and Practice*, Guildford Press, New York.

<sup>209</sup> Henderson, D. A. (1996). Mediation Success: An Empirical Analysis. 11 *Ohio St. J. on Dispute Resolution* 105.

<sup>210</sup> Boulle, L. and Teh, H. H. (2000), *op. cit.*

<sup>211</sup> Bond Dispute Resolution Centre, “*Reflections on conflicts – lessons learned*,” Survey results, October 1999.

<sup>212</sup> Lim, R. G. & Carnevale, P. J. D (1990), *op. cit.*

<sup>213</sup> Pearson, J. and Thoennes, M. (1988), *op. cit.*

Further, if the parties trust the mediator, they will perceive this as “quality”, which translates into increased settlement rates in a research which focused on the correlation between the overall quality of the mediator and the final mediation outcome (Kochan and Jick, 1978, p. 226, 227).<sup>214</sup> In other words, it was concluded that settlement is more likely to be reached with a more experienced mediator (Wissler, 2002, p. 678, 679).<sup>215</sup>

Studies by several researchers on court-connected programmes (mediation and other ADR mechanisms) attributed settlements and party satisfaction to mediators who are effective in facilitating communication, and listening; active in structuring the mediation process; focus on feelings, relationship concerns, interests; emphasize on problem solving, creativity at generating options and solutions; and generate a greater number and variety of interventions during the mediation process.<sup>216</sup>

Very similar views echoed the extent mediator capabilities and behaviour influence or contribute to the prospect of cases getting settled.<sup>217</sup> In fact, one view stressed that mediation is both an art and a gift; hence, it was opined that it is a case of “either you have it or you don’t.”<sup>218</sup> The researcher shares the same view that a good mediator is someone who is sensitive to people’s feelings and emotions, and has empathy for the parties. By mediator capabilities and skills, the researcher humbly submits that such capabilities and skills refer to capabilities, experiences, and skills which relate to conducting mediation, and do not refer to the mediator’s professional training in various industries or disciplines.

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<sup>214</sup> Kochan, T. A., & Jick, T. (1978). The Public Sector Mediation Process: A Theory and Empirical Examination. 22 *J. Conflict Resol.* 209.

<sup>215</sup> Wissler, R. L. (2002). Court-Connected Mediation in General Civil Cases: What we know from empirical research. 17 *Ohio State Journal on Dispute Resolution* 641.

<sup>216</sup> Henderson, D.A. (1996), *op. cit.*, p. 115; Kelly, J. B. (1996). A Decade of Divorce Mediation Research. 34(3) *Family and Conciliation Courts Review* 373, pp. 380-382; Pearson, J. A. (1997). Mediating When Domestic Violence is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs. 14 *Mediation Quarterly* 319, pp. 68-9; Rosenberg, J. D. and Folberg, J. P. (1994). Alternative Dispute Resolution: An Empirical Analysis. 46 *Stanford Law Review* 1487, p. 1532.

<sup>217</sup> A total of 34 respondents, comprising 7 from the judiciary and 27 from the MMC Panel of Mediators were included in Mediation Interview – Part I.

<sup>218</sup> This was a respondent from the judiciary in Sarawak in Mediation Interview – Part I.

In fact, professional training could sometimes become a setback to the mediator as he or she could be tempted to draw from previous professional experiences during the conduct of the mediation session. This point is particularly pertinent to court-directed mediation where judges and judicial officers act as mediators on a part-time basis. Therefore, the question on the table is whether they will make good and effective mediators considering the fact that the kind of capabilities and skills of the mediators are relatively very different from those of the judges and judicial officers.

It was viewed that the kind of attributes which an effective mediator should possess is someone who possesses a friendly and approachable personality, has a complete look at mediation as an informal session, uses a lot of psychology, treats the mediation session as the best opportunity to assist the parties to reach resolution for their dispute, patiently navigates the parties through the mediation process step by step, and paces these steps, and spends sufficient time in joint meetings with both parties and/or in caucuses with each party, and is able to take emotional outbursts from the parties, if any.<sup>219</sup> Further, the mediator's listening skills and patience are key skills which are instrumental to determine how the mediator conducts the mediation session.<sup>220</sup> In addition, the view was that the capabilities of the mediator to apply his or her knowledge, experience, art and skills are important to facilitate a structured mediation process.<sup>221</sup>

In the researcher's humble submission, an effective mediator must possess four basic attributes. First, the mediator must have the innate passion and affinity to help and guide people to solve their problems as painlessly and as smoothly as possible. In mediation, people's problems come in the form of disputes which the

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<sup>219</sup> All 34 respondents in Mediation Interview – Part 1 shared the same views.

<sup>220</sup> *Ibid.*

<sup>221</sup> All 27 respondents from the MMC Panel of Mediators from the total 34 respondents in Mediation Interview – Part 1 shared this view.

parties want to resolve in the most amicable fashion with an outcome which they can both live with. The question is whether judges and judicial officers have this innate passion and affinity. Many do; perhaps not all of them. Hence, this is not an automatic attribute that all court mediators possess.

Second, the mediator must have empathy. The mediator must be able to see the problem from the parties' perspectives so that he or she is able to appreciate what the root cause/s of the dispute is/are. With empathy, the mediator would be able to understand the root cause/s of why and how the dispute started in the first place, and why the parties behaved the way they did, or why the parties did what they did, in response to the dispute at hand. In this way, the mediator would be able to put himself or herself in the parties' shoes in order to have a better view of the various options which are tabled for negotiations between the parties concerned.

The third attribute is humility. Humility helps the mediator to remain modest, humble and be sensitive to what the parties are going through as far as the dispute is concerned. With humility, the mediator would not go about conducting the mediation process in a mechanical manner in his or her duty to assist the parties to resolve the dispute. Instead, the mediator would take cognisance of the underlying issues and interests of both parties. A mediator with humility would be able to avoid being judgemental on the options tabled by the parties, or be able to avoid providing expert advice on the substantive elements of the dispute, or be able to avoid providing his or her opinion on the final outcome of the dispute.

Lastly, the mediator must be a patient person. The entire mediation process is premised on the principle that the parties have come to the mediation table voluntarily, and with the hope that they would be able to resolve their dispute amicably. Sometimes, mutuality and consensus may be what the parties look for in mediation in their effort to arrive at an agreed final outcome which both parties can

live with. However, this may not often be the case. Simply put, the parties need the required time to reach a settlement to their dispute when they come to the mediation table, whether or not, the dispute eventually gets settled. Therefore, it is inevitable and justified that the mediation process takes the required time it deserves.

This also means that the mediator who conducts the mediation session must be someone who is patient in all sense of the word – from getting the parties to come to the mediation table, from understanding their underlying interests and issues devoid of all emotions and opinion, to tabling options for both parties to consider and to negotiate between them, to conducting caucuses with each party where required, and providing the necessary guidance and assistance to the parties throughout the entire mediation process.

Based on the identified basic attributes, the question is whether court mediators in Malaysia have these basic attributes as effective mediators. The researcher is of the view that it is *the* personality and *the* attitude of the judge or judicial officer which is of paramount relevance and importance in this discussion. Therefore, it is not by chance that seniority on the bench is irrelevant insofar as determining effective mediators are concerned. Some say mediation is an art, and not a science, and mediation skills which are innate or inherent, cannot be taught or learned or developed (New South Wales Law Reform Commission, 1989, p. 21).<sup>222</sup> Studies have provided evidence in that “mediation is more likely to be more successful if a mediator shares at least the social or cultural experiences of the parties or brings to the dispute a detailed knowledge of the parties’ perspectives” (Boulle & Teh, 2000, p. 115).<sup>223</sup>

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<sup>222</sup> “Mediators are born, not made”, New South Wales Law Reform Commission *Alternative dispute resolution – training and accreditation of mediators*, Discussion Paper 21, 1989.

<sup>223</sup> Boulle, L. and Teh. H. H. (2000), *op. cit.*

In any case, there are three areas of mediator competencies, which can be developed through training, education and reflection, namely, knowledge of the theory and process of negotiation and mediation; the mediation skills of planning, organization, communication, intervention and analysis; and attitudes which are appropriate for mediation, including an acceptance of its philosophy and ethics (Cruickshank, 1991, p. 248).<sup>224</sup> However, experience in these areas will enable mediators to design and drive mediation towards delivering in an effective outcome (Nupen, 1993, p. 39, 40).<sup>225</sup>

The researcher further submits that while we recognise that a person's personality is difficult to change, attitude change seems to be an area which is trainable. Hence, in the selection and appointment of judges and judicial officers to act as court mediators, the researcher is of the view that it is important to consider the personality and the attitude of these adjudicators. In other words, there must be a standardized set of criteria and a formalised process to ensure that the adjudicators who are selected and appointed as court mediators possess the described four basic attributes of an effective mediator. Hence, they should not be compelled to act as mediators, and neither should it be mandatory for them to act as mediators.

### **2.7.1 Mediator's Subject Matter Expertise**

There is one area which is of interesting debate - whether mediators with the subject matter expertise of the dispute make better and more effective mediators. The question is whether the mediator should possess the expertise in the subject matter of the dispute. Could the background and the experience of the mediator bring value to the outcome of the dispute so long as the mediator is able to distinguish between his

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<sup>224</sup> Cruickshank, D. (1991). Training mediators: moving towards competency-based training. In Mackie, K. (ed.) *A Handbook of Dispute Resolution*.

<sup>225</sup> Nupen, C. (1993). Mediation. In Pretorius, P. (ed.), *Dispute Resolution*, Juta & Co, Kenwyn, South Africa.

role as a mediator (at least has the basic knowledge of the area of mediation), and not the role as a professional? (Boulle and Teh, 2000).<sup>226</sup>

Given the mediator's subject matter expertise, the mediator may be tempted to take an evaluative or adjudicative approach as compared to the facilitative approach to mediation (Centre for Dispute Resolution, London, 1999).<sup>227</sup> Another view is that:

“If you have someone who specialises in [the] sector and is a good mediator, this will often be more effective – specialists will tend to have a quicker grasp of the various negotiating options that already exist in a field...there is a danger that their expertise may get in the way of their mediation role, but if they allow that to happen they are by definition unlikely to be excellent mediators in the first place...”  
(Karl Mackie, p. 5).<sup>228</sup>

It is important for the parties to realise that the mediator is not a judge or their lawyer, and hence, the mediator is not allowed to give his or her view or opinion on the merits of the case. Thus, where the parties insist to have mediators who have the subject matter expertise this could be construed as the “parties’ preoccupation with finding a legal or factual answer to a specific question under the guise of mediation” (David Shapiro, p. 4).<sup>229</sup> On the other hand, it was reported that “parties or their lawyers perceived that a lack of mediator’s lack of subject matter expertise was a factor in continued impasse in the mediation” (Boulle & Teh, 2000, p. 115).<sup>230</sup> Others concluded similar findings where “clients in family mediation who believed that the

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<sup>226</sup> Boulle, L. and Teh, H. H. (2000), *op. cit.*

<sup>227</sup> Centre for Dispute Resolution, *Court Referred ADR: a guide for the judiciary*, CEDR, London, 1999.

<sup>228</sup> Mackie, K. Expert mediators – not experts as mediators: CEDR replies. *Resolutions*, Issue no. 16.

<sup>229</sup> Shapiro, D. Expert mediators – not experts as mediators. *Resolutions*, Issue no. 16.

<sup>230</sup> Boulle, L. and Teh, H. H. (2000), *op. cit.*

mediator was not confident or familiar in handling the dispute dismissed the possibility of a successful outcome” (Boulle & Teh, 2000, p. 115).<sup>231</sup>

The above statements are true in their respective forms. When the mediator has domain expertise in the subject matter of the dispute, it is only natural that he or she will have the temptation to jump into the discussions with the parties, wearing an evaluative or adjudicative hat or lens. The mediator would be drawn into providing expert advice or expert opinion on the various options as he or she evaluates the substantive elements of the said options. Further, instead of performing the mediator role of managing and controlling the procedural aspects of the mediation process, the mediator may also be tempted or be drawn into the decision-making process together with the parties given his or her expertise in the particular subject matter.

The researcher humbly submits that this is the risk or danger which could befall the mediation session where the mediator has the subject matter expertise in question. Such a risk or danger is even more acute and prevalent in the case where judges and judicial officers act as court mediators on a part-time basis where they are also adjudicators in office. The researcher is mindful of the fact that where the mediator is a subject matter expert, he or she would be able to appreciate the underlying issues and interests of the dispute even more. This could be advantageous to the parties because the mediator would be able to grasp the technicalities of the dispute, and to provide sufficient guidance in the negotiations and discussions between the parties. Such an advantage could generally result in an outcome which could be more beneficial to the parties given the mediator’s appreciation of the nature of the dispute at hand.

However, the mediator may be caught in an ethical dilemma of grappling with the professional conduct of a mediator and the professional contribution as a subject

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<sup>231</sup> *Ibid.*



matter expert. If the mediator is not a strongly principled professional, he or she may be swayed or tempted towards offering expert opinion on the subject matter of the dispute. This would be the easier route to be taken by the mediator who has been trained in the particular domain expertise in question.

The researcher views that judges and judicial officers who act as mediators could easily fall into this trap because of their own professional inclination. Further, the parties could use mediation as the guise for reaching out to the mediator to obtain professional opinion and advice especially where the mediator is a judge or judicial officer. Traditionally, these court officials are viewed as persons of high and respected authority by the public at large, and the parties would not be an exception to the general rule. Hence, it is the researcher's submission that the risk or danger could be relatively more acute in court-directed mediation.

However, there are contrary views which stressed that the confidence of the parties in the mediator depends largely on the mediator's knowledge of the technical aspects of the issues.<sup>232</sup> Simply put, such views seemed to support the idea that the mediator's subject matter expertise is an advantage to the parties for them to reach an agreed outcome in a speedier fashion, as the mediator would be viewed by the parties as specialists or experts in the subject matter of the dispute concerned, and would be looked up and respected by the parties. It is also safe to surmise that the parties could view such a mediator as someone they could reach out to for professional advice. This view is also shared by some authors who emphasized on the need for mediators to be competent and knowledgeable in the subject matter which they mediate (Folberg and Taylor, 1984, p. 241).<sup>233</sup>

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<sup>232</sup> This view was shared by 7 out of the 34 respondents in Mediation Interview – Part 1, where 2 of them were from the judiciary in Sabah and Sarawak.

<sup>233</sup> Folberg, J. P. and Taylor, A. (1984), *op. cit.*

### 2.7.2 The Role of the Mediator

It has been said that mediators put themselves in the broad category of professional – a category of people who know more than ordinary people and who deserve to have their suggestions followed (Tracy and Spradlin, 1994, p. 116).<sup>234</sup> Others believed that mediators ought to be advisors as they would typically have gone through similar situations many times before, and hence would be familiar with those situations (Irving and Benjamin, 1995, p. 171).<sup>235</sup> In short, the role of the mediator is best explained by this metaphor – that “the mediator’s role is to direct the traffic, like a traffic officer, but the parties will be doing all the driving” (Boulle, 2001, p. 19).<sup>236</sup>

It has been said that the central quality of mediation is its capacity to reorient the parties toward each other not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another (Fuller, 1971).<sup>237</sup> As an illustration, in the final stages of the mediation process, the role of the mediator would involve helping the parties to negotiate all available options between them, which may trade options, give-and-take bargaining, where the parties may modify their positions, so that the final outcome of their dispute is agreed by and accepted by both parties, one which they can live with (Haynes, 1993).<sup>238</sup> From a more practical sense, the role of the mediator can be described as a multi-functional one from the perspective of the end-to-end mediation process where the mediator is seen as a chairperson, guide, coach, referee, communicator, and protector of the process.<sup>239</sup>

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<sup>234</sup> Tracy, K. and Spradlin, A. (1994). Talking Like a Mediator: Conversational Moves of Experienced Divorce Mediators. In Folger, J., and Jones, T. (eds.), *New Directions in Mediation – Communication Research and Perspectives*, Sage Publications.

<sup>235</sup> Irving, H. and Benjamin, R. (1995). *Family Mediation – Contemporary Issues*, Sage.

<sup>236</sup> Boulle, L. (2001). *Mediation: Skills and Techniques*, Sydney: Butterworths.

<sup>237</sup> Fuller, L. L. (1971), *op. cit.*

<sup>238</sup> Haynes, J. (1993). *Alternative Dispute Resolution – Fundamentals of Family Mediation*. Old Bailey Press.

<sup>239</sup> *Supra* note 3.

One of the perspectives was that on many occasions the parties tend to take the cue from the mediator.<sup>240</sup> By that, it was meant that the mediator sets the tone of how the mediation process will be conducted, where much depends on the mediator's body language, the tone of the mediator's voice, the words and language used by the mediator, which could inspire confidence and trust in the mediator. In fact, the arrangement of the room where the mediation takes place is also an important detail to take note of because the physical room setting cannot be intimidating to the parties or too formal a setting given that mediation is an informal process.<sup>241</sup>

These observations are extremely important as they set the tone and manner in which mediation will be conducted in an informal manner. The mediator must ensure that adversity or hostility between the parties is kept under sufficient control especially at the start of the mediation session by leveraging on the parties' agreement to come to the mediation table in the first place. Simply put, many see the mediator as the person who narrows underlying issues at hand for the parties, suggests potential solutions with identified pros and cons and suggestions of available options on how the dispute could be resolved; assists the parties on what they really want by understanding their underlying interests and needs; inspires confidence and trust to the parties, and raises relevant points to enable the parties to "see" the real issues where they could have overlooked them.<sup>242</sup>

Hence, the researcher surmises that the mediator is the driver of the "central quality of mediation."<sup>243</sup> Therefore, it is of paramount importance that the mediator keeps in mind key principles in a settlement-seeking mediation model, namely, separate the people from the problem; be soft on the people and hard on the problem;

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<sup>240</sup> These were the views of 9 of the 27 respondents from the MMC Panel of Mediators where a total of 34 respondents were included in Mediation Interview – Part 1.

<sup>241</sup> This was the view of one respondent from the MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>242</sup> These respondents comprised 50 of the total of 61 respondents in Mediation Interview – Part 1 and Mediation Interview – Part 2, where all 34 from Mediation Interview – Part 1 shared this view in addition to 8 respondents from the judiciary and 8 respondents from the MMC Panel of Mediators in Mediation Interview – Part 2.

<sup>243</sup> For a description of this term, see Fuller, L. L. (1971), *op. cit.*

focus on interest, not positions; create options for mutual gain; and reach win/win solutions instead of win/lose outcomes.<sup>244</sup>

## 2.8 Culture

In the context of disputes or conflict, culture should be understood to include all values and beliefs that affect how each individual understands his or her experiences of conflict, and how those individual's values and beliefs are connected to any set of people who share the same accumulated knowledge and experiences (Macfarlane, 2001, p. 671, 672).<sup>245</sup> Culture consists of unwritten rules and patterned ways of thinking, feeling and reacting, acquired and transmitted mainly by languages or symbols (Thomas, 2002, p. 28).<sup>246</sup> Hence, in every society there are multiple cultures which are defined by different age groups, gender, language spoken, ethnicity, spiritual beliefs, values and educational upbringing (Jandt, 2004).<sup>247</sup>

The term "culture" refers to habits, behaviour and manners of a given people at a given period of development, where it comprises a unique set of attributes relating to an aspect of social life (Lim, 1996, p. 197).<sup>248</sup> It was also stressed that culture is, therefore, one component which a mediator should be aware of in addition to other personality and procedural aspects which influence the mediation process (Street, 1990, p. 5).<sup>249</sup> In terms of the approach to resolving disputes, a more adversarial approach is preferred in the Western culture (Sarat, 1985, p. 321).<sup>250</sup> In contrast, a friendly negotiation or consultation is the practice where Confucian

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<sup>244</sup> Fisher, R. and Ury, W. R. (1991), *op. cit.*; Haynes, J. (1993), *op. cit.*

<sup>245</sup> Macfarlane, J. (2001), *op. cit.*

<sup>246</sup> Thomas, D. C. (2002). *Essentials of International Management: A Cross-cultural Perspective*, Sage.

<sup>247</sup> Jandt, F. E. (2004). *Introduction to International Communication: Identities in a Global Community*, 4<sup>th</sup> ed., Sage.

<sup>248</sup> Lim, L. Y. (1996). Impact of Cultural Differences on Dispute Resolution. 7 *Australian Dispute Resolution Journal* 3.

<sup>249</sup> Street, L. (1990). The Court System and Alternative Dispute Resolution Procedures. 1 *Australian Dispute Resolution Journal*.

<sup>250</sup> Sarat, A. (1985). The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions. 37 *Rutgers Law Review*.

teachings of moral persuasion discourage litigation between parties in dispute (Kim, 1987, p. 1413).<sup>251</sup>

Hence, culture is a factor to be considered in the conduct of mediation. Even the Mediation UK Practices Standard provides for mediators to be aware of “local and cultural differences that need to be taken into account.”<sup>252</sup> Some say that sometimes the actual root cause of the dispute may not be cultural differences; but these differences sometimes play a crucial role in the outcome of mediation (Stringer and Lusardo, 2001).<sup>253</sup> It was said that a mediator who is aware of these sensitivities is more likely to succeed in helping the parties with different cultural backgrounds achieve a satisfying resolution to their dispute.<sup>254</sup>

Mediators should have the knowledge about the relevance of culture to varying aspects of conflict and dispute resolution, which include the diversity of problem-solving approaches, communication and negotiation styles, ways of making concessions and compromises, sense of physical space, venue and time, attitudes toward the mediator and response to law, lawyers and professional advisors.<sup>255</sup> In the researcher’s view, these are valid points and details which the mediator cannot afford to take for granted. The question is whether judges and judicial officers who act as mediators have any guidelines on how to handle the cultural element especially in a multi-racial country such as Malaysia, and whether they consider the culture factor when they conduct court-directed mediation in Malaysia.

One author attempted to provide guidelines on the rules of conduct for cross-cultural mediation which are premised on good common sense, such as mediators ought to expect different expectations from individuals who are from different

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<sup>251</sup> Kim, C. (1987). The Modern Chinese Legal System. 61 *Tulane Law Review*.

<sup>252</sup> Mediation UK, *op. cit.*, Article 3.

<sup>253</sup> Stringer, D. M. and Lusardo, L. (2001). Bridging Cultural Gaps in Mediation. 56 *Dispute Resolution Journal* 29.

<sup>254</sup> *Ibid.*

<sup>255</sup> National Alternative Dispute Resolution Advisory Council (NADRAC), *The Development of Standards for ADR: Discussion Paper*, 2000; NADRAC, *A Framework for ADR Standards*, 2001; NADRAC, *Who Says You’re a Mediator: Towards a National System for Accrediting Mediators*, 2004.

cultures; they should not assume that what one says is always understood as the same words in English may have different meanings to people from different cultures; they should listen carefully to what each party is trying to communicate; they ought to seek ways of getting both parties to validate the concerns of the other; and they have to be patient, be humble, and be willing to learn.<sup>256</sup>

The researcher opines that the basic attribute of humility of an effective mediator which was discussed earlier is relevant in the discussion on culture as a factor to be considered in the conduct of mediation. With humility, the mediator would be able to appreciate the sensitivities which are associated with the cultural elements when interacting with the parties, and appreciating what made them behave the way they did, and why the dispute arose in the first instance.

Some viewed that Asians, including Malaysians, have a cultural norm to maintain a certain degree of pride insofar as privacy and confidentiality are concerned, especially in their private and business matters.<sup>257</sup> The view was that before any disclosure is made by any party in mediation the parties would want assurance from the mediator that there is confidentiality in their mediation session.<sup>258</sup> The researcher opines that the parties would accept mediation as an ADR mechanism more readily because it is conducted in a private setting away from the public glare unlike trials which are generally conducted in the open court.

The other aspect of culture is “face-saving” which is often cloaked under the veil of confidentiality in mediation where the parties would be more open to lay their cards on the mediation table than in the open court.<sup>259</sup> In fact, many disputes have been resolved through mediation because confidentiality in mediation has been

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<sup>256</sup> Lim, L. Y. (1996), *op. cit.*

<sup>257</sup> This view was represented by 7 of the 34 respondents in Mediation Interview – Part 1 where one of them was from the judiciary in Sarawak.

<sup>258</sup> The majority view was shared by 25 of the 34 respondents in Mediation Interview – Part 1 where 5 respondents were from the judiciary and 20 were from the MMC Panel of Mediators.

<sup>259</sup> *Ibid.*

maintained, especially in the Asian culture.<sup>260</sup> Further, the mediator's skills would come in handy to build the required confidence and trust from the parties in order to maintain confidentiality in mediation.<sup>261</sup>

## **2.9 Chapter Summary**

The present chapter introduces seven terms and concepts which are relevant to this study through various definitions and opinions of authors and proponents of mediation. The researcher's review, commentary and analysis further juxtapose views and thoughts from the respondents of this study which provide insights and refinement of the said terms and concepts in the local context, and within the scope of this study on court-directed mediation in Malaysia. These perspectives are important and relevant in the researcher's attempt to find answers to the main research question in this study, that is, whether court-directed mediation should be legislated in Malaysia.

The next chapter covers a review of reported relevant studies and researches from the early 1990s to 2011, on court-directed mediation across various countries, namely, Australia, the Philippines, Singapore, the UK, and the USA. Further, the said review also traces the growth, development and extent of legislation of court-directed mediation or the lack of it in the said jurisdictions. In the said review, the researcher provides insight into the said studies and researches, and the extent of mediation legislation, as the basis to find answers to the main research question in this study.

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<sup>260</sup> This is the view of one respondent from the 27 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>261</sup> This is another view from one other respondent from the 27 respondents from the MMC Panel of Mediators in Mediation Interview – Part 1.

## **CHAPTER 3: REVIEW OF RELEVANT RESEARCHES AND LEGISLATION**

### **3.1 Introduction**

As mentioned in the previous Chapter Summary, the next pertinent aspect of this study is relevant reported relevant studies and researches on court-directed mediation, and also legislations on court-directed mediation in various jurisdictions. This chapter therefore focuses on a review of such studies and researches from the early 1990s to 2011, in Australia, the Philippines, Singapore, the UK, and the USA (in alphabetical order), where there is relevance to the practice of court-directed mediation in the said jurisdictions.

As for relevant legislations on court-directed mediation, the second part of this chapter attempts to trace the growth and development of such legislations in four jurisdictions, namely, the USA, Australia, Hong Kong and Singapore. In this respect, the researcher attempts to draw relevant learning and insights from such a review to shed further light to the said main research question of this study, that is, whether court-directed mediation should be legislated in Malaysia.

### **3.2 Relevant Studies and Researches on Court-directed Mediation**

In the researcher's library research to find relevant reported studies and researches on court-directed mediation which could help to answer the said main research question, it can be said that the said library research has not revealed any known similar relevant studies and researches which were conducted to explore legislating court-directed mediation, whether in Malaysia or in other jurisdictions. Further, the researcher observes that there have been no known similar relevant



studies and researches, whether in Malaysia or abroad, which examined the sufficiency of current court-direction mediation guidelines in serving their purposes in court-directed mediation practice. In fact, the researcher further submits that there have been no known relevant studies or researches, whether in Malaysia or abroad, which reviewed whether mediation in general should be legislated, let alone any which specifically focused on court-directed mediation.

Be that as it may, a fair number of reported studies and researches on court-directed mediation were conducted based on civil cases which were filed in the courts. The said studies and researches centred largely on settlement rates of such disputes by the courts, and on attitudes of mediators, lawyers, and the parties, and the perceived role of the mediator in settlement of disputes. For purposes of this study, a dozen studies and researches are reviewed in this chapter in the researcher's attempt to use them as baseline references for this study. The said studies and researches touched on various jurisdictions such as Australia, the Philippines, Singapore, the UK, and the USA (in alphabetical order) from the early 1990s to 2011. Each is discussed in turn.

1. A study on Settlement Week in New South Wales, Australia in 1991.
2. A study on judges' attitudes and perceived role in settlement of disputes in six countries – Australia, Brazil, England, Germany, Japan, and the United States in 1992.
3. Statistics on the effectiveness of court mediation in Singapore in 1994 and 1995.
4. A research on Dependency Mediation in the San Francisco Juvenile Court conducted from April 1995 to December 1997.
5. A mediation study on Georgia's Court-Connected ADR programmes in 2000.

6. A mediation study on commercial litigation lawyers following the introduction of Civil Procedure Rules, UK in 2002.
7. A report on court mediation programme in the United States District Court in Nebraska from 2001 to 2004.
8. A mediation study by Singapore Mediation Centre (SMC) from January 1998 to August 2004.
9. A research project on court-annexed mediation in the Supreme and County Courts of Victoria, Australia in 2008.
10. An analysis on court-connected mediation in Federal Courts of Australia in November 2009.
11. Statistics on court-annexed mediation in the Philippines from 2001 to 2010.
12. A study on the growth and development of court-annexed and judge-led mediation in Malaysia from 2009 to 2011.

### **3.2.1 Settlement Week in New South Wales, Australia (1991)<sup>262</sup>**

Settlement Week whose origin was from the USA, specifically from Washington, DC is a week which is devoted to court-annexed mediation where it provides for mediation of cases which have been listed for hearing in the courts.<sup>263</sup> It is a structured mediation arrangement which is supervised by the courts, and using their physical facilities. In essence, it encourages dispute settlement given the right environment which is conducive to settlement, with the necessary facilities, availability of services of qualified mediators, and above all, with the authority of the courts.

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<sup>262</sup> Chinkin, C. & Dewdney, M. (1992). Settlement Week in New South Wales: An Evaluation. 3 *Australian Dispute Resolution Journal* 2, May. See note 9 on the term "court-directed mediation" which is used interchangeably with "court-annexed mediation."

<sup>263</sup> *Ibid.*

In the above 1991 study, the statistics in Table 3.1 below represent the results where a final classification of 235 cases was included with personal injury cases (motor and industrial) comprised more than 50% of the case types.<sup>264</sup> The Supreme Court was chosen as the designated court because of its authority and status (p. 95).<sup>265</sup> The thinking was that if the Settlement Week was successful in the Supreme Court, then other courts would be included in the future. In fact, the cases were jointly selected by the Supreme Court and the Dispute Resolution Committee.

**Table 3.1:** Statistical summary of settlements according to nature of claim (Chinkin & Dewdney, 1992)

Nature of Claim	Settled	Not Settled	Total	Percentage	Still to be Mediated	Grand Total
Personal Injuries - Motor Vehicle	80	19	99	81%	5	104
Personal Injuries - Industrial	17	8	25	68%	0	25
Probate	11	8	19	58%	0	19
Real Property and Intellectual Property	9	9	18	50%	0	18
Commercial	5	5	10	50%	0	10
Contract	13	10	23	57%	1	24
Partnership	1	1	2	50%	1	3
De Facto Relationships Act	4	2	6	67%	1	7
Tort	3	4	7	43%	1	8
Professional Medical Negligence	6	7	13	46%	2	15
Costs Dispute	1	0	1	100%	1	2
<b>Total</b>	<b>150</b>	<b>73</b>	<b>223</b>		<b>12</b>	<b>235</b>

Source: Chinkin, C. & Dewdney, M. (1992). Settlement Week in New South Wales: An Evaluation. *Australian Dispute Resolution Journal*, Vol. 3, No. 2, May, p. 114.

During the said 1991 study, data was collected through questionnaires from 64 mediators of which 94% of them responded on their previous mediation experience, the number of cases they had mediated prior to and during this Settlement Week, and their opinions on refresher training courses. Based on the gathered data, the mediators described the mediation process as “highly effective” in terms of

<sup>264</sup> The first Settlement Week in Australia was held in New South Wales from October 14-18, 1991.

<sup>265</sup> *Ibid.*

clarifying viewpoints, identifying options and reaching specific agreements (p. 104).<sup>266</sup>

According to the mediators, the mediation outcome in the majority of matters was viewed by them as being “very practical, very fair and likely to be very lasting” because positions had been clarified by mediation or parties had agreed to conduct further negotiations.<sup>267</sup> Further, it was reported that the mediators thought that the mediation process was perceived to have accelerated the resolution process in terms of an earlier clarification of issues, obtaining of necessary reports and documentation and getting the parties to think about settlement (p. 106).<sup>268</sup>

From the lawyers’ perspective, 93% of them viewed the mediation process “as being effective or highly effective” while only 7% thought otherwise (“ineffective”) (p. 108).<sup>269</sup> In terms of the mediator’s level of intervention, they rated it as being “about right” whether the case had settled or not with 61% of them were satisfied with the process and did not make any suggested improvements.<sup>270</sup> The Settlement Week questionnaire also covered viewpoints gathered from parties who took part in Settlement Week mediations. Based on 85 parties who completed the questionnaires, it was reported that 65% had their cases settled through mediation with 2% of parties’ cases partially settled, a further 2% had their cases settled after the preliminary conference prior to the mediation session, and 31% had not settled their cases (p. 111).<sup>271</sup>

Lastly, based on the Settlement Week Evaluation Report, the success of those mediated cases was measured by the settlement rate which was recorded at 70%.<sup>272</sup> This settlement rate was reported to be “an encouraging indication of success” which

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<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

<sup>272</sup> This Report has been adopted by the New South Wales Law Society Dispute Resolution Committee.

was considerably higher than most of the American Settlement Week schemes which recorded the national average settlement rate of 41.4% (p. 114).<sup>273</sup> One of the cited reasons for success was the role of the mediator in achieving settlement where mediation process which was guided by the mediator provided the right environment within which settlement was encouraged and achieved in most cases. This study brings back the relevant point on the role of the mediator which was further analysed and commented in the previous chapter where the researcher submitted that the role of the mediator is complex, yet versatile and multi-faceted, constantly juggling and balancing all necessary elements in the mediation process.<sup>274</sup>

However, the said research on the Settlement Week did not cover court-directed mediation *per se*. The closest relevance of the said research to this study is that the Settlement Week was supervised by the Supreme Court with use of the court's facilities. This arrangement is comparable to the CMCKL and the other CMCs in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country under their free court-annexed mediation programmes, where mediation is conducted by part-time mediators who comprise High Court judges and/or Sessions Court judges, and full-time mediators.

When comparing settlement rates from CMCKL and the other CMCs in chapter 4, it can be concluded that the results of mediation from the said Settlement Week garnered a higher rate of success.<sup>275</sup> It is to be noted that the mediation sessions in the said Settlement Week were not conducted by judges and judicial officers while those in the CMCKL and other CMCs in Malaysia were conducted by both full-time mediators with High Court judges and Sessions Court judges who acted as mediators

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<sup>273</sup> *Ibid.*

<sup>274</sup> See chapter 2 on *Review of Relevant Terms and Concepts* under "The Role of the Mediator" in the section on "Mediator Capabilities and Skills."

<sup>275</sup> See chapter 4 on *Court-directed Mediation in Malaysia* under "Court-Annexed Mediation Center Kuala Lumpur (CMCKL)." See also Table 4.3 on the profile of mediation cases conducted by CMCKL complete with settlement rates recorded as at March 2014.

on a part-time basis although full-time mediators recorded a higher settlement rate than part-time mediators.<sup>276</sup>

### 3.2.2 Judges' attitudes and perceived role in settlement of disputes (1992)<sup>277</sup>

The above 1992 study focused on the attitudes and perceived role of Federal Judges in settlement of disputes (p. 217).<sup>278</sup> Owing to the fact that judges have the discretion to affect the outcome of litigation, the study attempted to determine how and why judges exercise their discretion. The scope of the study covered 182 Federal Court judges in Australia and their counterparts in five other countries, namely, Brazil, England, Germany, Japan, and the USA (in alphabetical order) through 286 questions in a questionnaire. These questionnaires were sent to judges in the Australia Federal Court, District Courts in Alabama, Florida and Georgia in the USA, and Queen's Bench Division of the High Court in England, and to civil and criminal judges in Brazil and Germany.

The survey questions covered key areas including judges' attitudes towards settlement, their role in the settlement process, and the techniques they used in the settlement process. In terms of judges' role in settlement, it must be noted that Federal Court judges' role in the settlement process was rather limited previously until recently when the Rules of Court were amended to allow appropriate cases to be referred to mediation before a registrar or judge in pre-trial settlement conferences (French, 1990, p. 16).<sup>279</sup>

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<sup>276</sup> *Ibid.*

<sup>277</sup> DeGaris, A. H. (1994). The Role of Federal Court Judges in the Settlement of Disputes. *13 University of Tasmania Law Review* 2, pp. 217-236.

<sup>278</sup> *Ibid.*

<sup>279</sup> Honourable Mr. Justice French (1990). Hands-On Judges, User-Friendly Justice. Paper presented at the Ninth Annual Australian Institute of Judicial Administration Conference, August 18-19. See also *Federal Court Rule 0 10 R 1(2)(g)* which provides:

1(2) Without prejudice to the generality of sub-rule (1) the Court may –

(g) order that the parties attend before a Registrar or a Judge in confidential conference with a view to reaching a mediated resolution of the proceedings or an issue therein or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter or otherwise to shorten the time taken in preparation for and at the trial.

The responses received from the judges were mixed although it was noted that Federal Court judges did not perceive themselves to play a prominent role in the settlement process, nor did they perceive they did not play any role (DeGaris, 1994, p. 225).<sup>280</sup> The judges did share that they were now more involved in the settlement process as compared to 20 years ago. It was recorded from this study that 13% of the judges said they “actively encouraged” settlement, and 53% of the judges revealed that they “encouraged settlement in appropriate cases.”<sup>281</sup>

However, more than half Federal Court judges (53%) did not seem to be in favour of legislation increasing their role in the settlement process although 27% of them were not sure (DeGaris, 1994, p. 226).<sup>282</sup> A further 27% were of the view that judges should have the power to approve settlements in “all civil cases” and 7% stated that they should have the approval in “cases involving constitutional rights.”<sup>283</sup> Further, 73% of judges felt that they should not become involved in the settlement process unless the disputants requested for them to do so. Be that as it may, 60% stated that a judge should attempt to facilitate a settlement even if the disputants did not request for it (DeGaris, 1994, p. 226, 227).<sup>284</sup>

In terms of assessing judges’ participation in the settlement process as compared to encouraging settlement, it was found that 47% of judges believed that their involvement in the settlement process had assisted the disputants to reach settlement (DeGaris, 1994, p. 227).<sup>285</sup> When compared to 20 years ago, 47% of judges admitted that they were now more involved in the settlement process although this was not active participation on their part.<sup>286</sup> It is interesting to note that 40% of judges opined that disputants should be allowed to engage in settlement discussions without

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<sup>280</sup> DeGaris, A. H. (1994), *op. cit.*

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

judicial interference while 20% said they would persistently encourage disputants to settle (DeGaris, 1994, p. 227).<sup>287</sup> However, Federal Court judges were not willing to offer substantive assistance in settlement with 86% indicated disagreement that “a judge should be willing to express an opinion about a case, comment on strengths and weaknesses of evidence and arguments and propose what he considers a reasonable settlement” (DeGaris, 1994, p. 228).<sup>288</sup>

One other area which the 1992 study looked at was judge’s role in ensuring that settlements are “fair”. The result showed that Federal Court judges were “undecided” on whether their participation in the settlement process had produced a fairer resolution of disputes (DeGaris, 1994, p. 229).<sup>289</sup> An interesting point to note is that a majority of judges opined that they should not “take any action” and should not inform the disputants in a situation where one disputant was about to accept an unreasonable settlement, no matter what the case may be, no matter which disputant was disadvantaged.<sup>290</sup>

Consequently, based on the results of the said 1992 study, it could be surmised that Federal Court judges did not perceive themselves to play any role to ensure that settlements were fair, and therefore, there was lack of judicial involvement in the settlement mechanisms utilised in the Federal Court (DeGaris, 1994, 230).<sup>291</sup> In essence, the said 1992 study seemed to show that judges were perceived to play the role of promoters of settlement rather than active participants in the settlement process (DeGaris, 1994, p. 231).<sup>292</sup>

In essence, “settlement” in the above 1992 study did not categorically cover settlement in the context of mediation as an ADR mechanism. Instead, “settlement”

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<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid.*

<sup>292</sup> *Ibid.*



was referred to in the context of case settlement during the litigation process when the case is heard before the judge. In other words, the judges in the said 1992 study did not act as mediators, but they were the hearing or trial judges. The scope of the said 1992 study did not cover settlement in court-directed mediation practice nor did it cover the views of judges on their roles as mediators per se.

Be that as it may, the above 1992 study did show that judges felt that they were more involved in the settlement process than they were previously although they opined that they should not play an active role in the said process; instead they were perceived to play the role of promoting settlement between the parties. However, it could be noted that the said 1992 study did touch on judges' perception and attitudes on their extent of their role in the settlement process in the course of litigation, but not in court-directed mediation.

The perception and attitudes of judges on their roles as mediators in court-directed mediation is the area of focus by the researcher in this thesis where views and thoughts of respondents are gathered to enrich the findings in this study on the role of the courts and the judiciary, in promoting court-directed mediation as an ADR mechanism to facilitate settlement of disputes. Arguments for and against judges playing an active role in the settlement process in court-directed mediation are discussed in chapter 4.<sup>293</sup> This is the sub-question which the researcher hopes to find answers to in an attempt to find out whether court-directed mediation should be legislated in Malaysia.

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<sup>293</sup> See "Role of the Courts and the Judiciary in Promoting Court-Directed" in chapter 4 on *Court-directed Mediation in Malaysia*.

### 3.2.3 Effectiveness of court mediation in Singapore (1994~1995)

Mediation was first formally introduced in Singapore in the Subordinate Courts in 1994 through the Court Mediation Centre of the Subordinate Courts where numerous types of cases were handled involving Civil Cases (Court Dispute Resolution), Family Court Cases, Small Claims Tribunal Cases, Juvenile Court Cases (Family Conferencing), and Magistrate's Complaints.<sup>294</sup> The key objective of the Centre was to provide a forum for disputants to resolve their issues without having to go for litigation.

A pilot project on Civil Cases (Court Dispute Resolution or CDR where mediation was voluntary) was undertaken for a period of over one month from June 7, 1994 through July 9, 1994 where 43 cases ranging from negligence, contract, landlord and tenant, defamation and others were successfully mediated at a settlement rate of 81.4% (Lim and Liew, 1997).<sup>295</sup> As a comparison, at the Family Court which was formally established in January 1995, two levels of mandatory mediation were practised, one before the mention stage, and the other during the mention stage. For the period from January 1995 to March 1995, before the mention stage, mediation was successful with a 61.68% of settlement rate while 90.91% was achieved in those mediation sessions during the mention stage.<sup>296</sup>

Mediation was also mandatory where Small Claims Tribunal Cases were concerned where after nine years of establishment in 1994, its records showed that 93.24% of its mandatory mediated cases were successfully settled, and over a period of two months in January 1995 and February 1995, the settlement rate recorded was 90.9%.<sup>297</sup> However, the same could not be said on the mediation settlement rate of

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<sup>294</sup> Lim, L. Y., & Liew, T. L. (1997). *Court Mediation in Singapore*. Singapore: FT Law & Tax Asia Pacific.

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

the Magistrate's Complaints which only recorded less than 50% for the year 1994 and up to February 1995 before the mention stage while a higher settlement rate was seen at close to 80% for those cases mediated during the mention stage.<sup>298</sup>

Where Juvenile Court Cases were concerned, 100% settlement rate was depicted in its mandatory mediation sessions since its introduction on July 30, 1994 by way of family conferencing.<sup>299</sup> Table 3.2 below has the details on the settlement rate by case type. Overall, the settlement rates of major mediation sessions in 1995 can be summarised in Table 3.3, ranging from 85% to 92%, whose results could relatively be read as effective.

**Table 3.2:** Settlement rates by case type (Lim & Liew, 1997)

Type	Total No. of Cases	No. of Cases Successfully Mediated	Settlement Rate (%)
Civil Cases (Court Dispute Resolution) before November 8, 1994	43	35	81.4%
Civil Cases (Court Dispute Resolution) by November 8, 1994	236	197	83.5%
Family Court Cases (before mention stage)	274	169	61.7%
Family Court Cases (during mention stage)	693	630	90.9%
Small Claims Tribunal Cases (1994)	28488	26561	93.2%
Small Claims Tribunal Cases (January & February 1995)	3465	3149	90.9%
Juvenile Court Cases (Family Conferencing)	14	14	100.0%
Magistrate's Complaints (before mention stage)	1732	810	46.8%
Magistrate's Complaints (during mention stage)	1947	1549	79.6%

Source: Lim, L. Y & Liew, T. L. (1997). *Court Mediation in Singapore*, FT Law & Tax Asia Pacific, Singapore, p. 53.

The success of the court-directed mediation in Singapore is evident from the above settlement rate records which were achieved through its pilot mediation

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.*

programme in 1994/1995. Since then, Singapore has not looked back with court-directed mediation being practised in the Subordinate Courts where mediation is conducted by settlement judges whose role is to guide parties, offer advice and suggestions on possible solutions to resolve their dispute, and to help parties evaluate the merits of their dispute. Unlike Malaysia, there is no legislation governing the practice of private mediation.<sup>300</sup> However, like Malaysia, there is no law governing the practice of court-directed mediation, nor is there a law or national system to regulate the accreditation, quality or standards of mediators in Singapore.

**Table 3.3:** Percentage of successful court mediations in Singapore in 1995  
(Lim & Liew, 1997)

Type	Total No. of Cases	No. of Cases Successfully Mediated	Settlement Rate (%)
Court Dispute Resolution	1133	960	84.7%
Family Court Mediation	5452	4640	85.1%
Small Claims Tribunals	30107	27575	91.6%

Source: Lim, L. Y & Liew, T. L. (1997). *Court Mediation in Singapore*, FT Law & Tax Asia Pacific, Singapore, p. 53.

Hence, the researcher in this study attempts to examine whether court-directed mediation should be legislated in Malaysia. It is in the researcher's opinion that many answers to the said research question may be drawn from the Singapore model given the similarities in the legal framework in the two countries. As depicted in the later section of this chapter, a review on the various legislations governing mediation, be it private mediation or court-directed mediation reveals the pros and cons of legislating court-directed mediation in various jurisdictions.

<sup>300</sup> See Appendix D, *supra* note 27 on Mediation Act 2012 (Act 749).

### 3.2.4 Dependency Mediation in San Francisco Juvenile Court (1995~1997)

This mediation research on family mediation, Dependency Mediation research in the San Francisco Juvenile Court, which was conducted by the Center for Policy Research in March 1998, revealed that during the research period (April 1995 – December 1997), 71% of 227 sampled cases sent to mediation reached full settlement through the process, and partial settlements produced another 15% of the mediated cases, as shown in Table 3.4.<sup>301</sup> Table 3.5 displays settlement rates achieved in terms of the nature of the problems mediated.

**Table 3.4:** Settlement rate of 227 mediation cases  
(April 1995~December 1997)

Nature of Settlement	Settlement Rate (%)
Full Settlement	71
Partial Settlement	15
No Settlement	14

Source: Dependency Mediation in the San Francisco Courts conducted by the Center for Policy Research, March 1998, pp. 16~17.

In this study, partial settlements were defined as “agreements that specify resolutions for some, but not all, of the issues to be decided in the case.”<sup>302</sup> The source of the quantitative data was from the records which were maintained by mediators as well as file data extracted from dependency court records. To supplement this data, the researchers also conducted interviews with relevant professionals such as attorneys, therapists, mediators, judges, hearing officers, and the like, who had

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<sup>301</sup> This research was conducted by the Center for Policy Research, funded by the San Francisco Foundation, administered by the Study Centre of San Francisco, March 1998, p. 30.

<sup>302</sup> *Ibid.*

participated in, or were affected by, the mediation programmes operated by the juvenile court.

**Table 3.5:** Settlement rate in mediation by nature of selected presenting problems

	Drug Abuse by Perpetrator by Noted in Files		Prepetrator with Criminal History		Criminal Court Filing Due to Current Abuse	
	No	Yes	No	Yes	No	Yes
<b>Agreement:</b>						
Full	70%	72%	72%	65%	69%	57%
Partial	16%	15%	15%	16%	16%	29%
None	14%	14%	13%	19%	15%	14%
	(130)	(88)	(175)	(43)	(121)	(7)

Source: Dependency Mediation in the San Francisco Courts conducted by the Center for Policy Research, March 1998, pp. 16-17.

This research revealed that:

1. Professionals who were interviewed made subjective decisions about which cases are to be referred to mediation, and which are to be retained in the court hearing process (Center for Policy Research, 1998, p. 29);<sup>303</sup>
2. Positive things about mediation were said by attorneys for the parents in the dependency proceedings, both from their own perspectives as well as from their clients' (Center for Policy Research, 1998, p. 31);<sup>304</sup>
3. The need for clear guidelines on what cases are to be referred to mediation;<sup>305</sup>  
and
4. The referral guidelines should be inclusive to encourage parties to go for mediation as an alternative to a contested court hearing.<sup>306</sup>

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.*

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

The above mediation research gave a flavour of settlement rates in the juvenile courts as a measure of the success of mediation although the need for a set of clear guidelines on which cases were to be mediated came out as an important conclusion from the said research. There was no discussion as to whether the mediation was conducted by judges acting as settlement judges or mediators in court-directed mediation.

Although the need for a set of clear guidelines on what cases are to be mediated seemed to be a key recommendation from the said research, however, it did not further explore what kind of guidelines which were required for the parties, and for the mediator, or whether legislation could be an alternative to govern the practice of mediation for cases in juvenile courts. Hence, for purposes of this study, the researcher attempts to explore whether court-directed mediation should be legislated to ensure that there are standard and consistent mediation guidelines for court mediators.

### **3.2.5 Georgia's Court-Connected ADR programmes (2000)<sup>307</sup>**

This was a qualitative survey conducted by the Georgia Office of Dispute Resolution to understand how people feel about participating in the courts' mediation programmes, and whether the courts are providing good quality mediation services.<sup>308</sup> It started with a pilot phase from February 1999 through April 2009, while five other court programs spanned for six months from May through November 2009 (except for Clayton County which was completed in October 2009). Based on the qualitative feedback and the quantitative data gathered, the researchers were able

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<sup>307</sup> Final Report on Participation Satisfaction Survey of Georgia's Court-Connected ADR Programs. (2000). *Georgia Office of Dispute Resolution*, December.

<sup>308</sup> This survey was conducted by the Georgia Office of Dispute Resolution under a Grant from the State Justice Institute.

to assess the participation satisfaction to enable the courts to make informed decisions on how best to serve the needs of their patrons in Georgia.

The sample size of this survey was 316 mediators and 550 litigants who had responded to the survey based on 200 cases per program (a total of 1,000 cases). Each mediator was handed the survey forms for them to pass to the litigants just before mediation. These forms were then collected back by the mediators. In terms of litigants, of the 550 who had responded to the survey, 267 of them were men and 249 were women (with 34 respondents did not indicate their gender).

Table 3.6 shows that from a total of 313 case outcomes as described by mediators, 126 cases (40.3%) reached complete or full settlement, which incidentally was close to the number of cases which did not settle (129 cases or 41.2%). If the number of partially cases were to be included to those which had settled, that would have brought the success rate of settlement to over 50% at about 54%. The category labelled as “Other” comprised mediation situations where a second session was scheduled, a temporary settlement was reached, or where decisions on settlement were either pending or postponed. Another point to note is that the settlement rate was prevalent in certain types of cases such as general civil cases which attained a much higher settlement rate as compared to cases of contempt on domestic relations where they were less likely to settle, with partial settlement recorded the highest number in divorce cases at 17.9%.

The researchers also looked at factors which hampered settlement where it was revealed that the single most important factor which was the roadblock to settlement was that the parties’ positions were too far apart. Based on the findings of the said Georgia study, the second most frequently selected factor by mediators and attorneys which contributed to the lack of settlement was that parties were too angry or upset although this factor was ranked third by litigants, while the litigants shared



that the second most contributing factor to lack of settlement was that important information was missing. Table 3.7 has more details.

**Table 3.6:** Settlement rates by case-type

Case-type	Complete settlement		Partial settlement		No settlement		Terminated for domestic violence		Other		Total N
	No. of cases	% *	No. of cases	% *	No. of cases	% *	No. of cases	% *	No. of cases	% *	No. of cases
Divorce	63	38.9%	29	17.9%	61	37.7%	3	1.9%	6	3.7%	162
Modification of divorce	13	29.5%	6	13.6%	21	47.7%	0	0.0%	4	9.1%	44
Contempt - domestic relations	14	42.4%	2	6.1%	16	48.5%	0	0.0%	1	3.0%	33
General civil	18	56.3%	0	0.0%	13	40.6%	0	0.0%	1	3.1%	32
Other	18	42.9%	6	14.3%	18	42.9%	0	0.0%	0	0.0%	42

Legend: \*Percentages are of cases in row, i.e. by case type

Source: Final Report on Participation Satisfaction Survey of Georgia's Court-Connected ADR Programs. (2000). *Georgia Office of Dispute Resolution*, December.

**Table 3.7:** Factors contributing to lack of settlement

Factor	% of each group indicating contributing factor		
	Mediators	Attorneys	Litigants
Mediation held too early	2.5	4.8	2.9
Mediation held too late	1.3	0.6	4.5
Important information missing	18	13.6	15.5
More discovery needed	NA *	10.6	NA *
Parties' positions too far apart	35.8	36.9	29.6
Parties too angry or upset	19.3	14.2	15.3
Someone important missing	4.4	2.4	4.2
Someone lacked authority to settle	NA *	NA *	3.6
Parties wanted to go to trial	10.4	6.3	12.5
Attorney obstructed process	6.6	3.3	NA *
Domestic violence	3.5	NA *	NA *
Attorney not present	6.3	NA *	NA *
Other	8.2	6.9	5.8

Legend: \*NA indicates that this particular factor was not offered as an item on that survey.

Source: Final Report on Participation Satisfaction Survey of Georgia's Court-Connected ADR Programs. (2000). *Georgia Office of Dispute Resolution*, December.

In terms of factors which contributed to settlement, the said Georgia study found that mediator's effectiveness was the most important factor from the feedback of attorneys and litigants, with litigants who recorded the highest at 57.1% followed by attorneys at 40.5%. According to the said study, more attorneys who were surveyed mentioned mediator effectiveness as a factor in reaching full settlement than any other items, and about one-fifth of them called it the single most important factor in reaching settlement. The findings of the said study revealed that attorneys thought that the mediators had sufficient knowledge of the issues in dispute, and 91.9% said that they would use the same mediators again. This clearly shows that the role of mediators is an extremely important factor in mediation effectiveness.

Likewise, litigants in the said study had very positive views on their mediators. About 96.6% of them revealed that they trusted their mediators, and 93.1% said they would recommend them to their friends who would be going on mediation. In addition, a high number of litigants (97.5%) were of the view that their mediators treated both parties with respect, 91.1% litigants thought that their mediators helped them think of the dispute from a practical point of view. Their mediators also had done a good job of explaining the rules and process of mediation was of the opinion of 97.6% of the litigant respondents.

The Georgia study also showed that the litigant and attorney groups of respondents also shared that the other key factors included the need for parties to put the matter behind them, and that parties wanted to settle, were also important factors which contributed to settlement. When these respondents were asked the single most important factor to reach settlement, both groups of mediators and attorneys indicated that it was the parties' desire to settle. However, the litigant group indicated that mediator effectiveness was their single most important factor to reach settlement. Further details can be found in Table 3.8.

**Table 3.8:** Factors contributing to settlement

Factor	% of each group indicating contributing factor		
	Mediators	Attorneys	Litigants
Parties wanted to settle	35.4	29	30.7
Parties understood common interests	26.9	16.3	31.5
Parties' positions were close	25.3	15.1	22.4
Creative solutions found to problems	27.2	17.8	25.3
Parties didn't want trial	24.1	16.3	NA *
Parties needed to put matter behind them	21.8	23.3	31.5
Parties needed to settle for financial reasons	11.1	13	20.4
Mediator effectiveness	NA *	40.5	57.1
Relationship	NA *	NA *	16.4
Other	3.2	3.6	4.7

Legend: \*NA indicates that this particular factor was not offered as an item on that survey.

Source: Final Report on Participation Satisfaction Survey of Georgia's Court-Connected ADR Programs. (2000). *Georgia Office of Dispute Resolution*, December.

Lastly, the said Georgia study also showed that mediation has facilitated settlement in the sense that it helped parties progress towards resolution, even if parties did not eventually reach full settlement, or they were not ready to settle at that moment. Based on the results of the said Georgia study, from those litigants who did not reach settlement at mediation, about one quarter of them (23.2%) had the opinion that mediation had helped them move closer to mediation while the attorneys whose mediations did not reach settlement, 12.2% of them took the view that mediation had helped the parties move closer to mediation.

To a certain extent, the said Georgia study does shed some insight on the research sub-question of this study in terms of the role of the courts and the judiciary

in promoting court-directed mediation as an ADR mechanism to facilitate settlement of disputes.

Similar to the Georgia study, in the previous chapter, the researcher in this study has also stressed the importance of mediator capabilities and skills especially amongst judges and judicial officers when they act as court mediators.<sup>309</sup> The researcher had earlier submitted in the previous chapter that like all mediators, court mediators must also possess the four basic attributes of an effective mediator, namely, innate passion and affinity, empathy, humility, and patience. Further, the role of the mediator cannot be underestimated particularly in court-directed mediation where judges who are also part-time mediators need to constantly juggle and balance between their adjudication role and mediation role.

Be that as it may, it is to be noted that the said Georgia study was not focused on court-directed mediation where judges and judicial officers act as mediators. Instead, the court-connected mediation sessions in the Superior Court cases mediated under the five programs surveyed were conducted by mediators who were neutrals; not judges. In other words, there were no judges who acted as mediators per se in the said Georgia study in their court-annexed mediation programmes. Therefore, it can be said that there are no previous researches conducted on court-directed mediation practice where judges and judicial officers act as part-time mediators as in the case in Malaysia.

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<sup>309</sup> See chapter 2 on *Review of Relevant Terms and Concepts*.

### 3.2.6 Mediation post-Civil Procedure Rules, UK (2002)<sup>310</sup>

The 2002 study looked at the attitudes and experience of UK commercial litigators on the use of mediation as an ADR mechanism when the Civil Procedure Rules (CPR) was formally introduced on April 26, 1999 where a duty was placed on the courts by rule 1(4) (2) (e) to encourage and enable the parties to use ADR procedures in appropriate cases. This obligation is further supported by judicial power under rule 26.4 to order a stay of proceedings while the parties try to settle the dispute.<sup>311</sup>

The study methodology which was adopted was the use of questionnaire survey. Based on a random sample obtained from the lists of specialist construction and commercial litigation lawyers provided by the Law Society and the Bar Council, a total number of 500 questionnaires were dispatched to 250 commercial and 250 construction solicitors, with a further 50 such questionnaires sent to commercial and construction barristers. 128 responses were received, recording a 24% response rate.<sup>312</sup>

One of the methods used to test the effectiveness of mediation in the said survey was to determine the rate the process achieved full settlement of the dispute. Respondents were requested to state whether the mediation which they had taken part in had settled, not settled, or partially settled. Analysing the survey data, it was found that the respondents of the said 2002 study had participated in 258 commercial mediations as depicted in Table 3.9. 34% of them had indicated that they had used mediation once with 46% stated between two and five occasions of mediation use.

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<sup>310</sup> Brooker, P. & Lavers, A. (2002). Commercial Lawyers' Attitudes and Experience with Mediation. *Web Journal of Current Legal Issues*, Volume 4.

<http://webjcli.ncl.ac.uk/2002/issue4brooker4.html>.

<sup>311</sup> *Ibid.*

<sup>312</sup> 14 respondents had replied by letter or email stating that either they did not work in the commercial or construction sectors, or that the addressee could not be reached. The total sample size was 529 and the response rate was calculated from here.

The findings showed that they had used mediation more than 10 times comprised 18% of the respondents. Of the 258 mediation cases, more than 77% of these cases settled while 3% of them were partially settled.

**Table 3.9:** Frequency and settlement outcomes for commercial mediation (Brooker & Lavers, 2002)

Frequency	Settled	Did not settle	Partially settled	Settlement rate
258	199	45*	8	77%

*\*Two respondents did not record whether the commercial mediation partially settled or did not settle. These totalled 6 mediations.*

Source: Brooker, P. & Lavers, A. (2002). Commercial Lawyers' Attitudes and Experience with Mediation. First published in the Web Journal of Current Legal Issues.

The respondents were also asked to share and to assess what factors were relevant on why they had selected mediation or would select mediation including potential benefits to be achieved from participating in mediation. Below is a summary of the data points from the said 2002 study:

1. 90% (comprising 60% 'very relevant' and 30% 'somewhat relevant') found the decision to use mediation was appropriate because of the possibility of achieving an earlier settlement through the process;
2. 82% (a total of 51% 'very relevant' and 31% 'somewhat relevant') had proposed mediation because a creative settlement may have been achieved through the process; and
3. 73% (totalling from 33% 'very relevant' and 40% 'somewhat relevant') considered the possibility of narrowing the issues during mediation to be a relevant factor.

The said 2002 study was also able to demonstrate that the commercial respondents had incorporated mediation into the dispute resolution process. The findings also confirmed that a “sizable number of commercial mediations” including the number of “repeat-users” who were prepared to recommend or propose mediation. This means that the respondents of the said survey perceived potential benefits to be reaped by using mediation to settle the commercial cases. The researchers also tested the effectiveness of mediation by determining the rate the process achieved full settlement of the dispute. They calculated this metric by asking respondents to state whether the mediations which they had taken part in had settled, not settled, or partially settled. It was found that 77% of commercial disputes in this survey reached settlement, which was higher than the 68% rate from the construction mediation.

Table 3.10 shows further details of the mediation settlement rates by case-type as recorded in the said 2002 study. It can be seen that settlement rate was not dependent on the case-type. Whether the case-type involved professional negligence or personal injury or breach of contract, such contract issues or other case-types were not found to affect the settlement rate. Essentially, case-type is not likely to determine or indicate whether mediation is suitable or appropriate for commercial disputes.<sup>313</sup>

The said 2002 study also identified a few factors which contributed to failed mediation where no settlement was reached. According to the researchers, mediations were referred to as “failed” when they did not reach a settlement. The findings revealed that from the experience of one-third of the commercial respondents who were involved in non-settlement, they felt that the failure was due to a deficiency or lack of skills on the part of the mediator, while 45% perceived that failed mediations

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<sup>313</sup> *Ibid.*

were due to one or more parties who had used the mediation process tactically, and 50% of them cited such failure was due to a conflict of evidence.

**Table 3.10:** Mediation settlement rates for different commercial case-type (Brooker & Lavers, 2002)

Case-type	Frequency	Settled	Partially settled	Not settled	Settlement rate
Breach of contract	110 (116)	86	14	5	78.2%
Professional negligence	87 (90)	69	14 (2*)	2	79.3%
Neighbourhood	21	12	3	6	57.1%
General contract problems	20	14	6 (5)		70.0%
Personal injury**	16	15			93.8%
General negligence	15	13	2	0	86.7%
Goods and services	3 (8)	2	1	0	70.0%
Medical injury	4	3	1	0	75.0%
Debt	4	3	0	1	75.0%
Specific performance	1	1	0	0	100%
Other case-type	19	14	5	0	73.7%
Total	300 (314)	232	46	14	77.3%

\*Commercial lawyers reported no mediation experience with road traffic (non-personal injury) or breach of covenant cases.

\*\*Personal injury (including employers' liability, road traffic accidents, occupiers' liability, and other personal injuries)

\*\*\*Numbers in brackets are the total mediations reported for each category. Not all respondents gave the settlement outcome. Blank spaces in the chart indicate that respondents did not provide the relevant data on the settlement outcome.

Source: Brooker, P. & Lavers, A. (2002). Commercial Lawyers' Attitudes and Experience with Mediation. First published in the Web Journal of Current Legal Issues.

These findings were supported by Gould et al (2009) who concluded that the settlement rates were high where majority of respondents who had used mediation had their disputes settled.<sup>314</sup> It was also recorded that even where mediation did not result in a settlement, mediation was not always regarded as negative. Instead, it was often still viewed as beneficial and allowed an element of the dispute to be settled,

<sup>314</sup> Gould, N., King, C., Hudson-Tyerman, A., Betancourt, J. C., Ceron, P., Lugar, C., et al. (2009). *The Use of Mediation in Construction Disputes*, King's College London and the Technology and Construction Court, The Centre of Construction Law and Dispute Resolution, London: Society of Construction Law.



either by having disputes narrowed or had contributed to a better understanding of the other party's case.

As shown in the said 2002 study, mediation was positively received by respondents where they opined that mediation was suitable for a wide variety of commercial case-types but breach of contract, professional negligence, general negligence and debt cases were categorically perceived to be appropriate. The said 2002 study also revealed that the parties' attitude and expectations, and their genuine willingness to compromise are key factors to determine whether mediation would be successful or not. Be that as it may, the said 2002 study did not explore how the courts and the judiciary had played its role in encouraging mediation as an ADR mechanism to facilitate settlement of disputes following the introduction of the CPR which encouraged ADR. The researcher submits that it would have been interesting to examine the respondents' opinion and experience on the extent of the said role by the courts and judiciary. Such an analysis would have shed light on the current practice of court-directed mediation in the UK.

### **3.2.7 Court mediation programme in the United States District Court of Nebraska (2004)**

This is a court mediation programme which was embarked in 1994 following a recommendation made by the Civil Justice Reform Act Committee in collaboration with the Nebraska Office of Dispute Resolution ("ODR").<sup>315</sup> The said programme relied on court-approved mediators who comprised trained Nebraska lawyers with at least some mediation experience who had previously been qualified as mediators in accordance with the Nebraska Dispute Resolution Act (where they had to complete a four-day course in basic mediation) or who had comparable mediation experience.

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<sup>315</sup> See full report on <http://www.ned.uscourts.gov/internetDocs/mediation/reports/report-04.pdf>.

Mediators who mediate federal cases had to undergo additional training on mediation skills designed on disputes in federal courts, and on ethics. It was reported that mediation “caused” or “accelerated” settlement in 91% of the cases mediated as shown in Table 3.11 below. The 33 cases which were settled at the mediations were added to those later settled “because of” the mediations to give a total of 40 cases out of 44 cases mediated; they were settled directly because of the mediation programme.

**Table 3.11:** Effects of mediation on settlement, 2004

Mediator	No. of Cases Mediated	Settled AT Mediation	Settled "Because of" Mediation	Total No. of Cases Settled	Effective Rate of Settlement
Approved	19	13	3	16	84%
Non-Approved	25	20	4	24	96%
Total	44	33	7	40	91%

Source: United States Nebraska District Court, Report on Mediation, 2004.

Since its inception, of the 478 cases mediated, 56.9% had since settled “at the table,” that is, during the mediation session. The combined “effective settlement rate” for the last four years from 2001 through 2004, was 80% as shown in Table 3.12.<sup>316</sup> Looking at the statistics since the court’s first mediation referrals in 1996, over two-thirds of the cases mediated had settled either “at the table” or “because of” the mediation, with the “effective settlement rate” of 68% over eight years from 1997 to 2004. Based on the parties’ feedback on their mediation experience, the parties opined that mediation did foster a perception of fairness, involvement, and control amongst the parties.

It is in the researcher’s humble opinion that the programme did not consider the role the federal courts play in promoting or inculcating the mediation culture

<sup>316</sup> It is to be noted that prior to 2001 mediation statistics were reported on whether mediation was contacted through a mediation centre, or directly by the parties, and not whether the mediator was approved by the court as shown in Table 3.12.

amongst litigants and/or the parties under court-directed mediation. Given the steady rise in the percentage of settlements over the years as reported above, it would have been interesting to examine if the courts and the judiciary had been instrumental in that respect as a catalyst in court-directed mediation practice. Of particular interest would be to ask judges in federal courts for their views and thoughts on the extent the court mediation programme had evolved and progressed since its inception, and what they thought could be done or considered by the courts and the judiciary to play a more active role in the said programme.

**Table 3.12:** Approved mediators vs. non-approved mediators (2001~2004)

Year	Approved Mediator				Non-Approved Mediator				Overall Totals				
	2001	2002	2003	2004	2001	2002	2003	2004	2001	2002	2003	2004	Overall 2001 ~ 2004
Cases Mediated	25	27	28	19	24	43	27	25	49	70	55	44	218
Cases Settled in Mediation	18	19	21	13	13	20	17	20	31	39	38	33	141
Total Cases Effectively Settled	19	24	24	16	16	26	26	24	35	50	50	40	175
Effective Settlement Rate	76%	89%	86%	84%	67%	60%	96%	96%	71%	71%	91%	91%	80%

Source: United States Nebraska District Court, Report on Mediation, 2004.

### 3.2.8 Singapore Mediation Centre (SMC) (2004)<sup>317</sup>

This study involved a survey on effectiveness of non-court-directed mediation conducted by the SMC on lawyers and parties in dispute from January 1998 to August 2004, which was measured in terms of the nature of the outcome from both the perspectives of lawyers and the parties, and how satisfied these respondents are in relation to the outcome achieved.<sup>318</sup> The said 2004 study revealed that mediation

<sup>317</sup> Statistics were gathered from surveys of disputants and lawyers from the Singapore Mediation Centre from January 1998 to August 2004.

<sup>318</sup> Loong, S. O. (2005). Non-Court Annexed Mediation in Singapore. Paper presented at the *International Conference & Showcase on Judicial Reforms*, Makati City, Philippines, November 28-30.

effectiveness was measured by factors such as fairness of the mediation process, opportunity for meaningful participation, and control over the outcome of the mediation process. In terms of the data gathered, it could be seen that from the cases which reached settlement,

1. 97% of the parties said that they had a chance to communicate their views about the disputes;
2. 91% of them revealed that they were given the opportunity to speak;
3. 90% shared that they had a better understanding of the strengths and weaknesses of their own cases as a result of mediation;
4. 98% confessed that their views were understood by the mediators; and
5. 92% said that the mediation outcome which was reached was determined by the inputs they had provided.

As for the cases which did not settle, the data on mediation effectiveness was equally compelling whereby 84% of the parties and 95% of the lawyers indicated that they would be willing to recommend mediation to others although their cases did not reach settlement. In terms of satisfaction, the top factors included an environment which is conducive, impartiality of mediators, and fairness of process. As for the lawyers, the factors which affected their satisfaction rate were effectiveness of mediator, impartiality of mediator and productivity of process. Table 3.13 and Table 3.14 have more details on the statistics.

The survey results also revealed that mediator intervention in terms of abilities of the mediator had an impact on the satisfaction, fairness of process, and mediator impartiality. Table 3.15 shows the details in relation to the percentage of parties and lawyers, who rated satisfaction highly, who had also rated the following

four features of mediator intervention “a great deal.” Similar measures were also made on the other two factors, namely, fairness of process, and mediator intervention.

**Table 3.13:** Common features associated with parties' satisfaction in relation to the outcome of mediation (Loong, 2005)

Feature	% of Satisfaction
Conducive environment	98
Impartiality of mediators	91
Chance to tell their views	85
Fairness of process	90
Mediators who understood their views	90

Source: Loong, S. O. (2005). Non-Court Annexed Mediation in Singapore. Paper presented for the International Conference & Showcase on Judicial Reforms, p. 7.

**Table 3.14:** Common features associated with lawyers' satisfaction in relation to the outcome of mediation (Loong, 2005)

Feature	% of Satisfaction
Effectiveness of mediator	96
Impartiality of mediator	95
Productivity of process	91
Fairness of process	89
Conducive environment	87

Source: Loong, S. O. (2005). Non-Court Annexed Mediation in Singapore. Paper presented for the International Conference & Showcase on Judicial Reforms, p. 7.

Based on the results, it was found that the parties and lawyers, who had rated mediation to be satisfactory, had also rated mediation intervention highly. This was evident in the high percentages scored on “evaluated merits of the case,” “assisted in evaluation of case”, and “recommended particular settlement.” The reverse was also seen in the low percentages of the parties and lawyers who found the process to be

satisfactory, fair and mediation impartial where the mediators had “kept silent about their views.” It was reported that in Singapore where compulsory mediation is concerned, the settlement rate had been very encouraging where the statistics showed that 3,746 out of 3,943 cases were resolved or 95%.<sup>319</sup>

**Table 3.15:** Common features associated with mediator intervention in relation to Satisfaction, Fairness to Process, and Mediator Impartiality (Loong, 2005)

Feature	%					
	On Satisfaction		On Fairness of Process		On Mediator Impartiality	
	Parties	Lawyers	Parties	Lawyers	Parties	Lawyers
Evaluated merits of the case	83	55	81	57	80	56
Assisted in evaluation of case	89	77	87	78	86	78
Recommended particular settlement	68	57	67	58	66	57
Suggested possible options for settlement	85	86	85	88	84	87
Kept silent about their views	35	46	34	45	35	45

Source: Loong, S. O. (2005). Non-Court Annexed Mediation in Singapore. Paper presented for the International Conference & Showcase on Judicial Reforms, p. 7.

Although the said SMC study focused on non-court mediation, the findings on mediation effectiveness such as fairness of the mediation process, opportunity for meaningful participation, and control over the outcome of the mediation process could also be applicable to court-directed mediation. The only difference is that the mediators in court-directed mediation are judges and judicial officers. However, the said SMC study did not examine whether mediator’s capabilities and skills could be a factor in terms of the role of the mediator in mediation success. It is the researcher’s submission that this point is particularly important to ensure that judges and judicial officers who act as mediators on a part-time basis are sufficiently trained as mediators because they need to constantly switch between their “adjudicator hat” and their “mediation hat.”

<sup>319</sup> Mediation in Singapore: A Brief Overview. (2000). *Asian Dispute Review*, No. 1, September.

### 3.2.9 Court-annexed mediation in the Supreme and County Courts of Victoria, Australia (2008)<sup>320</sup>

This research project which was conducted over a three-month period from February 1, 2008 to April 30, 2008 covered all civil mediation sessions which were handled by the Supreme Court and County Courts of Victoria, Australia. The said research project was aimed to assess whether mediation processes used in court-connected disputes were accessible by the parties, were considered fair by the parties, used resources efficiently, resolved the disputes, and that the agreed outcomes were lasting, effective and acceptable by the parties.<sup>321</sup>

The sources of data were compiled from 553 court files in the Supreme Court and the County Courts of Victoria, written survey feedback from 20 mediators and 98 disputants, and focus group structured interview feedback from disputants, mediators and lawyers. Lastly, the researchers had compared their collected data with results from previous researches of dispute resolution processes which were used in the samples from the New South Wales Settlement Scheme (2004), Consumer Affairs Victoria (2007), and the national Financial Industry Complaints Service (2002/2003).<sup>322</sup>

Based on the results from the said 2008 research, it can be seen that the mediation respondents from the Supreme Court and County Courts of Victoria shared that they experienced higher pressure to settle than the respondents in the other sample groups. Also, worth noting is the fact that the respondents in the Supreme

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<sup>320</sup> Sourdin, T. and Balvin, N. (2009). Mediation styles and their impact: Lessons from the Supreme and County Courts of Victoria research project. *Australasian Dispute Resolution Journal*, Vol. 20, No.3, August, pp. 142-152.

<sup>321</sup> *Ibid.*

<sup>322</sup> On the New South Wales Settlement Scheme (2004) which was conducted from May 2002 to May 2003, see Sourdin, T. & Matruggio, T. (2004). *Evaluating Mediation – New South Wales Settlement Scheme 2002/2003*. La Trobe University and the Law Society of New South Wales, Melbourne. On the Consumer Affairs Victoria (2007) analysis which was based on 55 telephone interviews with Consumer Affairs Victoria (CAV) complainants, see Sourdin, T. (2007). *Dispute Resolution Processes for Credit Consumers*. La Trobe University, Melbourne. On the Financial Industry Complaints Service (2002/2003), see Elix, J. & Sourdin, T. (2002). *Review of the Financial Industry Complaints Service 2002 – What are the Issues? Community Solutions*, La Trobe University, University of Western Sydney.

Court and County Courts of Victoria recorded almost three times of percentage points over the New South Wales Settlement Week on the perception of fairness variable, and the ability to participate in the mediation process. Table 3.16 and Table 3.17 have the details respectively.

**Table 3.16:** Perceptions of fairness using different ADR processes  
(Sourdin & Balvin, 2009)

Perception of fairness variables	Mediation connected to Supreme and County Courts of Victoria n=36-38 Agree %	NSW Settlement Scheme Mediation n=59-61 Agree %
Process was fair	73.7	96.7
Treated with respect during process	83.8	NA
Pressured to settle	66.7	23.7
Control over the outcome	45.9	90.0

Source: Sourdin, T. & Balvin, N. (2009). Mediation styles and their impact: Lessons from the Supreme and County Courts of Victoria research project. *Australasian Dispute Resolution Journal*, Vol. 20, No. 3, August, p. 149.

On the actual outcomes reached from these mediation sessions, the said 2008 research discovered that higher levels of agreed outcomes were attained in cases where the dispute resolution processes had enabled higher participation. The findings revealed that 10% fewer mediated cases resulted in an agreed outcome as compared with the New South Wales Settlement Week which involved District Court and Supreme Court of New South Wales mediated cases. The researchers pointed out that there were other factors which could contribute to whether an agreed outcome was reached, such as length of the dispute, the court case age, legal costs, disputant characteristics, and the length of time taken in the actual dispute resolution process.

However, it must be noted that the researchers did not cover judicial mediation of the Supreme Court of Victoria where court-annexed mediators did not participate in the survey. Be that as it may, court statistics showed that the success of court-annexed mediation were evident in higher courts of Australia in 2008, for



instance, in the Federal Court, 57% of cases referred to mediation were settled; in the New South Wales Supreme Court, a 59% settlement rate was recorded; in the Supreme Court of Western Australia, a total of 1,009 trial days were saved which equated to a settlement rate of 61% in the year 2007~2008 (Warren, 2010, p. 77).<sup>323</sup>

**Table 3.17:** Perceptions of participation across different styles of ADR  
(Sourdin & Balvin, 2009)

Perception of fairness variables	Mediation connected to Supreme and County Courts of Victoria n=36-38 Agree %	NSW Settlement Scheme Mediation n=59-61 Agree %
Able to participate during process	86.5	96.7
Control during the process	48.6	0.2
Comfortable during the process	52.6	88.3
Had enough time to discuss all necessary information	45.9	NA
Would have liked to participate during the process	59.5	NA

Source: Sourdin, T. & Balvin, N. (2009). Mediation styles and their impact: Lessons from the Supreme and County Courts of Victoria research project. *Australasian Dispute Resolution Journal*, Vol. 20, No. 3, August, p. 149.

In essence, the said 2008 research project focused on different mediation approaches and how they have an impact on the parties' perceptions of fairness, participation and satisfaction, and whether agreed outcomes were reached in mediation. As mediation in the Supreme and County Courts of Victoria comprised private mediators as well as mediators appointed by said courts, none of the mediators were judges and judicial officers who act as mediators. Hence, there was no focus on court-directed mediation per se. The court-annexed mediation practice in the Supreme Court and County Courts of Victoria is very different from the court-directed mediation practice in Malaysia where judges and judicial officers play the mediator role on a part-time basis while retaining their adjudicator role (still on the

<sup>323</sup> The Honourable Marilyn Louise Warren (2010). Should judges be mediators? 21 *ADRJ* 77. Paper originally presented at the Supreme and Federal Court Judges' Conference, Canberra, Australia, January 27.

bench) although they may preside over cases which they did not mediate, or may not mediate the cases which they adjudicate.<sup>324</sup>

### **3.2.10 Court-connected mediation in Federal Courts of Australia (2009)<sup>325</sup>**

This 2009 analysis focused on three areas on court-connected mediation in Federal Courts of Australia where the third area is of interest and relevance to this study at hand, that is, outcome measures which were discussed from the recorded settlement rates as the measure of success in mediations employed in the Federal Court.<sup>326</sup> As far as the Federal Court is concerned, settlement rate denotes the percentage of matters referred to mediation as compared to those that settled as a result of the mediation, where it stated,

“Settlement rates at mediation should not, however, be the sole criterion by which the program is evaluated. Many matters which do not settle proceed to trial with issues better defined, or on the basis of agreed facts settled by the parties with the assistance of the mediator.

In some instances, the parties agree that the Court should not only be asked to determine liability or quantum resulting in significant savings to the parties and the Court” (Federal Court of Australia, 2008, p. 29).<sup>327</sup>

The Federal Court started using mediation as an ADR mechanism to settle dispute between the parties when a small number of matters which were filed in the

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<sup>324</sup> See chapter 4 on *Court-directed Mediation in Malaysia* on current mediation guidelines governing judges and judicial officers who act as mediators.

<sup>325</sup> Buth, R. (2009). Limits to the quantitative data on court-connected mediation in Federal Courts of Australia. 20 *Australasian Dispute Resolution Journal* 4, November, pp. 233-234.

<sup>326</sup> The three areas covered are reporting of mediation, activity measure of court-connected mediation, which is its referral, and outcome measures which are demonstrated in the recorded settlement rates.

<sup>327</sup> Federal Court of Australia, Annual Report 2007-2008 (2008).

New South Wales District Registry in 1987 were referred to mediation.<sup>328</sup> Since April 1997, parties can be ordered to resolve their dispute through mediation even if they do not consent under Section 53A of the Federal Court of Australia Act 1976 (Cth). It is to be noted that the Federal Court of Australia did publish its mediation settlement rate as depicted in Table 3.18 for the period between 1990 through 2008, although it was argued that the settlement rates depicted in the annual reports were those cases which were merely referred to mediation versus cases which reached settlement as a result of mediation.

The statistics revealed that settlement rates had not been encouraging through the years. However, it was argued that the reporting of such rates was based on various definitions describing the relationship between the civil courts and mediation as an ADR mechanism. For instance, court-annexed mediation means that the Federal Court retains considerable supervisory control over mediation through the use of court staff and court facilities. Court-referred mediation is used to describe the situation where the court retains little or no supervisory control over the mediation itself where the court functions only as a conduit to refer matters to private mediators who have been accredited by the court. Another possible reason for the reported low settlement rates could be attributed to the fact that court-connected mediation had been increasingly conducted by private mediators without adequate reporting to the court or court authority.

Be that as it may, the said 2009 analysis did not consider examining factors such as the role of the mediators, and the role of the courts and the judiciary in facilitating settlement of disputes through court-directed mediation amongst parties. Given the inconsistent use of the description on the relationship between the courts and mediation as an ADR mechanism, an important focus of the said 2009 could have

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<sup>328</sup> Buth, R. (2009), *op. cit.*

been to examine the extent of such inconsistency, and the kind of efforts which would be required to address such inconsistency.

**Table 3.18:** Federal Court of Australia's settlement rate (1990 ~ 2008)

Year	Settlement rate - year	Settlement rate since 1987 (%)	Year	Settlement rate - year	Settlement rate since 1987 (%)
2007 ~ 2008	58	55	1998 ~ 1999	ND	55
2006 ~ 2007	ND	55	1997 ~ 1998	ND	55 ~ 68
2005 ~ 2006	56*	ND	1996 ~ 1997	ND	68
2004 ~ 2005	ND	55	1995 ~ 1996	69.6	ND
2003 ~ 2004	ND	55	1994 ~ 1995	67.3	ND
2002 ~ 2003	ND	55	1993 ~ 1994	62.8	ND
2001 ~ 2002	ND	55	1992 ~ 1993	63.0	ND
2000 ~ 2001	ND	55	1991 ~ 1992	64.0	ND
1999 ~ 2000	ND	55	1990 ~ 1991	ND**	ND

ND denotes No Data

\*This reporting was not of the settlement rate per se, but rather the term "finalised by mediation" was employed, which appears to quantify a similar outcome measure.

\*\*For 1990 ~ 1991, while no settlement rate was provided, the following excerpt gestures to relevant outcome measurements in terms of a "completion rate", but was not specific to the reporting timeframe: "The program [of court-connected mediation] continues to be effective, the completion rate of matters referred remaining at about 60 percent." (Federal Court of Australia, Annual Report 1990-1991 (1991), at p. 18.)

### 3.2.11 Court-annexed mediation in the Philippines (2001~ 2010)<sup>329</sup>

Court-annexed mediation was first introduced by the Supreme Court in the Philippines as a pilot test and launched in 1999, and later, launched Judicial Dispute Resolution where the focus was civil cases and civil aspect of some criminal cases (de Los Angeles, 2011, p. 2).<sup>330</sup> Since its inception after ten years, it was reported that a settlement rate of 69% had been achieved as shown in Table 3.19 and Figure 3.1 below.

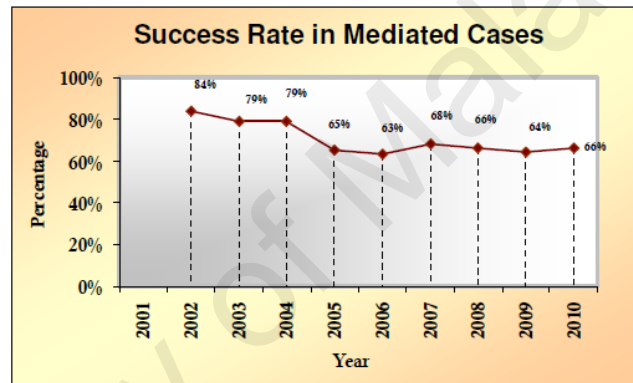
<sup>329</sup> de Los Angeles, E. (2011). *Perspectives on Court-Annexed Mediation in the Philippines*. Paper presented at the 2<sup>nd</sup> Annual Mediation Association (AMA) conference on Rediscovering Mediation in the 21<sup>st</sup> Century, February 24-25, Sheraton Imperial Hotel, Kuala Lumpur, Malaysia.

<sup>330</sup> *Ibid.*

**Table 3.19:** Settlement rate over 10 years (2001~2010)

	Total Number of Cases Mediated	Successful Mediation	Percentage
2001	n.a.	n.a.	n.a.
2002	3,559	3,000	84%
2003	3,097	2,410	79%
2004	7,490	5,899	79%
2005	11,717	7,626	65%
2006	13,050	8,159	63%
2007	20,905	14,300	68%
2008	50,279	33,336	66%
2009	33,430	21,429	64%
2010	23,374	15,369	66%
<b>TOTAL</b>	<b>166,901</b>	<b>111,528</b>	<b>69%</b>

Source: Philippine Mediation Center Office

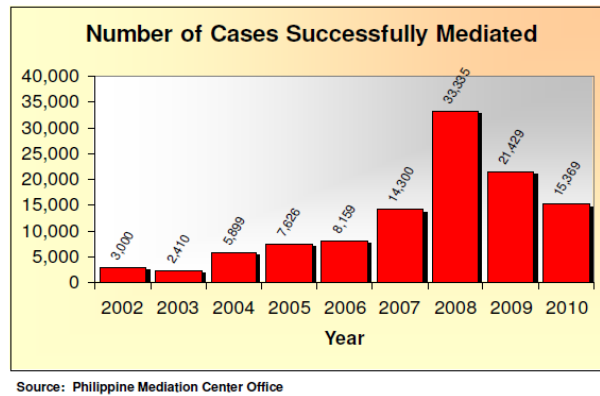


**Figure 3.1:** Success rate in mediated cases (2001~2010)

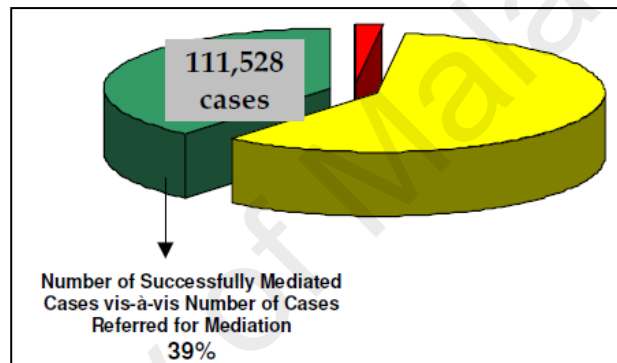
Figure 3.2 shows an increasing number of cases which were successfully mediated during the ten-year period, largely attributed by the increase of mediation centres which were established where more mediators had been accredited; the spike in 2008 was recorded following the direction from the Supreme Court to its judges to each refer 20 additional cases for mediation (de Los Angeles, 2011, p. 6).<sup>331</sup> From Figure 3.3 it could be seen that a settlement rate of 39% was recorded based on the number of cases which was referred to mediation (285,003 cases), and not based on the total number of cases which underwent mediation (166,901 cases) (de Los Angeles, 2011, p. 7).<sup>332</sup>

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*



**Figure 3.2:** Number of cases successfully mediated (2002~2010)



**Figure 3.3:** Breakdown of cases successfully mediated and those referred for mediation

Aside from the above statistics which specifically showed the settlement rate over a period of 10 years, there are still a number of questions on the practice of court-annexed mediation in the Philippines whose answers would be interesting in the study of court-annexed mediation practice in the Philippines. For example, judges' views and attitudes towards mediation as an ADR mechanism, the role of the courts and the judiciary in promoting mediation in the settlement of disputes by the parties, training and accreditation for mediators, and adequacy of current guidelines on court-annexed mediation and private mediation.

### 3.2.12 Court-annexed and judge-led mediation in Malaysia (2009~2011)<sup>333</sup>

This is one Malaysian exploratory research which involved both qualitative and quantitative methods to explore three areas, namely, key factors which led to the growth and development of court-annexed and judge-led mediation in Malaysia, key factors which have made court-annexed and judge-led mediation successful in other jurisdictions, and key factors which caused barriers to court-annexed and judge-led mediation in Malaysia. The study surveyed 100 lawyers who were registered to practise in Sabah and Sarawak, and interviewed 13 judges from Peninsular Malaysia, Sabah and Sarawak.

On the growth and development of court-annexed and judge-led mediation in Malaysia, the said 2009-2011 study revealed that key factors comprised increased understanding of the benefits of mediation, ability of mediation to reduce backlog of court cases, support and encouragement from the judiciary and the legal profession, continuous mediation training, a transparent mediation model, and cultural reconnection with mediation by the Malaysian society. The 2009-2011 study also found that the success of court-annexed mediation and judge-led mediation in other jurisdictions was attributed to high litigation costs, increased levels of public awareness of mediation, involvement of government policies to promote mediation helped to gain public confidence, the role of lawyers and relevant legal associations helped to promote mediation, and the use of mandatory mediation in some jurisdictions such as the USA and Australia. Lastly, barriers such as lack of mediation experience amongst judges who are familiar with their adjudication role, lawyers' resistance to mediation where they were trained to be combative and adversarial in

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<sup>333</sup> Alwi Abdul Wahab (2013). *Court-annexed and Judge-led Mediation in Civil Cases: The Malaysian Experience*. Ph.D Thesis, College of Law and Justice, Victoria University of Melbourne, Australia.

litigation versus being conciliatory in mediation, and public's attitude that disputes could only be settled in the courts, were identified.

In the humble opinion of the researcher, the 2009-2011 study was not focused to analyse current mediation guidelines which governed court-annexed and judge-led mediation in Malaysia, nor did it attempt to explore if the said guidelines were adequate to serve their purpose. Hence, there was no discussion on whether court-annexed and judge-led mediation should be legislated in Malaysia. The survey which was conducted on lawyers did not target lawyers who were mediators; neither did the interviews on judges who acted as mediators. What the 2009-2011 study attempted was to collect data from lawyers and judges on their opinion and feedback on the said three areas, so it was not focused on analysing opinions and feedback from practising mediators.

### **3.3 Commentary on Relevant Studies and Researches**

It can be seen from the review of the dozen reported relevant studies and researches on court-directed mediation that none of their focus were on legislating court-directed mediation nor whether court-directed mediation should be legislated even in jurisdictions like the USA and Hong Kong where there is existing legislation on mediation in general, for example, the Uniform Mediation Act (UMA) in the USA, and the Mediation Ordinance in Hong Kong. The said studies and researches did not specifically explore the role of the courts and the judiciary in promoting court-directed mediation as an ADR mechanism to facilitate settlement of disputes. The question of whether judges should be mediators or not was not touched on. The other question of whether current guidelines governing court-directed mediation were adequate to serve their purpose was not raised in any of the said previous studies and



researches. Essentially, there has been no particular focus on the topic of mediation legislation on court-directed mediation per se.

Hence, this study is aimed to explore this topic on mediation legislation, particularly, whether court-directed mediation should be legislated in Malaysia where the said Mediation Act 2012 is not applicable. To that end, in addition to the literature review on mediation legislation or the lack of it, the focus of this study is to gather views and thoughts of current mediators from both Peninsular Malaysia and East Malaysia on whether court-directed mediation should be legislated in Malaysia. Their views and thoughts are also sought on whether the current mediation guidelines (the said Practice Direction, the said Rules for Court Assisted Mediation, and general guidelines as issued by CMCKL and CMCs in other parts of the country) are sufficient to serve their purposes, and if not, what kind of recommendations or suggestions could be considered.

### **3.4 Growth and Development of Legislating Court-directed Mediation**

The main research question of this study is whether court-directed mediation should be legislated in Malaysia. In the researcher's attempt to answer the said research question, it is relevant to draw references on the extent court-directed mediation has been legislated in other jurisdictions. This section is focused on tracing the growth and development of legislating mediation, specifically, court-directed mediation in other jurisdictions outside of Malaysia, namely the USA, Australia, Hong Kong and Singapore, which could provide insights into how court-directed mediation has been legislated or not legislated in the said jurisdictions.

### 3.4.1 United States of America (USA)

The interest in mediation started as a result of the ADR movement which gained popularity in the 1970s. It started as “an alternative to criminal prosecution” to resolve minor interpersonal disputes between neighbours, acquaintances, co-workers and so on, that could lead to complaints to local law-enforcement agencies.<sup>334</sup> It was also used as an alternative to civil litigation to resolve contested divorces, especially child custody, visitation and support issues.<sup>335</sup> As was recorded in history, mediation was “crystallised” in the USA when the courts also became involved (Leathes, 2010).<sup>336</sup>

The 1976 Roscoe Pound Conference marked the historic gathering of legal scholars and jurists in their effort to reform the administration and delivery of justice in the USA as they expressed concerns about increased expense and delay for parties in a crowded justice system.<sup>337</sup> By 1979, the CPR Institute was founded and began to explain the idea of mediation. In essence, the emergence of mediation as an ADR mechanism in the USA can be traced to the work in negotiation theory propounded by Roger Fisher and William Ury of the Harvard Negotiation Project, popularised in their 1981 book, *Getting to Yes* which focused on the generation of creative solutions to meet the principled and mutually beneficial resolution of the conflict.<sup>338</sup>

In 1983, Harvard Law School, MIT and Tufts collectively founded the Program on Negotiation, followed by the formation of Pepperdine’s Straus Institute

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<sup>334</sup> Goldberg, S. B., Green, E. and Sander, F. (1985). *Teachers’ Manual - Dispute Resolution*, Boston: Little, Brown & Co.

<sup>335</sup> American Bar Association, *Alternative Means of Family Dispute Resolution*, 1982.

<sup>336</sup> Leathes, M. (2010). *2020 Vision. Where in the World will Mediation be in 10 Years?* Paper presented at 2<sup>nd</sup> Asian Mediation Association Conference, February 24-25, 2011, Kuala Lumpur, Malaysia; Goldberg, S., Sander, F. & Rogers, N (1999), *op. cit.*; Levin, A. L. and Wheeler, R. (eds.) (1979). *The Pound Conference: Perspectives on Justice in the Future*, St. Paul, West.

<sup>337</sup> Levin, A. L. & Wheeler, R. (1979), *op. cit.* At the said Conference, the paper presented by Professor Frank E. A. Sander of Harvard Law School entitled “Perspectives on Justice in the Future” urged a widespread adoption of non-litigious forms of dispute resolution which included mediation, including his vision of a court that was not simply a courthouse but a dispute resolution centre where the parties, with the assistance of a court screening clerk personnel, would be directed to the most appropriate processes and sequence of processes. See Sander, F. E. A. (1976). *Varieties of Dispute Processing*. 70 *F. R. D.* 111.

<sup>338</sup> Fisher, R. & Ury, W. R. (1991), *op. cit.* Cited the example of a librarian who acted as a mediator to two students in dispute over whether to keep the window open or shut, who generated an alternative solution by opening the window in the next room.

for Dispute Resolution.<sup>339</sup> By the late 1980s this new field had attracted pioneers who started to define the mediation process and required skills. Professional interest groups like the Association for Conflict Resolution and the ABA Section of Dispute Resolution were established. By mid-1980s, child custody mediation was so popular and widespread that major states in the USA adopted legislation requiring the use of mediation in contested custody cases.<sup>340</sup> It rapidly gained popularity in the 1980s, and there were about 500 community programs operating in the early 1990s.<sup>341</sup> In the last few years, mediation has become increasingly popular in business and personal injury claims as an alternative to litigation.<sup>342</sup> In terms of mediation programmes developed, there are approximately 200 of them which deal with over 200,000 disputes a year in the USA.<sup>343</sup>

It was not long after that the need for uniformity in mediation became increasingly needed in the USA because different state laws have been enacted which affect mediation where there has been a great deal of inconsistency in approach at inter-state and intra-state levels. The Uniform Mediation Act (UMA) was subsequently constructed in 2001 by drafting committees from the National Conference of Commissioners on Uniform State Laws and the American Bar Association (ABA)'s Section of Dispute Resolution. UMA was subsequently amended in 2003 to facilitate state adoption of the 2002 UNCITRAL Model Law on International Commercial Conciliation.<sup>344</sup> To date, UMA has since been enacted in 12 states, namely, Washington, Idaho, Utah, South Dakota, Nebraska, Iowa, Illinois, Ohio, Vermont, New Jersey, District of Columbia, and Hawaii.<sup>345</sup>

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<sup>339</sup> Leathes, M. (2010), *op. cit.*

<sup>340</sup> Milne and Folberg, J. P. (1988). *The Theory and Practice of Divorce Mediation, Divorce Mediation 3.*

<sup>341</sup> Bush, R. A. B. (1994), *op. cit.*

<sup>342</sup> Singer, L. R. (1990). *Settling Disputes: Conflict Resolution in Business, Families and the Legal System*, 2<sup>nd</sup> ed., Boulder, Colorado: Westview Press.

<sup>343</sup> McCarthy, J. J. (1982). Dispute Resolution: Seeking Justice Outside the Courtroom. 8 *Corrections Magazine* 33.

<sup>344</sup> Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, as viewed on November 17, 2014. See [www.uniformlaws.org](http://www.uniformlaws.org).

<sup>345</sup> *Ibid.*

The UMA is intended to achieve a number of objectives, namely:

1. promote the autonomy of the parties by leaving to them those matters that can be set by agreement, and need not be set inflexibly by statute;
2. promote candour of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests;
3. encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties; and
4. advance the policy that the decision-making authority in the mediation process rests with the parties.<sup>346</sup>

It is opined that the UMA is a significant step towards promoting the use of mediation as an ADR mechanism in the USA where essentially, the objective of the UMA is to protect the integrity, and enhance fairness of the mediation process through a uniform approach.<sup>347</sup> According to its Section 3(a) on the scope of the UMA, the said UMA applies to mediation in which the parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency or arbitrator, or where the parties and the mediator agree to mediate pursuant to a signed agreement, or where the parties use a mediator who holds himself or herself out as a mediator.<sup>348</sup>

Based on the described scope, the researcher opines that the UMA does not specifically include court-directed mediation where judges and judicial officers act

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<sup>346</sup> See Prefatory Notes and Sections 4 ~ 6, Uniform Mediation Act (UMA). <http://www.mediate.com/articles/umafinalstyled.cfm> [Assessed November 18, 2014].

<sup>347</sup> Conway, S. (2003). Uniform Mediation Act (UMA): Legal Privilege for All Mediation Communications. *TMD Summer 1*. [http://www.conway-partners.com/uploads/files/uniform\\_mediation\\_act.pdf](http://www.conway-partners.com/uploads/files/uniform_mediation_act.pdf) [Assessed November 18, 2014].

<sup>348</sup> Section 3(a)(1), (2) and (3), UMA.

as mediators. This is because in the USA the courts would order mediation which would then be conducted by mediators, not judicial officers. In other words, the researcher surmises that mediation is compulsory or mandatory even if the parties do not agree to go for mediation. Mandatory mediation is not the practice in Malaysia. Further, Section 3(b) of the UMA stipulates that it does not apply to disputes involving unions, judicial settlement conferences, and school peer mediation. This means that the scope of the UMA is somewhat restricted and does not apply to all disputes. Based on the above comments, the researcher humbly submits that the UMA is not relevant to court-directed mediation practice in Malaysia, and therefore, no direct reference could be drawn from it.

### 3.4.2 Australia

Australian courts promote settlement rather than litigation of all civil disputes where it is said that “the primary aim of any judicial system is to dispose of the dispute between the parties by compromise.”<sup>349</sup> In fact, in South Australia, the primary objective of the court is “to facilitate and encourage the resolution of civil disputes by agreement between the parties.”<sup>350</sup> The courts’ settlement policy is evident in the implementation of litigation management schemes.<sup>351</sup> Such a policy involves encouraging parties to engage in ADR processes, and promotes settlement since “settlement of a dispute is thought to more readily advance these objects of case management.”<sup>352</sup>

This resulted in significant settlement rate with mediation gradually becoming more and more accepted with the Federal Courts and the Supreme Courts offering

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<sup>349</sup> Per Rogers, CJ in *Tickell v Trifleska Pty Ltd* [1990] 25 NSWLR 353, pp. 354-355.

<sup>350</sup> Supreme Court Civil Rules 2006 (SA), r 3(b). See also Rules of the Supreme Court 1971 (WA), O 4B (1)(d).

<sup>351</sup> Cairns, B. (2007). *Australian Civil Procedure*, 7<sup>th</sup> ed., Lawbook Co., pp. 44-78.

<sup>352</sup> Australian Law Reform Commission (ALRC)(2000). *Managing Justice: A Review of the Federal Civil Justice System*, No. 89, pp. 76-88, 390; Bamford, D. (2004). *Litigation Reform 1980-2000: A Radical Change?* In Priest, W., and A. Roach, (eds.), *Litigation: Past and Present*, UNSW Press, pp. 146-170, 159.

court-based or court-annexed mediation services to litigants where registrars, associate judges and judges act as mediators. In Australia, judges or officers of the courts are empowered under legislation (not all states) and rules to refer matters to mediators at any time during the litigation process, and is referred to as “court-annexed” or “court referred”.<sup>353</sup> Such rules provide that the order for reference to mediation will not operate as a stay of the proceeding; they provide for the confidentiality of the mediation process where no evidence shall be admitted on anything said or done by any person at the mediation; and mediators are given the same immunity from civil suits as an arbitrator or a judge.<sup>354</sup>

In fact, court-annexed mediation began in Australia in the 1980s when the Victorian County Court Building Cases List made provisions for matters to be referred to mediation as an ADR mechanism, and when a pilot programme which started at the New South Wales District Registry paved the way for the Federal Court of Australia to conduct mediation programme from 1987.<sup>355</sup> Subsequent to that, mediation movement began to pick up its pace in the early 1990s evidenced by a series of development and realisation that mediation could be an effective ADR mechanism:

1. the Federal Court of Australia Act 1976 was amended in June 1991 to allow the court, with the consent of the parties, to refer the proceeding or any part to a mediator or arbitrator for mediation or arbitration;
2. “Spring Offensive” took place in 1992 where 280 cases from 762 cases which were waiting for trial were mediated by barristers and senior solicitors, which resulted in a dramatic settlement rate when 104 cases were settled at mediation;<sup>356</sup>

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<sup>353</sup> North, J. (2005). *Court-Annexed Mediation in Australia*. Overview speech by Law Council President, 13<sup>th</sup> Malaysian Law Conference, November 17.

<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.* See Warren, M. L. (2010), *op. cit.*

<sup>356</sup> Warren, M. L. (2010), *op. cit.*

3. National Alternative Dispute Resolution Advisory Council (NADRAC) was established in 1995 “to foster the expansion of alternatives to court action in civil matters, where the terms of reference NADRAC are to advise the Attorney-General on issues of effectiveness, efficiency, fairness and standards for ADR services;
4. Council of Chief Justices of Australia and New Zealand agreed in March 1997 that it is the function of the State to provide the necessary mechanisms for the resolution of disputes, and that court-annexed mediation was part of that process;
5. The Law Council’s Constituent Bodies, various law societies, law institutes and Bar associations in Australia fostered ADR processes within the legal profession, and have been responsible for conducting pilot schemes in some courts. For example, the New South Wales Law Society encourages its members to advise their clients of the advantages of mediation through publication of guides and codes of practice. Law societies of the Australian Capital Territory, New South Wales, Queensland, South Australia, Victoria, and Western Australia offer ADR services to the public; and
6. The Law Council has been involved in the development of standards for mediators and model rules for courts and tribunals.<sup>357</sup>

Since 2010, all trials or appeals of civil cases will only proceed to hearing after at least one session of mediation mostly by specialist members of the Bar or the profession, and sometimes by retired judges.<sup>358</sup> It has been legislated in Australia under Civil Dispute Resolution Act 2011 (Cth) that as a general rule, the parties take genuine steps to resolve disputes, and are required to pursue alternative methods of

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<sup>357</sup> North, J. (2005), *op. cit.*

<sup>358</sup> Warren, M. L. (2010), *op. cit.*

dispute resolution before they commence civil litigation, where private mediation is generally conducted by former judicial officers, lawyers, and other professionals who have relevant expertise and experience in the particular field or industry where the dispute arose.<sup>359</sup> However, court-directed mediation is conducted by court staff although in some states such as in Victoria, judges are allowed to act as mediators under judicial mediation.<sup>360</sup>

Three states have adopted a similar legislation in New South Wales, Victoria (subsequently repealed) and South Australia. In New South Wales in late 2010 new procedures were formed under Part 2A of Civil Procedure Act 2005 (NSW) prescribe pre-litigation requirements where parties are required to take “reasonable steps” either to resolve their dispute or “clarify and narrow issues in dispute” before commencing proceedings.<sup>361</sup> In Victoria, Civil Procedure Act 2010 (Vic) which commenced on January 1, 2011 introduced similar pre-litigation requirements but has since been repealed under Civil Procedure and Legal Profession Amendments Act 2011 (Vic).<sup>362</sup> The third state which has enacted similar legislation is South Australia under Supreme Court rules 2006 (SA) where plaintiffs are required to notify defendants of a prospective claim at least 90 days before commencement of proceedings.<sup>363</sup>

In other words, in all states in Australia save for Victoria, court-directed mediation is not conducted by judges while in office, rather by court staff only. As for Victoria, judges are allowed to conduct mediation under judicial mediation, not court-directed mediation. Lastly, in private mediation, mediators comprise retired judges, former judicial officers, lawyers and other professionals who have experience

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<sup>359</sup> Bergin, P. A. (2012), *op. cit.* See Section 3 of the said Act which commenced operation on August 1, 2011.

<sup>360</sup> For example, judicial resolution conferences are conducted under Civil Procedure Act 2010 (Vic); Practice Note 2 2012, “Judicial Mediator Guidelines Supreme Court of Victoria,” March 30; Nickless, R. (2012). Victoria allows Judge Mediators. *Australian Financial Review*, April 13.

<sup>361</sup> Bergin, P. A. (2012), *op. cit.* See Section 18E, Civil Procedure Act 2005 (NSW).

<sup>362</sup> Bergin, P. A. (2012), *op. cit.*

<sup>363</sup> See Rule 33.



in mediation. From a legislation perspective, it must be recognised that there is no specific legislation governing court-directed mediation (or judicial mediation as it is locally referred to as), nor is there any legislation governing mediation in general in Australia.

Be that as it may, where judicial mediation is concerned, if legislation were to be considered, it is opined that any such legislation should include provisions which must protect judges and judicial officers from becoming embroiled in the aftermath of unsuccessful mediation when they act as mediators.<sup>364</sup> It has also been suggested that such related legislation would need to include such provisions where judges and judicial officers are given immunity from being called as a witness in any post-mediation litigation of any unsuccessful mediation where the dispute returns to be tried in the courts.<sup>365</sup> In any case, this study is unable to draw any learning from the court-directed mediation practice in Australia when considering whether court-directed mediation in Malaysia should be legislated.

### **3.4.3 Hong Kong**

Mediation was first introduced in the 1980s, mainly in the family and construction disputes, and has since gained popularity. As Chief Justice Kwok Nang Li (2007) put it, “in Hong Kong, mediation has been developing and the pool of mediators has been growing” (p. 34).<sup>366</sup> On June 22, 2012, the Mediation Ordinance, which contains 11 provisions, was enacted in Hong Kong and effected on January 1, 2013.<sup>367</sup> According to its Section 5, the said Ordinance applies to any mediation conducted under an agreement to mediate if either of the following circumstances

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<sup>364</sup> Bergin, P. A. (2011). *Judicial Mediation in Australia*. Paper presented at the National Judicial College, Beijing, China, April 25-28.

<sup>365</sup> Bergin, P. A. (2011), *op. cit.*

<sup>366</sup> Speech presented at the Ceremonial Opening of the Legal Year 2007, February, Hong Kong.

<sup>367</sup> Mediation Ordinance (Ord. No. 15 of 2012). See news article <https://imimmediation.org/index.php?cID=91&cType=news> [Assessed November 2, 2014].

applies, namely, the mediation is wholly or partly conducted in Hong Kong; or the agreement provides that the said Ordinance or the law of Hong Kong is to apply to the mediation.<sup>368</sup> It also applies to the Hong Kong Government and its statutory bodies.<sup>369</sup>

However, its Schedule 1 stipulates the processes to which the Ordinance does not apply.<sup>370</sup> The said Ordinance does not promote nor provide for any incentives for parties to a dispute to go for mediation, nor does it stipulate requirements for the parties to do so. Further, it does not regulate the mediation process nor does it deal with accreditation of mediators. Be that as it may, it was reported that mediator accreditation is governed by a sole accreditation body called Hong Kong Mediation Accreditation Association Limited, which comprises representatives of key mediation service providers in Hong Kong.<sup>371</sup> The said Ordinance does not cover provisions on rights and obligations of the parties on mediated settlements in its attempt to preserve flexibility on the nature of the form of mediation outcome. As the said Ordinance is silent on this point, it is then left to the parties to determine the legal form of their mediated outcome, whether in the form of a legally binding contract, or a settlement deed, or a consent judgement by the court.

Judging from such recent developments in mediation legislation in Hong Kong, the researcher opines that the said Ordinance only applies to private mediation, as mediation is only conducted by professional mediators in Hong Kong. After all, it was previously stated in the preceding paragraph that the said Ordinance only applies to any mediation where mediation agreements have been executed. It can also be seen that the flexibility nature of mediation seems to have been considered where regulation of mediation process has been excluded in the said Ordinance, where if

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<sup>368</sup> Section 5(1) (a) and (b).

<sup>369</sup> Section 6.

<sup>370</sup> Section 5(2).

<sup>371</sup> Bergin, P. A. (2011), *op. cit.*

legislated, may not offer sufficient flexibility should changes be made. The same could also be seen in the exclusion of mediator accreditation in the said Ordinance, where if legislated, would not be easily amended to cater to adjustments of accreditation requirements in the development of mediator competencies and quality assurance in the delivery of mediation services.

#### 3.4.4 Singapore

The growth of mediation in Singapore was driven by the judiciary in the 1990s where mediation was formally introduced in the Subordinate Courts in 1994 for civil cases, family disputes, small claims tribunal cases, juvenile court cases, and magistrates' complaints.<sup>372</sup> In addition to court-directed mediation, private mediation services were first provided by Singapore Mediation Centre (SMC) in 1996.<sup>373</sup> SMC is a non-profit organization guaranteed by the Singapore Academy of Law, and receives the support of the Supreme Court of Singapore, the Subordinate Courts of Singapore, and the said Singapore Academy of Law.<sup>374</sup> SMC maintains its own panel of trained mediators and neutrals, which comprise Members of Parliament, former High Court judges, senior counsels, architects, doctors, engineers, IT specialists, project managers, psychologists, and university professors.<sup>375</sup>

In fact, in 1994, the Subordinate Courts piloted a mediation programme where selected settlement judges took on the role as mediators to mediate a range of cases, and upon its success, the Primary Dispute Resolution Centre (PDRC) was established.<sup>376</sup> Mediators in the PDRC comprise district judges who are designated as settlement judges, and since 2009, lawyers have been included under the Associate

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<sup>372</sup> Lim, L. Y., & Liew, T. L. (1997), *op. cit.*

<sup>373</sup> Low, J. & Quek, D. (2010). The ADR Form in the Subordinate Courts: Finding the APPROPRIATE Mode of Dispute Resolution. *The Singapore Gazette*, April.

<sup>374</sup> Loong, S. O. (2005), *op. cit.*

<sup>375</sup> *Ibid.*

<sup>376</sup> *Ibid.* See Loong, S. O. (2005), *op. cit.*

Mediator programme which is a collaboration of the Subordinate Courts, the Singapore Mediation Centre (SMC), and the Law Society Pro Bono Services Office.<sup>377</sup> The scope of the PDRC is to mediate two main categories of cases, namely, motor accidents not involving injuries, and other civil matters.<sup>378</sup>

In essence, court-directed mediation is practised in the Subordinate Courts in Singapore under the “Singapore Courts Mediation Model” which involves a settlement conference presided over by a settlement judge.<sup>379</sup> The role of the settlement judge is to guide the parties, offer them advice and suggestions on possible solutions to resolve their dispute, and assist the parties to evaluate the merits of the dispute. The settlement judge conducts mediation on a “without prejudice” basis, and all communication during mediation is treated as confidential. It could be argued that such a directive and evaluative approach adopted by the court mediator does not embrace pure mediation principles of party autonomy and self-determination where the parties ultimately decide and agree on a mediation outcome, one which they can live with. However, it has been stated that “it is believed that Singaporeans are less vocal in a formal setting...a greater degree of intervention is required in order to facilitate negotiations.”<sup>380</sup>

Since then, Singapore never looked back. As highlighted by the Honourable Chief Justice Chan Sek Keong in the Opening of Legal Year, mediation is “one undisputed success story in the development of legal services in Singapore in the last decade.”<sup>381</sup> Even the former Chief Justice Yong Pung How emphasized that Singapore was developing mediation as a non-confrontational way of resolving

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<sup>377</sup> Low, J. & Quek, D. (2010), *op. cit.* The said Programme allows lawyers who have been accredited by SMC and approved by the Subordinate Courts to volunteer as mediators besides accumulate pro bono hours with the said Law Society.

<sup>378</sup> Low, J. & Quek, D. (2010), *op. cit.*

<sup>379</sup> Loong, S. O. (2005), *op. cit.*

<sup>380</sup> *Ibid.*

<sup>381</sup> Response from The Honourable Chief Justice at the Opening of Legal Year 2010, Paragraphs 13-14. See <http://app.supremecourt.gov.sg/data/doc/ManageHighlights/2126/Opening%20of%20the%20Legal%20Year%202010%20-%20Response%20of%20Chief%20Justice%20Chan%20Sek%20Keong%2019%20Jan%202010.pdf>.

disputes and preserving relationships.<sup>382</sup> Be that as it may, there is no law regulating the practice of mediation, nor is there a law or national system to regulate the accreditation, quality or standards of mediators in Singapore. Therefore, common law on legal principles which govern mediation is used as guidance.

Insofar as court mediators are concerned, they are governed by a model standard of practice, “Model Standards of Practice for Court Mediators”, which explains the objectives and role of court mediation, types of mediation, mediation process, and delivery of quality mediation.<sup>383</sup> In addition to the model standard of practice, court mediators are also bound and governed by a code of ethics, “Code of Ethics for Court Mediators,” which covers responsibilities of court mediators with emphasis on mediation principles on impartiality, neutrality, confidentiality, consensual decision making, and other ethical duties.<sup>384</sup>

However, SMC has undertaken this effort to develop its own system of mediator training and accreditation, where its accreditation is limited to one year and is subject to renewal.<sup>385</sup> In addition, its mediators and neutrals are governed by SMC’s Mediation Procedure and SMC’s Code of Conduct to guide and direct its mediators through the mediation process and to abide by mediation principles such as confidentiality, neutrality and impartiality.<sup>386</sup> Further, in its effort to promote mediation, it conducts regular mediation accreditation workshops for lawyers where those who have been accredited may apply to be associate mediators of the Subordinate Courts under the said Associate Mediator Programme.<sup>387</sup>

Hence, in the Singapore model, while there is no legislation to govern mediation, whether private mediation or court-directed mediation, the researcher

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<sup>382</sup> Low, J. & Quek, D. (2010), *op. cit.*

<sup>383</sup> Lim, L. Y. & Liew, T. L. (1997), *op. cit.*

<sup>384</sup> *Ibid.*

<sup>385</sup> Loong, S. O. (2005), *op. cit.* Re-accreditation will be granted if the mediator engages in at least four hours of annual continuing education in mediation, and is available to conduct at least five mediations per year.

<sup>386</sup> Loong, S. O. (2005), *op. cit.*

<sup>387</sup> Low, J. & Quek, D. (2010), *op. cit.*

opines that such non-legislated mediation practice is governed by a strict mediation practice framework to ensure that parties who are in dispute receive professional mediation services based on mediation principles and process. The said governance takes the form of the model standards of practice and code of ethics for court mediators as governed by the Subordinate Courts under its Singapore Courts Mediation Model, while the SMC governs private mediators through its own professional training initiatives of preserving the quality of private mediation.

### **3.5 Commentary on Legislating Court-directed Mediation in Other Jurisdictions**

It can be seen from the review on the extent of legislating court-directed mediation practice in other jurisdictions in the USA, Australia, Hong Kong and Singapore, that there are a number of key observations. First, not all four of these jurisdictions practise court-directed mediation as how it is practised in Malaysia where judges and judicial officers act as mediators on a part-time basis while still in office. Unlike in Malaysia, the courts in the USA order mediation for the parties to resolve their dispute but mediation is then conducted by mediators who are not judges or judicial officers. In the case of Australia, its court-directed mediation practice is not the same as in Malaysia where its judicial mediation involves judges as mediators instead. Similarly, mediation is only conducted by mediation professionals not judges in Hong Kong. In Singapore, however, judges are involved in settlement conferences where they conduct mediation in a “without prejudice” basis, and all communication during mediation is treated as confidential.

Second, in terms of mediation legislation, there are a number of variations in terms of the governing instrument. In the USA, the UMA which was introduced to ensure uniformity in mediation in all the states (although not all states have adopted

it) does not specifically apply to court-directed mediation as discussed in the earlier section. In the case of Australia, as seen in the previous discussion that there is no legislation governing mediation, be it court-directed mediation or judicial mediation or private mediation. However, in Hong Kong, its Mediation Ordinance only governs private mediation which is conducted by professional mediators, and there is no court-directed mediation.

Lastly, as seen in the Singapore practice, court mediators such as judges are involved in settlement conferences but there is no legislation governing this practice. However, its professional framework consisting of strict governance by the Subordinate Courts of providing model standard practice and code of ethics for court mediators is one practical approach in the absence of an enacted legislation on court-directed mediation. The said framework is further supported by the SMC which maintains its own panel of trained mediators through its own system of mediation training and accreditation.

It is in the researcher's humble opinion that the Singapore model seems to be the more practical approach to be adopted by Malaysia in determining whether legislating court-directed mediation is the way forward for several reasons. First, the legal systems and framework of these two countries are not dissimilar so adoption of legal practices would not require excessive effort and understanding of the intended changes in the adoption process. Second, settlement judges in Singapore conduct mediation while still in office under the Singapore Courts Mediation Model as enunciated by the Subordinate Courts. This is not different from the court-directed mediation practice in Malaysia where judges and judicial officers, act as mediators while still in office too. In the later chapters the researcher examines the extent the Singapore model could help shed further insight on possible solutions to determine whether court-directed mediation should be legislated in Malaysia.

### 3.6 Chapter Summary

The review in this chapter covered two areas which are relevant to the main research question of this study, that is, whether court-directed mediation should be legislated in Malaysia, namely, reported relevant studies and researches on legislating court-directed mediation, and mediation legislation or the lack of it outside of Malaysia. In essence, the said review on reported studies and researches shows that from a dozen of such studies and researches from the early 1990s to 2011 in a number of countries in Australia, the Philippines, Singapore, the UK, and the USA, none of them had focused on legislating mediation, let alone legislating court-directed mediation. Further, none of them had focused on the role of the courts and the judiciary in facilitating or promoting mediation as an ADR mechanism to settle disputes, nor did they explore the adequacy of current mediation guidelines and procedures to serve their purpose in the absence of any mediation legislation.

Be that as it may, the said review on mediation legislation in the said four jurisdictions, however, seems to have shed some insight on whether court-directed mediation should be legislated in Malaysia. The review shows that there could be alternative approaches and solutions to legislating court-directed mediation which could still serve the same purpose through legislation. In this respect, the researcher humbly submits that the Singapore model of non-legislation in court-directed mediation but governing mediation practice in a strict framework and governance, both court-directed mediation and private mediation, may be the answer this study hopes to find answers to its main research question of whether court-directed mediation should be legislated in Malaysia.



## CHAPTER 4: COURT-DIRECTED MEDIATION IN MALAYSIA

### 4.1 Introduction

This chapter covers insights into current practices of court-directed mediation in Malaysia where judges and judicial officers act as mediators. They are governed by mediation rules, guidelines and procedures from a number of named sources, namely, the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and the other CMCs in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country.<sup>388</sup> Further, this chapter discusses the role of the courts and the judiciary in Malaysia in promoting court-directed mediation as an ADR mechanism to facilitate settlement of disputes. The views and thoughts of the respondents in this study also add different perspectives to the question as to whether court-directed mediation should be legislated in Malaysia.

The practice of mediation in Malaysia is still at its embryonic stages (Abraham, 1998, p. 2).<sup>389</sup> In recent years, the severe backlog of court cases in this country has somewhat provided the catalyst for mediation to be taken notice by the courts.<sup>390</sup> Be that as it may, this does not mean that all cases can be referred to mediation or be mediated. In fact, there are 11 types of matters which are not suitable for mediation which are deemed non-applicable under the said Mediation Act.<sup>391</sup> One author views that cases which are suitable for court-directed mediation are those which are related to neighbourhood and community issues such as boundary disputes, nuisance, tort including medical negligence, just to name a few.<sup>392</sup>

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<sup>388</sup> Please see *Appendix A*, *supra* note 10, *Appendix B*, *supra* note 16, and *Appendix C-2*, *supra* note 25 respectively.

<sup>389</sup> Abraham, C. (1998). *Asia Business Law Review* 20.

<sup>390</sup> *Supra* note 17.

<sup>391</sup> *Appendix D*, *supra* note 27, Schedule [Paragraph 2(a)] Non-Application.

<sup>392</sup> Abraham, C., *op. cit.*

In fact, there is no statutory provision or legislation which expressly provides for the parties to resolve their dispute through court-directed mediation, or for courts to resolve disputes via mediation as an ADR mechanism. However, reference must be made to Order 34 rule 2(2) (a) of the revamped Rules of Court 2012. Rule 2(2) (a) provides that,

“At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including – mediation in accordance with any practice direction for the time being issued.”<sup>393</sup>

Reference to mediation in the 2012 Rules can also be traced to Order 59 rule 8(c), concerning the exercise of a court’s discretion as to costs. The relevant rules mandate that in exercising its discretion as to costs, the court “shall, to such extent, if any, as may be appropriate in the circumstances, take into account – the conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution.” These two provisions in the 2012 Rules confirm that litigating parties must pay heed to mediation, and that the practice of mediation is now firmly entrenched in the civil litigation landscape in Malaysia.

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<sup>393</sup> P.U.(A) 205/2012, [http://www.malaysianbar.org.my/index.php?option=com\\_docman&task=doc\\_view&gid=3766](http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=3766) [Accessed 20 March 2016]. Similar provision can be seen in the USA where efforts have been made to formerly legitimize and institutionalise mediation by judges in Rule 16 of the Federal Rules of Civil Procedure which was amended in 1983 to strengthen the hand of the trial judge in brokering settlements on “the possibility of settlement or the use of extrajudicial procedures to resolve the dispute”. Please see Fiss, O. M. (1984). Against Settlement. 93 *The Yale Law Journal* 1073.

Lastly, there is the recent provision which requires claims for personal injuries and other damages due to road accidents to be automatically referred to court-directed mediation prior to the cases being fixed for hearing. The said provision can be found in Practice Direction No. 2 of 2013.<sup>394</sup> Under the said Practice Direction No. 2 of 2013, all accident cases under Code 73 in the Magistrate's Court, and those under Code 53 in the Sessions Court must first be referred to court-directed mediation within ten weeks from the date of filing before pleadings are closed. However, the parties could request for a court hearing date prior to the said referral to court-directed mediation in their effort for early preparation in the event that court-directed mediation does not succeed in resolving their dispute.

In essence, in the absence of any statutory provisions governing court-directed mediation in Malaysia, there are three sources of mediation rules, guidelines and procedures which are applicable to judges and judicial officers when they act as mediators. They are the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and the other CMCs in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country. For the judges and judicial officers, they rely solely on the said Practice Direction and the said Rules for Court Assisted Mediation for mediation rules, guidelines and procedures when they conduct mediation. The two said sources are not made available to the parties or to potential litigants who have access to the general guidelines on mediation which are issued by CMCKL and other CMCs for public consumption. Each of these sources is discussed in turn.

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<sup>394</sup> *Appendix E* for Practice Direction No. 2 of 2013 on "Mediation Process for Road Accident Cases in Magistrates' Courts and Sessions Courts."

#### 4.2 Practice Direction No. 5 of 2010 (Practice Direction on Mediation)

The Practice Direction No. 5 of 2010 which is the Practice Direction on Mediation came into effect on August 16, 2010 where it governs mediation for civil and commercial cases which are pending in the High Court and Subordinate Courts.<sup>395</sup> Under the said Practice Direction, the Chief Justice of Malaysia directs that all Judges of the High Court and its Deputy Registrars, and all Judges of the Sessions Court and Magistrates and their Registrars, may, at the pre-trial case management stage as stipulated under Order 34 rule 2(2) (a) of the recently revamped Rules of Court 2012, and reference to mediation in the 2012 is traced to Order 59 rule 8(c) on the exercise of a court's decision as to costs. These two provisions confirm that the parties must pay heed to mediation, and give such directions that the parties facilitate the settlement of the matter before the court by way of mediation.<sup>396</sup>

In fact, Judges may encourage parties in dispute to settle their disputes at the pre-trial case management stage or at any stage, whether prior to, or even after a trial has commenced, or even be suggested at the appeal stage, where settlement can occur during any interlocutory application stage.<sup>397</sup> It is to be noted that the said Practice Direction is intended only as a guideline for settlement, and that Judges and the parties may suggest alternative modes of settlement other than through mediation.<sup>398</sup> Lawyers representing the parties are required to cooperate and assist their clients in resolving their disputes in the most amicable manner.<sup>399</sup> Essentially, the key objective of the said Practice Direction is to encourage the parties to come to an amicable settlement without having to go through or to complete a trial or appeal for the simple

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<sup>395</sup> Appendix A, *supra* note 10; *supra* note 11; *supra* note 393.

<sup>396</sup> Appendix A, *supra* note 10, at p. 1. See Section 1.1 which states that the term "Judge" includes a Judge or Judicial Commissioner of the High Court, Judge of the Sessions Court, Magistrate or a registrar of the High Court.

<sup>397</sup> Appendix A, *supra* note 10, Section 3.1.

<sup>398</sup> Appendix A, *supra* note 10, Section 2.2.

<sup>399</sup> *Ibid*, Section 2.3.

benefit of parties arriving at a settlement which is agreed by both parties, that it is expeditious, and that it is a final settlement.<sup>400</sup>

The said Practice Direction contains six key areas of general guidelines, which cover responsibilities of Judges, and confidentiality, which require Judges to adhere to when they act as mediators. Therefore, this set of mediation guidelines is a reference for judges and judicial officers when they conduct court-directed mediation. On the guidelines on confidentiality, the specific section provides for the general rule on confidentiality, and the “without prejudice” rule relating to testimonies by the mediator, and whether he or she could be compelled to divulge the said information or communication.<sup>401</sup>

However, the researcher observes that this section does not provide the required guidelines on the rule on confidentiality which relate to the parties. The mediator must be guided in terms of the extent to which communication and information which are shared by the parties during mediation, whether at joint meetings where both parties are present or at caucuses between the mediator and each of the parties, are protected. The researcher returns to this important point on protecting confidentiality in joint meetings and caucuses which was discussed at length in the previous chapter.<sup>402</sup>

In addition to the said general guidelines, there are two Annexures, namely, Annexure A on “Judge-led Mediation”, and Annexure B on “Mediation by any other mediator,” as indicated in the said Practice Direction that mediation may be conducted in the two said modes.<sup>403</sup> The said modes are provided for under Section 5 on Modes of Mediation.<sup>404</sup>

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<sup>400</sup> *Ibid*, Section 2.1.

<sup>401</sup> *Appendix A, supra* note 10, Section 6.2 (a).

<sup>402</sup> See section on Confidentiality in chapter 2 on *Review of Relevant Terms and Concepts*.

<sup>403</sup> *Appendix A, supra* note 10, Annexure A (Judge-led mediation) and Annexure B (Mediation by any other mediator).

<sup>404</sup> See Section 5.1(a) on “Judge-led mediation” and Section 5.1(b) on mediation “by a mediator agreeable by both parties.”

According to the said Annexure A, under the Judge-led mediation mode, the general rule is that the judge hearing the case should not be the mediating judge unless agreed to by the parties. If the parties do not agree to that, the case should then be passed to another judge to mediate it. Under this process, the parties must have their lawyers present during the mediation session unless the parties are not represented by any legal counsel. In cases where the mediation is successful, the judge who acts as the mediator will record a consent judgement on the agreed terms by the parties. However, if the mediation is not successful, the case is then reverted to the hearing judge who will continue to hear the case.

The researcher submits that the phrase “*unless agreed to by the parties*” gives the parties the option to decide if they want the judge hearing their case to be the judge to mediate their matter. Based on the principles of mediator impartiality and mediator neutrality, it is safe to state that the existence of the said phrase goes against the fundamental rule that the judge or judicial officer who hears the matter cannot be the same person to mediate the same case. It also goes against the fundamental rule on confidentiality in mediation where all materials, communication and information exchanged and shared during mediation are kept confidential and cannot be communicated to the trial judge.

In this respect, where the said phrase exists in the mediation rule under Annexure A, the researcher argues that a number of issues could arise. First, there is the issue of perception which raises the question of whether the appearance of independence and objectivity of a judge who conducts court-directed mediation would be compromised. This would also raise other questions as to whether the judge could compromise his or her mediator impartiality, mediator neutrality, and mediator biasness wherein as the mediator, the judge has ethical, and express and implied duties to be objective, and to keep all communication and information shared and

exchanged by the parties during mediation confidential, and to ensure that mediation is fairly conducted. In short, public confidence in the integrity and impartiality of the court and the judge may be threatened.

The other issue is the fear as to the impartiality at a post-mediation trial by the same judge where the judge conducts the mediation and the dispute does not settle. The said phrase which exists in the mediation rule under Annexure A allows the judge who has mediated the dispute to have further involvement with the matter as all communication and information exchanged and shared during mediation when the judge hears the matter during the trial. In other words, the phrase allows for the same person to act as both the mediator and the hearing judge in the same case. Although this issue could be resolved by the judge's recusal during the trial, the researcher submits that judges might then need to be recused in an increasing number of hearings if the said phrase is not removed.

Aside from the potential negative perception on judges as mediators, the said phrase if allowed to be retained in the said Annexure A could also provide the opportunity to the parties and/or their lawyers to undermine the mediation process. There is the potential risk of the parties and/or their lawyers using mediation as a "dry run" of their case to obtain materials, communication and information from the other party which otherwise may not be made available to them in litigation. Where the said phrase allows for the judge and the mediator to be the same person, the researcher submits that the parties and/or their lawyers may be familiar with the mediator who hears the matter as the trial judge, and this could provide the parties and/or their lawyers the opportunity to react in a certain way in response to the various options which were made available by the other party during mediation.

At the end of the day, an increasing dissatisfaction with judicial conduct of court-directed mediation would not be healthy. In fact, it may reflect negatively upon

the judiciary as a whole. Consequently, the researcher submits that the said phrase ought to be removed where Section 1 in the said Annexure should be amended accordingly to read as follows - “The Judge hearing the case should not be the mediating Judge.”

On Annexure B which covers the procedure where mediation is referred to a non-judge mediator, or private mediators, there are three main sections comprising guidelines on appointing the mediator who is not the Judge, the procedure of such appointment, and the settlement agreement arrangement in situations where mediation is successful and where mediation does not succeed. Annexure B allows for more than one private mediator to be appointed from the list of certified mediators which is provided by the MMC or any other mediator who is chosen by the parties.<sup>405</sup> The said Annexure has a general provision which relates to mediator code of conduct but it is a loose provision which does not impose a strict or mandatory requirement for all appointed private mediators to be bound by available mediation codes of conduct or rules.

It is noted that Section 1.4 of the said Annexure B reads as follows: “Any mediator so chosen by the parties may agree to be bound by the MMC Code of Conduct and the MMC Mediation Rules, or not at all.” The researcher submits that such a provision could be seen to be extremely lax in terms of imposing strict or mandatory compliance to the mediation code of conduct of all appointed private mediators, especially, those who are not from the list of certified mediators from the MMC. While the MMC may impose strict adherence to its said Code of Conduct and its said Mediation Rules to all its certified mediators, however, the said Section 4.1 allows for even the MMC certified mediators an option *not* to be bound by the said Code of Conduct and the said Mediation Rules under the said Annexure B. As for the

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<sup>405</sup> Appendix A, *supra* note 10, Section 1.3 and Section 1.1 of Annexure B.



other private mediators who are not from the list of certified mediators by MMC, there is no set of mediation code of conduct for them to refer to, let alone to adhere to.

The researcher humbly submits that the said Section 4.1 should be amended to impose a mandatory requirement for “Any mediator so chosen by the parties *must [emphasis added by the researcher]* agree to be bound by the MMC Code of Conduct and the MMC Mediation Rules” and to remove the phrase “...or not at all.” The researcher contends that there must be same standards and code of conduct for all mediators to ensure consistency in mediation practice, process and conduct of mediation sessions, whether by judges and judicial officers who act as court mediators, or private mediators, whether they are certified mediators by MMC or not. Further elaboration on the need to formalise and regulate a consistent and standardised code of conduct and professional ethics for all mediators is discussed in chapter 6.<sup>406</sup>

Moving on from the said Annexures, it is to be noted that the said Practice Direction does not cover mediation for Court of Appeal cases which could then be conducted on a voluntary basis with the consent of the parties.<sup>407</sup> The inaugural court-initiated mediation for Court of Appeal was reported to have begun its own court-initiated mediation process to clear outstanding and civil appeal cases on April 9, 2010.<sup>408</sup> To illustrate by way of statistics, since the introduction of mediation in the Court of Appeal in April 2010 until November 2010, 45 cases were set down for mediation, of which 17 cases were settled and consent judgments were recorded, two

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<sup>406</sup> See chapter 7 on *Implementing Court-directed Mediation in Malaysia*.

<sup>407</sup> Datuk Wira Low Hop Bing (2011). Retired Court of Appeal Judge, Malaysia. Alternative Dispute Resolution in Civil and Commercial Cases. Paper presented at the Commonwealth Magistrates’ and Judges’ Conference 2011, July 18-21, 2011 at Royale Chulan Hotel, Kuala Lumpur, Malaysia, p. 22.

<sup>408</sup> As reported in *The Malaysian Insider* on April 9, 2010, “Court of Appeal sits for first time to clear cases through mediation.” See <http://www.themalaysianinsider.com/mobile/malaysia/article/Court-of-Appeal-sits-for-first-time-to-clear-cases-through-mediation/>.

cases were withdrawn by way of Notices of Discontinuance, and mediation was not successful in 19 cases as shown in Table 4.1 below.<sup>409</sup>

**Table 4.1:** Profile of Cases Mediated by Court of Appeal  
(April 2010 to December 2010)

CASES FIXED FOR MEDIATION	CONSENT JUDGMENTS RECORDED	MEDIATION FAILED	NOTICES OF DISCONTINUANCE	CONTINUED MEDIATION
45	17	19	2	7

At the Federal Court, two cases were mediated in 2011 while a total 13 cases were settled at the Court of Appeal through mediation, and 2,276 cases at the High Court, and 4,347 cases at the subordinate courts were mediated with a 50% settlement rate achieved in all these cases.<sup>410</sup> In the courts of Sabah and Sarawak, court-annexed mediation programme was equally popular with a settlement rate of 44% achieved over 746 mediations conducted in the courts from the period 2007 through 2009.<sup>411</sup> A further illustration on statistics gathered from the period 2007 through 2010 also indicated that the Sabah and Sarawak Courts had saved 1,368 sitting days or 3.75 years of judicial time as shown in Table 4.2, where the hearing days saved was calculated as follows, assuming each case took three sitting days:

$$456 \times 3 \text{ sitting days} = 1,368 \text{ days or } 3.75 \text{ years of hearing days}^{412}$$

<sup>409</sup> Datuk Wira Low Hop Bing (2012). Retired Court of Appeal Judge. Mediation: The Way Forward, Challenges & Solutions. Paper presented at the Seminar on Malaysia's New Mediation Act, Law Revision and Reform Division, Attorney General's Chambers in Putrajaya, Malaysia, July 3, 2012.

<sup>410</sup> Speech delivered by The Right Honourable Tan Sri Arifin bin Zakaria, Chief Justice of Malaya at the opening of the Legal Year 2012, Putrajaya, Malaysia, January 14, 2012, p. 14.

<sup>411</sup> Puan Egusra binti Ali and Tuan Edward Paul, "Mediation." Paper as posted in the official website of The High Court in Sabah and Sarawak on February 17, 2010. Puan Egusra binti Ali, Sessions Court Judge, Sessions Court Tawau, Sabah, and Tuan Edward Paul, Magistrate, Magistrate's Court, Tawau, Sabah, Malaysia, as viewed in the official website of The High Court of Sabah and Sarawak on January 6, 2013. See

[http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt\\_web/](http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/).

<sup>412</sup> The Honourable Mr Justice Datuk David Wong Dak Wah (2011). High Court Judge, Kota Kinabalu High Court, Sabah, Malaysia. Court-Annexed Mediation, as viewed in the official website of The High Court of Sabah and Sarawak on January 6, 2013. Please see

[http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt\\_web/](http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/).

**Table 4.2:** Number of Cases Referred and Settled by Mediation (2007 to 2010)

NUMBER OF CASES REFERRED AND SETTLED BY MEDIATION										
STATE	2007		2008		2009		2010		TOTAL	
	REFERRED	SETTLED	REFERRED	SETTLED	REFERRED	SETTLED	REFERRED	SETTLED	REFERRED	SETTLED
SABAH	83	59	75	30	66	37	187	97	411	223
SARAWAK	49	5	116	13	270	137	166	78	601	233
TOTAL	132	64	191	43	336	174	353	175	1012	456

There have been mixed views as to whether the said Practice Direction constitutes sufficient guidelines for judges and judicial officers to act as court mediators. On the one hand, the majority of the respondents in this study were of the view that these guidelines, although relatively general in nature, are sufficient at the beginning, in view of the fact that there have been no previous rules or guidelines for these court mediators.<sup>413</sup> Be that as it may, these respondents cautioned that in the course of time, the Practice Direction may become insufficient in the long term because there is no legislation governing court-directed mediation in Malaysia.<sup>414</sup> As such, it is their strong recommendation to have these rules and guidelines in the said Practice Direction reviewed on a regular basis for long-term purposes.<sup>415</sup>

On the other side of the coin, other respondents in this study opined that the current mediation rules and guidelines in the said Practice Direction are relatively too general in nature, and therefore, lack depth and precision in several areas.<sup>416</sup> Amongst these include the boundaries, scope and extent of the mediation process and its

<sup>413</sup> This was the view of 14 out of 27 respondents from Mediation Interview – Part 2, of which 9 from the judiciary in Peninsular Malaysia, Sabah and Sarawak, while the remaining 5 were from the MMC Panel of Mediators. A total of 27 respondents were made up of 10 from the judiciary and 17 from the MMC Panel of Mediators.

<sup>414</sup> *Ibid.*

<sup>415</sup> *Ibid.*

<sup>416</sup> This view was shared by 9 of the 27 respondents from Mediation Interview – Part 2, where all 9 were from the MMC Panel of Mediators.

procedures, the role, responsibilities and duties of the mediator to be elaborated to include the do's and don'ts of judges and judicial officers who act as mediators, the fundamental ethics on the conduct of mediators on impartiality, neutrality and conflict of interest, as areas of shortcomings of the current rules and guidelines.<sup>417</sup>

### **4.3 Rules for Court Assisted Mediation**

In addition to the said Practice Direction, there is a separate set of rules on court-directed mediation entitled “Rules for Court Assisted Mediation.”<sup>418</sup> The said Rules was authored by a judicial officer in Sabah, serves as easy reference for all judicial officers who act as mediators, including those in Peninsular Malaysia.<sup>419</sup> As there are no statutory provisions to govern judicial officers who act as mediators in court-directed mediation, the said Rules have been written with the sole objective of using them as guidelines to assist judicial officers, as indicated under the section on “Application” of the Rules.<sup>420</sup> In essence, there are a total of 16 sections, of which some key ones are elaborated and outlined in turn.

#### **4.3.1 Section 2 on “Judicial officers as mediators”**

This Section promotes mediation as an efficient alternative to trial to save time and money, and provides guidelines on the importance of impartiality to be maintained in the mediation process so that judges and judicial officers avoid mediating their own trial cases. In fact, under Section 2.2, there is a strict prohibition which explicitly states that judges and judicial officers are strictly not permitted to

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<sup>417</sup> These areas are further discussed in chapter 6 on *Mediation Interviews: Research Findings and Commentary*.

<sup>418</sup> *Appendix B, supra* note 16.

<sup>419</sup> The Honourable Justice Ravinthan N. Paramaguru, “Rules for Court Assisted Mediation” as posted on March 18, 2011 in official website of The High Court in Sabah and Sarawak. See [http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt\\_web/mediation.php](http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/mediation.php).

<sup>420</sup> *Appendix B, supra* note 16, Section 1.

mediate cases which they hear. The said Section goes on to state the risk of judges being wrongly accused of being unfair should they mediate their own trial list of cases. It even goes on to explain that judges can only mediate cases which are on other judges' trial lists.

This explicit prohibition with clear explanation on why such a prohibition exists is extremely helpful to judges and judicial officers who act as mediators. It is the researcher's humble view that such prohibition ought to be adopted by the said Practice Direction where not only is such an express prohibition absent, the said Practice Direction allows the same hearing judge to be the mediating judge for the cases on the hearing judge's trial list as long as the parties consent to this. As discussed at length in the earlier section of this chapter, in essence, the said Practice Direction allows judges and judicial officers to mediate their own cases which they hear if the parties do not object to that.

#### **4.3.2 Section 4 on “Basic function of a mediator”**

This Section elaborates that there are two roles of a mediator in court-directed mediation, namely, as a facilitator at the first stage of the mediation process, and as an evaluator at the second stage where impartiality and neutrality need to be maintained throughout the process, including the duty to discharge with caution, tact and diplomacy, although the consent of the other party needs to be obtained first.<sup>421</sup> The researcher contends that this Section does recognise the widespread use of evaluative intervention by mediators in court-directed mediation although mediation was defined as a facilitative process when it was first introduced to the courts (Riskin, 1996, p. 24).<sup>422</sup>

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<sup>421</sup> Appendix B, *supra* note 16, Section 4.3.

<sup>422</sup> Riskin, L. L. (1996). Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed. 1 *Harvard Negotiation Law Review* 7.

As an evaluative mediator, for example, the mediator hears confidential information which may not be legally relevant but may comprise either facts on the underlying needs, interests, and objectives of the parties (why they want what they want in the dispute) or sensitive information which may affect the possible settlement ranges or solutions, conducts “reality checks” by critically assessing the strengths and weaknesses of the various options and suggestions, and gives neutral, non-representation information, that is not adversarial “advice” or “prediction. In the researcher’s opinion, the parties and/or their lawyers would be more receptive to the evaluative role of the mediator in court-directed mediation because they want the mediator to provide opinions on the merits of the case and suggested settlement options.

There is a very fine line between the first stage and the second stage because the role of the mediator is not a mechanical one, but one which is seamless from start to end. The researcher argues that the mediator in playing his role as the mediator cannot just switch from a facilitative mode to an evaluative one, and perhaps, where the situation warrants it, to switch back to being facilitative. Although the proviso in the said Section requires the consent of the other party, the researcher humbly submits that where evaluation is to be undertaken at all, the mediator must exercise utmost care insofar as not to deny the parties of their autonomy, and the opportunity to control their own decisions.

This point is especially important to judges and judicial officers who act as court mediators because they have a greater tendency to wear their adjudication hat as compared to other mediators who are not court mediators. Further, given their adjudication training, they tend to apply their evaluative skills during the mediation process. Hence, it is humbly submitted by the researcher that the two-fold role of the mediator encourages mediators in court-directed mediation to use the evaluative

approach because they have been trained to do so when hearing cases. Simply put, where the two-fold role of the mediator is allowed under the said Rules in court-directed mediation, party self-determination and party autonomy may be gravely prejudiced, impaired and compromised, if utmost caution is not taken by the mediator.

At the end of the day, whether it is the facilitative or the evaluative role, the role of the mediator is to steer the direction of mediation with the aim of assisting and guiding the parties to find an agreed outcome which is to be decided by the parties. Therefore, mediators in court-directed mediation should use his or her trained evaluative skills for the benefit of the parties. For example, when they test one party's views or perception by reference to the other party's position and views, the parties would benefit by having a more accurate appreciation of the respective strengths and weaknesses of the options in order for them to achieve a more realistic outcome.

If the mediator is not requested by the parties to provide an evaluation of the issues at hand, the mediator may still want to do so with a view to assist the parties to recognise certain points and facts so that they could re-assess their respective positions. If the mediator is asked by the parties to make an evaluation of their positions, the informal and non-binding opinion of the mediator could provide an informal indication of the weak and strong aspects of the dispute to guide the parties in their negotiations. Be that as it may, the mediator must, at all times, consider the circumstances and appropriateness of playing the evaluative role as there is always the risk that such an evaluation may impair or damage the perceived neutrality, perceived impartiality and perceived biasness of the mediator.

### 4.3.3 Section 5 on “Introducing the process”

This Section caters for the need for mediators to provide a good introduction to the parties on the overall mediation process, to explain to them the role of the mediator in various stages of the process (during joint meetings in the presence of both parties, and during caucuses with each party separately, where applicable), to discharge words of caution on the governance of the mediation process, and to explain the effects of the mediation session whether a settlement is reached or not. The researcher notes that this Section contains specific provisions on very important aspects of the mediation process.

In the researcher’s opinion the said provisions are relatively more significant to judges and judicial officers when they act as mediators because they also adjudicate cases given the expectations of the parties who know that they also hold adjudication positions. The said provisions read as follows:

1. that the decision is to be made by the parties, not the mediator.<sup>423</sup>
2. that the parties own the mediation process, and they would need to decide if they wish to reach a settlement on a voluntarily basis. So they would not be compelled to agree on an outcome from the dispute.<sup>424</sup>
3. that the role of the mediator is to assist the parties and to facilitate the mediation process to ensure impartiality.<sup>425</sup>

The researcher submits that the said Rules have been very precise and careful in articulating the mediation process. This is indeed a welcome move to ensure that judges and judicial officers fully understand the mediation process given the fact that the parties may be unaware of the said process and what to expect of it.

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<sup>423</sup> Appendix B, *supra* note 16, Section 5.1 (ii).

<sup>424</sup> Appendix B, *supra* note 16, Section 5.1 (iii).

<sup>425</sup> Appendix B, *supra* note 16, Section 5.1 (iv).



#### **4.3.4 Section 6 on “Voluntariness”**

This Section reminds the mediator to ensure that the parties must come to the mediation table voluntarily in order to avoid any attempt to waste time and effort should either party be unwilling to mediate their dispute. The mediator is also reminded not to compel the parties to resolve their dispute through mediation. It is comforting and assuring to note that the said Rules have devoted a specific section on this important requirement in the mediation process because one of the principal attractions of mediation lies in the voluntary nature of the process which allows the parties to seize control over the result of their dispute (Carter, 2002, p. 394).<sup>426</sup> It is also evident that this Section stresses on party autonomy or self-determination which has been noted as the key principle of mediation that places settlement power solely with the parties because the parties are “happier with and more likely to honour an agreement they voluntarily choose to create” (Izumi and La Rue, 2003, p. 80).<sup>427</sup>

#### **4.3.5 Section 7 on “Authority to settle”**

This is an important Section as it requires the mediator to ensure that the parties who have come to the mediation table do have the authority to settle the dispute, or at least possess the required delegation or mandate to do so. This will save time and effort in the mediation process.

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<sup>426</sup> Carter, R. L. (2002). Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediation. *Journal of Dispute Resolution*.

<sup>427</sup> Izumi, C. L. and La Rue, H. C. (2003). Prohibiting “Good Faith” Reports under the Uniform Mediation Act: Keeping Adjudication Camel Out of the Mediation Tent. *Journal of Dispute Resolution*.

#### **4.3.6 Section 8 on “Conflict of interest”**

This Section serves as a reminder to the mediator to ensure that there is no conflict of interest which may impair the mediator’s impartiality and neutrality in his or her role as a neutral party in facilitating the mediation process. The extent of the conflict of interest covers mediating cases where the mediator has personal interests, and where family and friends are involved. It is noted that this Section elaborates on reasons why it is of paramount importance for the mediator to maintain a no-conflict situation throughout the mediation process.

The researcher surmises that it is especially pertinent and crucial to stress on the need for the mediator to avoid being accused of being bias or partial in conducting the mediation session through the process. This is because judges and judicial officers must continue to uphold their impartial and neutral disposition in their adjudication role. This requirement is even more relevant when they also act as mediators in court-directed mediation, and they need to know the fundamentals of maintaining mediator impartiality and mediator neutrality. At the end of the day, the researcher submits that an impartial, neutral and unbiased judicial conduct of mediators who are judges and judicial officers must be protected at all costs. Any hint of dissatisfaction or lapse with regard to such conduct may reflect negatively upon the judiciary as a whole, and the parties’ trust on court-directed mediation would be lost.

#### **4.3.7 Section 9 on “Confidentiality”**

This Section explains that there are levels of confidentiality, namely, at the first level of confidentiality, the entire mediation process is confidential, and the second level of confidentiality lies in the caucuses between each party and the mediator. In essence, it is to be noted that:

1. the first level of confidentiality lies in the entire mediation process from start to end to the extent that no formal mediation notes will be taken during the entire process although the mediator may take his or her own notes. However, these notes must be destroyed when the mediation ends, and even if settlement is not reached, none of the information divulged or discussed will be made use of during the trial. The mediator is required to inform the parties at the start of the mediation process of the extent of confidentiality in mediation to assure them that any concessions or admissions made by them during mediation will not be used against either party if mediation does not succeed and the matter has to proceed to trial.

The researcher submits that this specific sub-section contains minute details on the kind of information which the mediator must inform the parties, and mediator do's and don'ts to protect this level of confidentiality in mediation. This shows that a high level of focus and emphasis is placed on ensuring that no stone is left unturned insofar as assurance is given to the parties on the extent of confidentiality which is required during the mediation process, and after mediation, especially when mediation does not work out and the matter proceeds to trial; and

2. the second level of confidentiality covers deliberations in caucuses unless the parties agree to waive this level of confidentiality in mediation. The parties need such an assurance that their concessions and admissions made during caucuses with the mediator remain confidential with the mediator, and that the mediator does not divulge or share with the other party or anyone else unless the party concerned waives this veil of confidentiality. However, the extent of confidentiality in caucuses has been discussed at length in chapter 2 where the mediator could make an arrangement with the parties on the two

options of such an arrangement, namely, full disclosure of all communication and information which were shared in the caucuses to be brought back to the joint meetings to be shared with the other party, or for the parties to agree to maintain confidentiality in the said caucuses.<sup>428</sup>

The same level of confidentiality is also extended to all information and communication made during mediation that they would not be divulged at the trial in the event mediation is unsuccessful. The researcher contends that such confidentiality protection is assured even if mediation does not succeed when the matter goes back to trial. This is because under the said Rules for Court Assisted Mediation, unlike the said Practice Direction, judges and judicial officers are prohibited from mediating their own trial list, and they are not allowed to try the mediated case in the event mediation does not succeed.<sup>429</sup>

This means that all materials, communication and information which were exchanged and shared during mediation are kept confidential, and must not be communicated to the trial judge. Be that as it may, adherence to such a confidentiality rule would depend on the number of judges who are available to hear such cases. This could be a practical problem where these judges who have acted as mediators may be required to hear the unsuccessful mediated cases although they have been precluded from hearing these cases by reason of their involvement in these unsuccessful mediation cases.

From the parties' perspectives, they may perceive that the protection of confidentiality in mediation has dissipated or lost by virtue of the fact that the

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<sup>428</sup> See section on Confidentiality in chapter 2 on *Review of Relevant Terms and Concepts*.

<sup>429</sup> *Appendix B*, *supra* note 16, Section 2 on "Judicial officers as mediators" and Section 14 on "Mediator should not try the case himself or herself."

mediator who has unsuccessfully mediated their dispute is now the trial judge. From the judges' perspectives, it is important to ensure that judges do not become embroiled in the aftermath of unsuccessful mediation. If judges are to act as mediators in court-directed mediation, they must be assured that they are to mediate without the prospect of becoming involved in unsatisfactory consequences of unsuccessful mediation. The researcher contends that due consideration must be given to strike a proper balance between assisting the parties to resolve their dispute through mediation, and at the same time, protecting the integrity of the judiciary in post-mediation litigation in cases of unsuccessful mediation.

#### **4.3.8 Section 10 on “Presence of lawyers”**

This Section provides the general guideline to allow lawyers to be present during the mediation session because they have been involved in their client's case throughout the litigation process. However, the mediator is given the discretion to disallow lawyers to be present with the consent of their clients (the parties) if the lawyers pose a problem to the mediation process. This decision rightly lies with the mediator whose responsibility is to control the procedural elements of the mediation process. Hence, to ensure that no one or nothing disrupts the mediation process, it is only right that the mediator keeps the lawyers out of the process if they do not assist their clients to explore options to reach a settlement.

Generally, it is advisable for the mediator to allow the parties' lawyers to be present during the mediation session. The argument is that the lawyers may influence the parties when options are tabled and negotiated between the parties, or they may discourage the parties from accepting and agreeing to a win-win outcome if the said outcome is a compromise to what the parties have hoped to settle in the first instance.

#### **4.3.9 Section 11 on “Presence of family members and friends”**

This Section allows the parties who are not represented or uneducated to bring their family members and friends in the mediation session if their presence could assist in the mediation process. This is because the mediation session is not a court proceeding. The researcher is of the view that the mediator may be flexible in this respect as mediation is an informal process, so long as they do not disrupt the procedural aspects of the mediation process, or they do not intimidate the other party during the mediation session. Depending on the nature of the dispute, the researcher opines that sometimes their presence may be instrumental to provide the required moral support to the parties concerned throughout the mediation process. As such, this could help and encourage the parties to reach consensus, mutuality and voluntariness in their effort to come to terms on an agreed final outcome which they can live with.

#### **4.3.10 Section 12 on “Suitable venue”**

This Section stipulates that selected venues such as the judge’s chamber or a special mediation room must have minimal interference, and that the open court should be avoided. On the point about using the judge’s chamber, the researcher argues that such a venue would be highly prejudicial to the parties as they look up to judges as persons of higher authority. The judge as a mediator conducting mediation in his or her chamber indirectly sets the serious and formal tone and manner on how the mediation session would be conducted. In addition, such a venue gives the parties the impression that the mediator is the judge who would be adjudicating their matter.

Hence, no matter how the judge may explain the role of the mediator and the procedural aspects of the mediation process, the parties could still have the wrong

perception of how the mediation session is to be conducted. The researcher submits that the selection of the most suitable venue must not only have minimal interference as the only criterion. Instead, selection ought to include the criteria of a neutral and non-prejudicial venue to both parties as well as a venue which is in a non-formal setting. As such, court-directed mediation has been given its own neutral premises (not court rooms or judges' chambers) in the form of CMCs which have since been provided to all litigants although the infrastructure is located on court premises (but not in open court) in Kuala Lumpur, Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country.

The researcher agrees that holding the mediation session in the open court must definitely be avoided for the simple reason that such a formal court setting would give the parties the erroneous perception and impression that the judge or judicial officer who conducts the mediation would also be the judge who would be adjudicating the matter in the event mediation does not succeed. The researcher argues that such a formal setting, if allowed, would be highly prejudicial to the parties, even if it does not confuse them on what mediation really entails, and what the role of the mediator actually is.

#### **4.3.11 Section 13 on “Authority of mediator”**

This Section reminds the mediator that he or she has no authority to impose any settlement or solution on the parties, although the mediator may assist in generating options to the parties upon the parties' requests, but not to provide advice to the parties to relent on any position. At the end of the day, the mediator must remember that party autonomy and self-determination remain the crux of mediation where it is the parties who decide what is best for them.

The final result of mediation would be one which both parties agree as the outcome of their dispute, and one which they can live with, although mediation as an ADR mechanism encourages the parties to consider mutuality and consensus throughout the process to reach a win-win solution at the end of it. Whether the agreed final outcome is fair or not is not for the mediator to judge or to influence. Fairness must not be viewed from the mediator's perspective; rather from the parties' positions and perspectives so long as the mediator has ensured that the entire mediation process has been conducted fairly, and that the mediator has discharged his role, responsibilities and duties within the ethical standards of the mediation process.

The researcher submits that the point on the mediator's authority is especially relevant to court mediators because they have been trained to exert authority in their adjudication role. This particular section in the said Rules on "Authority of Mediator" contains express reminders to judges and judicial officers that they do not have the authority to impose any settlement or solution on the parties when they act as mediators.<sup>430</sup> This express provision is a very welcome one considering that court mediators may have the tendency to do so, given their adjudication roles where they have been trained to make the final decision after hearing from both parties in a trial. The researcher submits that such a tendency would continue to prevail as long as they play the dual role as adjudicators and mediators although they may not preside over cases which they mediate.

Related to this provision is the other express reminder to mediators that they cannot force the parties to relent on any position in the event the mediation session is not making any headway. This is also a welcome move because it is the parties who will decide what is best for them as the final outcome of their dispute in mediation. It is not for the mediator to interfere nor to compel the parties to do so.<sup>431</sup>

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<sup>430</sup> *Appendix B, supra* note 16, Section 13.1.

<sup>431</sup> *Appendix B, supra* note 16, Section 13.3.



#### **4.3.12 Section 14 on “Mediator should not try the case himself or herself”**

This Section serves to remind the judicial officer who acts as the mediator not to try the case in the event the mediation fails. The best practice is to allow another judicial officer to try the case in order to protect the mediator’s impartiality and neutrality, objectivity and open-mindedness, and to avoid tainting the trial process. This Section also provides complete explanation on why the mediator should not mediate cases which are on his or own trial list. The researcher observes that this is a welcome direction which is a far departure from the provision in the said Practice Direction as seen earlier in this chapter.<sup>432</sup>

Comparing the two sets of mediation guidelines, the researcher contends that the provision in the said Practice Direction would seem to be inconsistent with the fundamental principles of mediation where the mediator must maintain complete impartiality and neutrality, and to avoid any prejudice or bias in his or her conduct of mediation. This is especially pertinent and relevant in court-directed mediation where judges and judicial officers also double up as mediators on a part-time basis.

#### **4.3.13 Section 15 on “Conclusion of successful mediation”**

This Section articulates the need for the mediator to record the terms of the settlement, and to enter consent judgment when mediation succeeds. However, the mediator may request for judges to perform that duty if the parties are not represented during mediation in order to protect mediator impartiality and neutrality.

It is in the researcher’s opinion that the said Rules are generally adequate to provide general guidelines for court mediators in the absence of statutory legislation or provisions. However, more elaboration on specific areas on the required mediation

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<sup>432</sup> Appendix A, *supra* note 10, Section 1, Annexure A (Judge-led mediation).

practices and procedures would be useful for mediators. In the researcher's view, amongst the said specific areas which are not covered in this set of guidelines are as outlined below.<sup>433</sup>

**1. Section 3 on “Cases that are highly recommended for mediation”**

specifically on Section 3.3 where it provides that “other cases can be referred to mediation as well with the consent of the parties.” However, it is in the researcher's opinion that although consent of the parties could be obtained, not all cases are suitable for mediation. Hence, the researcher is of the view that this Section ought to have provided clarity and direction to the parties as well as judges and judicial officers who act as mediators.

**2. Section 4 on “Basic function of a mediator”** does not provide guidelines on the specific styles of mediation to be adopted by the mediator on the two roles of the mediator. Fundamentally, this Section does not clearly spell out the difference between the roles of the judges and judicial officers as a trial judge and as a mediator.

**3. Section 5 on “Introducing the process”** contains only one sub-section which in the opinion of the researcher describes the principles of mediation, and not the mediation process per se. This should have included the step-by-step process of the end-to-end mediation session.

**4. Section 8 on “Conflict of interest”** does not cover the concept of impartiality and neutrality of the judges or judicial officers as mediators. The three sub-sections only cover the rule on conflict of interest. It is in the researcher's opinion that perhaps a separate section could be created to provide for the rule on mediator impartiality and mediator neutrality.

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<sup>433</sup> See chapter 7 on *Implementing Court-directed Mediation in Malaysia*.

**5. Section 9 on “Confidentiality”** does not touch on limitations and exceptions to confidentiality for the two levels of confidentiality.

It is understood that since its inception in March 2011, the said Rules have been widely practised by the Sabah and Sarawak courts. However, the same could not be concluded by the researcher on the extent of practice of the said Rules by judicial officers in the courts in Peninsular Malaysia.<sup>434</sup> Be that as it may, the said Rules on court-directed mediation are currently available to all judicial officers for their reference when they act as mediators. It should be noted that the said Rules constitute the official set of guidelines on court-directed mediation which are recognised by the courts both in Peninsular Malaysia and East Malaysia.

#### **4.4 The Court-Annexed Mediation Center Kuala Lumpur (CMCKL)**

The Kuala Lumpur Court Mediation Centre (KLCMC) which opened in August 2011 was a move taken by the Malaysian judiciary to allow parties in dispute who have filed their cases in court (litigants) to seek an alternative channel to resolve their dispute amicably. The then Chief Justice Tun Zaki bin Tun Azmi had said that “court-annexed mediation was a free mediation programme using judges as mediators to help disputing parties in a litigation to find a solution.”<sup>435</sup> In essence, this is an alternative service to litigation which is provided to all litigants at no cost to encourage them to resolve their disputes amicably and speedily.

The court-annexed mediation programme conducted in KLCMC was a pilot project which would be integrated into the court process to ensure that mediation is available to all litigants (parties in dispute who have filed their civil suits in court)

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<sup>434</sup> The researcher observed that 8 out of the total 10 respondents from the judiciary in Mediation Interview – Part 2 did not provide any response to the question whether the said Rules could be formally adopted by all courts in Malaysia.

<sup>435</sup> *Supra* note 22.

with a view to send the right message to all litigants and their lawyers that the mediation process is now under the umbrella of the courts, where several advantages of court-directed mediation were highlighted at the introduction of the said programme which was provided free of charge to the public.<sup>436</sup>

It was stressed that under the said programme, the first step is for the parties and their lawyers to commit to mediation. This means that the parties must first agree to come to the mediation table to resolve their dispute. This would provide the parties the opportunity to give mediation a try as an ADR mechanism to resolve their dispute in an amicable manner with the assistance and guidance of a neutral third party, that is, the mediator. The mediation session is provided free of charge to the parties so there are no costs in addition to legal fees if they are represented by lawyers. The parties would still be able to enjoy the advantage of having a mediator to assist them to explore possible options and to reach a final agreed outcome, or to narrow down their underlying issues to proceed to trial even if the parties eventually do not reach a settlement or where mediation does not succeed.

It was also highlighted that the said programme is not limited to legal issues only and could include wider issues when the parties explore possible options in order to reach an agreed outcome. Hence, if the mediation were successful, the parties would have saved time and cost of going through a trial process. At the same time, as mediation encourages the parties to focus on mutuality, consensus and voluntariness, they would have maintained or kept their personal or business relationships intact as compared to the parties proceeding with the trial where their relationships could be strained or challenged.

At its inception KLCMC issued an eight-page document entitled “Kuala Lumpur Court Mediation Centre, Pioneer Court-Annexed Mediation in Malaysia”

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<sup>436</sup> *Ibid.*

which was available free of charge to all parties who had filed their cases in court.<sup>437</sup>

This document contained the following sections, namely:

1. **Introduction.** This section explained that the court-annexed mediation programme was run as a pilot project where mediation was conducted by judges as mediators at KLCMC at no cost to all parties who are in litigation to reach a settlement.
2. **Advantages of Court-Annexed Mediation.** This section covered the three advantages as outlined by Tun Zaki during the opening event of KLCMC.<sup>438</sup>
3. **Mediation Procedures.** This section comprised 11 areas which include Order of Referral, Mediation Agreement, Scheduling, Attendance, Conduct of Mediation Sessions, Duration, Settlement Agreement, Adjournment, No Agreement, Confidentiality, and Withdrawal.
4. **Organization Structure.** Under this section, the panel of mediators comprised 10 judges from the High Court, and three Sessions Court judges and magistrates.<sup>439</sup>

This document was primarily aimed at providing general information about court-directed mediation in Malaysia. It also covered general rules and procedures governing how such mediation process worked, including the names of judges and magistrates who had been appointed as the panel of mediators at KLCMC. However, this document did not cover any rules and procedures on how mediators should conduct such mediation sessions. In essence, this document did not provide guidelines to mediators on the process, practice and procedures of conducting court-directed mediation at KLCMC.<sup>440</sup>

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<sup>437</sup> Appendix C-I, *supra* note 24.

<sup>438</sup> *Supra* note 22.

<sup>439</sup> Appendix C-I, *supra* note 24.

<sup>440</sup> These areas are discussed in chapter 7 on *Implementing Court-directed Mediation in Malaysia*.

KLCMC has since changed its name to The Court-Annexed Mediation Center Kuala Lumpur (CMCKL) where a revised set of general information and guidelines on the court-annexed mediation programme has since been issued in a brochure entitled “The Court-Annexed Mediation Center Kuala Lumpur – a positive solution” to replace the previous version.<sup>441</sup> In the said brochure which is offered free of charge to the public, the revised set of general information and guidelines have been simplified, condensed and categorized into seven sections only. In addition to the said brochure, CMCKL also adopts the same Form 1 on “Agreement to Mediate” per the said Practice Direction.<sup>442</sup>

The brochure introduces the court-annexed mediation programme which is a mediation service offered free of charge to all parties in dispute (litigants), and is provided by the judiciary as an alternative to a trial where judges act as mediators to help the parties reach a settlement.<sup>443</sup> This programme which is run by CMCKL is part of the civil litigation process. The researcher observes that essentially, the same advantages have been noted as in the previous document issued by KLCMC.<sup>444</sup>

In addition, the said brochure also contains general information on how the said programme is conducted, and has identical content as contained in the previous document issued by KLCMC.<sup>445</sup> The essential points in this section covers the availability of joint meetings or caucuses which could also be a mix of both joint meetings and caucuses in one mediation session, and that mediation is not a formal process but is a flexible one so there is no requirement to comply to the rules of evidence or formal procedures. However, it is stated in this section that “unless

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<sup>441</sup> *Appendix C-2, supra* note 25. See *Appendix C-1, supra* note 24 on the previous version of guidelines first issued at the inception of KLCMC in August 2010.

<sup>442</sup> *Appendix A, supra* note 10, Clause 6.1 (a) on “Agreement to Mediate.”

<sup>443</sup> It is noted that the advantage of “free services” is mentioned several times in the said brochure.

<sup>444</sup> *Appendix C-1, supra* note 24.

<sup>445</sup> *Ibid.* See Section 5 on “Conduct of Mediation Sessions” under Mediation Procedures.

agreed to by the parties, the Judge hearing the case should not be the mediating Judge.”<sup>446</sup>

This statement is identical to the one contained in the said Practice Direction which allows for the mediating judge to mediate his or her own trial list with the consent of the parties. As with the researcher’s earlier comments on the statement in the said Practice Direction, the same comments apply in this instance, which is that, by allowing the mediating judge to do so, this goes to the very root of compromising mediator impartiality and mediator neutrality, and the avoidance of biasness and prejudice in the conduct of mediation.<sup>447</sup> The researcher recommends that this statement be removed and be replaced by the one stipulated in the said Rules where it is expressly provided that mediators are disallowed to try his or her own trial list of cases.<sup>448</sup>

There is a section which covers confidentiality in the programme where it is noted that the content is identical to the one contained in the said Practice Direction and in the previous KLCMC document.<sup>449</sup> The researcher observes that it only provides for the general rule on confidentiality in mediation, but does not elaborate on the limitations to the protection of confidentiality to the parties whether during mediation or after mediation in the event mediation does not succeed.

Having studied the general information and general guidelines as contained in the said brochure as issued by the CMCKL, the researcher submits that the mediators from CMCKL are guided by the mediation guidelines as contained in the said Practice Direction in their conduct of mediation, the rule of confidentiality in mediation, the agreement to mediate, and the like. Hence, it is observed that the purpose of the said brochure is merely to provide general information to the general

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<sup>446</sup> *Appendix C-2, supra* note 25, part (d) on “Conduct of Mediation.”

<sup>447</sup> *Appendix A, supra* note 10, Section 1 under Annexure A (Judge-led mediation).

<sup>448</sup> *Appendix B, supra* note 16, Section 14 on “Mediator should not try the case himself or herself.”

<sup>449</sup> *Appendix A, supra* note 10, Clause 6.2(a). See also *Appendix C-1, supra* note 24, Section 10 on “Confidentiality” under Mediation Procedures.

public on the court-annexed mediation programme. It would seem that the said brochure is not intended to provide full and complete information and guidelines on how court-directed mediation is conducted to both the public and mediators alike. Instead, the mediators of CMCKL, namely, High Court judges, Sessions Court judges, and full-time mediators, refer to the said Practice Direction for guidelines on court-directed mediation.

In terms of how the court-annexed mediation programme is run by CMCKL, the researcher observes that there were a total of 13 mediators, 10 of whom were part-time mediators who comprised seven High Court judges and three Sessions Court judges, while the remaining three were full-time mediators.<sup>450</sup> It was shared by CMCKL that all cases must first be filed in the courts before they can be registered for mediation unless they are “running down” cases on claims for personal injuries and other damages due to road accidents which are automatically referred to mediation under Practice Direction No. 2 of 2013 prior to the case being fixed for hearing.<sup>451</sup>

All registered cases for mediation which originate from the lower courts are mediated by full-time mediators from CMCKL while those from the higher courts are mediated by High Court judges. Table 4.3 shows the profile of mediation cases conducted by CMCKL over the last three years from 2011 to 2013. In terms of statistics, it can be seen from the said Table 4.3 the number of cases which were registered at CMCKL increased by almost three-fold from 2011 to 2012, followed by an increase of almost 2.5 times in the number of registered cases between 2012 and 2013. The number of cases registered at CMCKL over the same period totalled 2,036 cases. It must also be noted that following the implementation of the said Practice

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<sup>450</sup> The information was obtained in March – April 2014 from one full-time mediator who is based at the Court-Annexed Mediation Center Kuala Lumpur (CMCKL), Level 2, Kuala Lumpur Court Complex, Jalan Duta, 50506 Kuala Lumpur, Malaysia.

<sup>451</sup> *Appendix E, supra* note 394.



Direction No. 2 of 2013, the number of cases registered at CMCKL increased to 1,287 cases with the inclusion of 779 accident cases in 2013, comprising more than 60% of the total number of cases in that year.

On the settlement rate of mediated cases by CMCKL, it is encouraging to note that 816 cases were successfully mediated over the three-year period with a settlement rate of 40% while 53% did not settle with a pending list of 140 cases (7%) yet to be mediated as at December 2013. The researcher also observes that the 40% settlement rate was attributed by 35% from full-time mediators who had successfully mediated 707 cases while the judges who acted as mediators on a part-time basis contributed a settlement rate of 5% or 109 cases from the total of 816 cases which were successfully mediated over the three years.

Also worth noting is the success rate of accident cases which were registered for mediation for the first time in 2013 following implementation of the said Practice Direction No. 2 of 2013. From the 779 “running down” accident cases which were registered for mediation at the CMCKL, a settlement rate of close to 50% at 49.7% was recorded while 287 cases did not settle (37%), and those pending mediation made up 13.2% as at December 2013. These accident cases constituted 38.3% of the total number of cases registered at CMCKL for automatic mediation across the three years in accordance with the said Practice Direction No. 2 of 2013.

In fact, as early as 2011 when court-directed mediation was formerly introduced by the courts, it was reported that 28 civil cases from the High Court had been referred to CMCKL (or formerly known as KLCMC when it was launched) pending mediation to commence, with a mediation success rate of 52% at all trial courts, and 15% at the Court of Appeal.<sup>452</sup>

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<sup>452</sup> *Supra* note 22.

Following the success of mediation conducted by CMCKL, there have been other CMCs which have been set up in other parts of Malaysia, namely, in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country.<sup>453</sup> In terms of statistics, up until December 2013, a total of 3,134 cases were referred to the CMCs in Kuala Lumpur, Shah Alam and Johor Bahru, with a collective settlement rate of 47% which is close to 50% where 1,470 cases were successfully mediated by the three CMCs.<sup>454</sup>

As for the CMC Selangor in Shah Alam, it was reported that 168 cases were settled out of 539 cases which were registered between early 2013 and January 2014, recording a 31.2% settlement rate, where 234 cases were not settled (43.4%) and had been transferred back to the courts for trial while 137 (25.4%) were still undergoing mediation.<sup>455</sup> From the CMC in Johor Bahru, a total of 251 cases were registered for mediation between September 2011 and December 2012 with a settlement rate of 47.6%, while the CMC in Kuantan recorded a 25% settlement rate where it successfully mediated 20 out of 80 cases which were registered for mediation between November 2011 and December 2012.<sup>456</sup>

It could be surmised that since the formal inception of CMCKL and subsequent establishment of CMCs in identified cities nationwide, a steady rise of cases has since been registered at these CMCs over the last few years, with a slow increase of settlement rates recorded where the highest rates were evident in CMCKL which was the pioneer CMC. It is also noted that the court mediators in these CMCs have been largely guided by mediation rules and guidelines in the said Practice

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<sup>453</sup> Speech delivered by The Right Honourable Tun Arifin bin Zakaria, Chief Justice of Malaya at the opening of the Legal Year 2014, Putrajaya, Malaysia, January 11, 2014.

<sup>454</sup> *Ibid.*

<sup>455</sup> As reported in Business Times on February 28, 2014, "Mediation can help court reduce case backlog." See <http://www.nst.com.my/business/latest/mediation-can-help-court-reduce-case-backlog-1.495150>. Also reported in New Straits Times on March 1, 2014, "Use mediation to resolve disputes, urges CJ." See <http://www.nst.com.my/opinion/letters-to-the-editor/use-meditation-to-resolve-disputes-urges-cj-1.495431>.

<sup>456</sup> Speech delivered by The Right Honourable Tan Sri Arifin bin Zakaria, Chief Justice of Malaya at the opening of the Legal Year 2013, Putrajaya, Malaysia, January 12, 2013.

Direction and its Annexure A which is the main source of reference for judges and judicial officers when they conduct court-directed mediation.<sup>457</sup> Such a positive trend should encourage CMCs to be set up in more locations nationwide including those in Sabah and Sarawak.

**Table 4.3:** Profile of mediation cases conducted by CMCKL (2011~2013)

Year	Origin of cases	Period	Number of cases registered at CMCKL	Status of cases				
				Settled		Total settled	Not settled	Pending @ December
				Judge as mediator (part-time)	CMCKL mediator (full-time)			
2011	High Court	June ~ December	180	31	2	33	31	116
	Lower courts	October ~ December	9	0	4	4	5	0
	CMCKL ("running down" cases)	-	0	0	0	0	0	0
	<b>Total 2011</b>		<b>189</b>	<b>31</b>	<b>6</b>	<b>37</b>	<b>36</b>	<b>116</b>
2012	High Court	January ~ December	391	58	71	129	306	72
	Lower courts	January ~ December	169	0	73	73	76	20
	CMCKL ("running down" cases)	-	0	0	0	0	0	0
	<b>Total 2012</b>		<b>560</b>	<b>58</b>	<b>144</b>	<b>202</b>	<b>382</b>	<b>92</b>
2013	High Court	January ~ December	249	20	76	96	208	17
	Lower courts	January ~ December	259	0	94	94	165	20
	CMCKL ("running down" cases)	April ~ December	779	0	387	387	289	103
	<b>Total 2013</b>		<b>1287</b>	<b>20</b>	<b>557</b>	<b>577</b>	<b>662</b>	<b>140</b>
<b>Total High Court</b>			<b>820</b>	<b>109</b>	<b>149</b>	<b>258</b>	<b>545</b>	<b>17</b>
<b>Total Lower courts</b>			<b>437</b>	<b>0</b>	<b>171</b>	<b>171</b>	<b>246</b>	<b>20</b>
<b>Total CMCKL ("running down" cases)</b>			<b>779</b>	<b>0</b>	<b>387</b>	<b>387</b>	<b>289</b>	<b>103</b>
<b>Grand Total</b>			<b>2036</b>	<b>109</b>	<b>707</b>	<b>816</b>	<b>1080</b>	<b>140</b>
				<b>5%</b>	<b>35%</b>	<b>40%</b>	<b>53%</b>	<b>7%</b>

**Source:** The Court-Annexed Mediation Centre Kuala Lumpur, March 2014

## 4.5 Mediation Act 2012

Mediation Act 2012 came into operation on August 1, 2012 with the objective “to promote and encourage mediation as a method of alternative dispute resolution by providing the process of mediation, thereby facilitating the parties to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters.”<sup>458</sup> The enactment of the said Mediation Act indicates that the Malaysian Government is desirous of having a mediation statute to promote mediation as an

<sup>457</sup> Appendix A, *supra* note 10, Annexure A (Judge-led mediation).

<sup>458</sup> Appendix D, *supra* note 27. The Mediation Act 2012 was debated and first passed on April 2, 2012, and thereafter was gazetted on June 22, 2012.

ADR, and is also indicative that the Government is moving along the international trend.<sup>459</sup> However, it is to be noted that there is no comprehensive national mediation legislation in Commonwealth countries such as the United Kingdom, Canada, Australia (except for its state level), New Zealand and Singapore.

In essence, the said Mediation Act is made up of seven parts with a total of 20 sections and one Schedule where its scope covers the following key features, namely, the mediation agreement, settlement agreement, issue of enforceability of both agreements, mediation process, confidentiality and privileges, and mediator's liability. Be that as it may, the said Mediation Act is not applicable to three areas, where only one of the said areas is relevant to this study, which states that the said Mediation Act is not applicable to any mediation conducted by a judge or judicial officer pursuant to any civil action that has been filed in court.<sup>460</sup> However, judges and judicial officers who act as mediators take guidance from the said Practice Direction which provides the required guidelines in court-directed mediation practice during the pre-trial case management stage.<sup>461</sup>

In any case, mediation as an ADR mechanism encourages consensus, mutuality and voluntariness where the parties are not compelled to use mediation to resolve their dispute, whether before or after they have commenced any civil action in court. At the same time, every person has the legal right to seek remedy or recourse through the court process. This point is clearly stipulated in Section 4 of the said Mediation Act which states that "mediation under this Act shall not prevent the commencement of any civil action in court or arbitration nor shall it act as a stay of, or execution of any proceedings, if the proceedings have been commenced."<sup>462</sup>

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<sup>459</sup> *Supra* note 28. Mediation legislation in other jurisdictions include Hong Kong Mediation Ordinance 2011, Mediation Act 2004 (Republic of Trinidad and Tobago), Mediation Act 2004 (Malta), Mediation Act 2004 (Bulgaria), Uniform Mediation Act 2001 (USA), International Conciliation and Arbitration Act 1993 (Bermuda), Mediation Act 1997 (Australian Capital Territory), Disputes Resolution Centres Act 1990 (Queensland), and Farm Debt Mediation Act 1994 (New South Wales).

<sup>460</sup> *Appendix D, supra* note 27, Section 2(b).

<sup>461</sup> *Appendix A, supra* note 10.

<sup>462</sup> *Appendix D, supra* note 27, Section 4(1) and 4(2).

It is to be noted that the said Mediation Act is not intended to restrain or curb flexibility and voluntariness of the mediation process per se; instead, its purpose is to promote, encourage and facilitate fair, speedy and cost-effective resolution of disputes by mediation within the confines and governance of confidentiality and privilege accorded to this ADR mechanism.<sup>463</sup> Further, with the said Mediation Act in place, all mediators who are not court mediators could conduct and practise mediation based on fundamental elements of mediation in terms of mediation agreement, settlement agreement, issue of enforceability of both agreements, mediation process, confidentiality and privileges, and mediator's liability, in accordance with the given legislation.

However, the question remains whether such legislated fundamental elements of mediation could be extended to other mediators like judges and judicial officers who are not governed by the said Mediation Act. Although these judicial officers are guided by the said Practice Direction, for mediation to be promoted and encouraged as an ADR mechanism, there must be consistency in mediation practice and process across all mediators, including judges and judicial officers who conduct court-directed mediation. In ensuring that such consistency prevails in mediation practice in Malaysia, the researcher is of the view that mediation accreditation should be introduced for standardization and uniformity purposes.

In this respect, the researcher is mindful that the purpose of the said Mediation Act is not to regulate accreditation and registration of mediators in Malaysia. However, it is submitted that accreditation and registration of all mediators should be introduced in Malaysia for judges and judicial officers who act as court mediators on a part-time basis.<sup>464</sup> The issue is more pronounced with the introduction of the said

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<sup>463</sup> *Supra* note 28.

<sup>464</sup> *Supra* note 28. The only country thus far who has successfully implemented a uniform accreditation and registration nationwide is Australia in its National Mediator Accreditation System.

Mediation Act which governs mediation practice by all mediators but not judges and judicial officers who conduct court-directed mediation.

In the light of the non-application of the said Mediation Act to any mediation conducted by a judge or judicial officer pursuant to any civil action that has been filed in court, the main question remains whether court-directed mediation should be legislated in Malaysia. Based on the views gathered from the respondents in this study, it can be said that there is a higher number of respondents who supported the need for a new legislation to govern court-directed mediation in Malaysia.<sup>465</sup> It is also interesting to note that there is an equal split in the number of respondents from the judiciary who supported and who were opposed to legislating court-directed mediation as compared to a higher number of respondents from the MMC Panel of Mediators who were in support of such legislation.<sup>466</sup>

From those respondents who did not favour legislating court-directed mediation, it was felt that it is more important to keep court-directed mediation as an informal and voluntary process just as how private mediation has been practised in Malaysia. They shared that mediation, whether court-directed mediation or private mediation, constitutes certain attributes which may not be suitable to be legislated. According to them, such attributes are party relationships, willingness of the parties to compromise, and mediator capabilities and soft skills.<sup>467</sup> Chapter 6 on “Mediation Interviews: Research Findings and Commentary” covers more details on this point under the main research question.

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<sup>465</sup> One of the respondents from the total 27 did not wish to respond to this question in Mediation Interview – Part 2. From the 26 respondents who responded, 14 of them supported legislating court-directed mediation and 12 others were opposed to such legislation.

<sup>466</sup> 5 out of the 12 respondents who were opposed to legislating court-directed mediation were from the judiciary while the other 5 from the 14 respondents who were supportive of such legislation were from the judiciary.

<sup>467</sup> These attributes are discussed in chapter 6 on *Mediation Interviews: Research Findings and Commentary*.

#### 4.6 Role of the Courts and the Judiciary in Promoting Court-Directed Mediation

The conventional view of the role of the judiciary in the administration of justice is to judge (not mediate), to apply law (not interests), to evaluate (not facilitate), to order (not accommodate), and to decide (not settle) (Chodosh, 1999, p. 6).<sup>468</sup> However, in the context of court-directed mediation, this view is now viewed as an oxymoron because judges also play the role to mediate, to apply interests, to facilitate, to accommodate, and to settle, which is based on the assumption that the functions of judging and mediation are mutually exclusive.<sup>469</sup> The researcher agrees to the statement on the increasingly oxymoronic role of the judge who is now required as part of his or her KPI in Malaysia to mediate cases in court-directed mediation, albeit that the judge plays the role of the mediator in addition to his or her adjudication role as the judge.

Based on the sources of rules and guidelines on court-directed mediation in Malaysia, namely the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and the other CMCs in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country, it can be summarised that the extent of the role of judges and judicial officers when they act as court mediators is outlined as follows:

1. The hearing judge may encourage the parties to settle their disputes at the pre-trial case management or at any stage, whether prior to, or even after a trial has commenced. It can even be suggested at the appeal stage.<sup>470</sup>

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<sup>468</sup> Chodosh, H. E. (1999). Judicial Mediation and Legal Culture. In *Mediation and the Courts*, 4 *Issues of Democracy* 3, December.

<sup>469</sup> *Ibid.*

<sup>470</sup> *Appendix A, supra* note 10, Section 3.1; *Appendix C-1, supra* note 24, Section 1 on "Order of Referral" under "Mediation Procedures."

2. If the parties agree to mediate their matter, mediation may be conducted in either mode, either through judge-led mediation, or mediation by a third party. The parties will be asked to decide on which mode.<sup>471</sup>
3. If the parties agree for a mediating judge to mediate their matter, the mediating judge takes over from the hearing judge to conduct the mediation. Unless agreed by the parties, the hearing judge should not be the mediating judge. He should pass the case to another judge.<sup>472</sup>
4. If the matter is successfully mediated and settled, the hearing judge shall record a consent judgement on the terms as agreed to by the parties.<sup>473</sup>
5. If the matter is not settled through mediation, the court shall, on application of either one of the parties or on the court's own motion, give such directions as the court deems fit.<sup>474</sup>

The above summary does illustrate the point that presumably there has been substantial focus in forming and shaping the real distinction between the role of the judge and the role of the mediator, and in the seamless linkage between these two roles insofar as court-directed mediation is concerned. The issues on the table relate to whether the mediating judge could mediate his or her own trial list, what should the parties expect when the case is settled through mediation, and what happens next if the case does not settle, with a view to preserve the fundamentals of mediation as an ADR mechanism. At the end of the day, as with private mediation, court-directed mediation is no different in the courts' effort to ensure fairness in the mediation

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<sup>471</sup> *Appendix A, supra* note 10, Section 5.1 and Section 5.3.

<sup>472</sup> *Appendix A, supra* note 10, Section 1 in Annexure A (Judge-led mediation); *Appendix B, supra* note 16, Section 2.2 under "Judicial officers as mediators"; *Appendix C-I, supra* note 24, Section 5(d) on "Conduct of mediation sessions" under Mediation Procedures.

<sup>473</sup> *Appendix A, supra* note 10, Section 4 in Annexure A (Judge-led mediation); *Appendix B, supra* note 16, Section 15.1 under "Conclusion of successful mediation"; *Appendix C-I, supra* note 24, Section 7 on "Settlement agreement" under Mediation Procedures.

<sup>474</sup> *Appendix A, supra* note 10, Section 6.3(b); *Appendix B, supra* note 16, Section 16.1 under "Termination of mediation"; *Appendix C-I, supra* note 24, Section 9 on "No agreement" under Mediation Procedures.



process. It is the duty and responsibilities of the judges and judicial officers when they act as mediators to guide and provide assistance to the parties to enable them to reach their agreed outcome, one which they can live with.

Be that as it may, there seems to be different schools of thought on whether judges should play the role as mediators. Proponents of judicial mediation opined that it is an opportunity to combine the legal and moral gravitas of the judicial role with the flexibility and adaptability of ADR.”<sup>475</sup> In further support of judges playing the role as mediators, it is believed that judges are able to address the fear of impartiality at post-mediation trials (where mediation did not succeed) by recusing himself or herself; judges are resolvers of disputes through other mechanisms besides litigation; judges have been trained in and are highly skilled at identifying issues; and judges do understand that mediation is not the same as adjudication.<sup>476</sup>

In fact, newly appointed judges are reminded that the proper judicial role is to include functions as mediator and judicial administrator where 95 per cent of their cases should be settled with the judge’s active intervention.<sup>477</sup> It has been said that mediation has become an accepted part of the litigation process where judges are currently being encouraged to engage in ADR mechanisms such as judicial case management, mediation, just to name a few.<sup>478</sup> This statement also holds water in the context of court-directed mediation in Malaysia where judges and judicial officers have since participated actively as mediators on a part-time basis with the formalisation of several CMCs nationwide in Kuala Lumpur, Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country. This can be seen from the take up rate of cases registered for mediation

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<sup>475</sup> Madame Justice Otis, L. and Reiter, E. H. (2006). Mediation by Judges: A New Phenomenon in the Transformation of Justice. 6 *Pepperdine Dispute Resolution Law Journal* 351.

<sup>476</sup> Justice Bruce DeBelle (2007). Should Judges Act as Mediators? Paper presented at the Institute of Arbitrators and Mediators Australia Conference, Adelaide, Australia, June 1-3, 2007.

<sup>477</sup> Judge Lacey (1977). The Judge’s Role in the Settlement of Civil Suits. Seminar for Newly Appointed Judges, as cited in Galanter, M. (1985). A Settlement Judge, not a Trial Judge: Judicial Mediation in the United States. 12 *Journal of Law & Society* 1, Spring, p. 2

<sup>478</sup> Warren, M. L. (2010), *op. cit.*

at the said CMCs, and the settlement rate of these cases over the last few years, which have been encouraging.<sup>479</sup>

There are three more reasons which have been given in support of the idea for judges to mediate disputes.<sup>480</sup> The first one, centres on the notion that having a judge as the mediator could increase the likelihood of a settlement because the parties respect the bench and the mantle of the judicial officer. On the contrary, the researcher begs to differ on this point. When the judge takes on the role as the mediator, he or she becomes the mediator, just as the mediator. This crucial point must be properly explained to the parties including the judge who acts as the mediator.

Although one cannot change the fact that the judge is a part-time mediator, nonetheless, once he or she steps into the role as the mediator, that notion of a mediator must be crystallised in the perception, understanding and acceptance by the parties, and the judge or judicial officer who acts as the mediator. In other words, there cannot be any unfair advantage of having the judge as the mediator as compared to other mediators who are not judges. Hence, the “likelihood of a settlement” is not the unfair advantage for the parties to go for mediation even in difficult or complex cases, by virtue of the fact that the judge is the mediator, and not some other person who is not a judge.

While the parties and the public at large do respect judges as persons of higher authority, they must understand that in mediation the judge as the mediator does not make any decision for the parties. Neither would any award or judgement be handed down by the mediator to the parties, just as how mediation is conducted by mediators who are not judges and judicial officers. The final outcome of the dispute still lies in

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<sup>479</sup> *Supra* note 453, *supra* note 455, and *supra* note 456. See also Table 4.3 on “Profile of Mediation Cases by CMCKL (2011 to 2013).”

<sup>480</sup> Warren, M. L., *op. cit.*, at pp. 83-4.

the hands of the parties. In fact, as far as CMCs are concerned in Malaysia, statistics have shown that the settlement rate was higher in cases which were mediated by full-time mediators who were not judges and judicial officers, as compared to judges who acted as mediators.<sup>481</sup>

The second reason to support having judges to mediate is related to civil litigation per se whereby if judges do not start getting engaged in ADR mechanisms such as mediation, the courts will risk being marginalised and eventually become appellate and supervisory institutions.<sup>482</sup> In fact, this scenario is well summarised by Farley J of the Ontario Supreme Court when he said “one can only hope that the litigating public and bar will recognise the benefits of resolving disputes through alternative dispute resolution (ADR); as a judge, one is constantly amazed at how many matters can be resolved if the parties face up to the practical problem...”<sup>483</sup>

In the researcher’s view, this is a valid concern which is also evident in the courts in Malaysia where the backlog of cases has been recognised as a major concern in recent years. As far back as 2005, mediation was already viewed by the Malaysian judiciary as an ADR mode to clear the backlog of cases, and was given due recognition in its annual report.<sup>484</sup> The push for mediation has intensified since 2010 when the said Practice Direction was issued to judges at all levels for suitable cases to be referred to mediation before trial.<sup>485</sup>

The last reason to support the move for judges to mediate comes in the form of the opportunity given to judges to develop variety in judicial life and to expand their judicial role for the mutual benefits of the judges and the community at large when they adopt ADR skills.<sup>486</sup> Compared to the other reasons, this reason is not as

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<sup>481</sup> See Table 4.3 on “Profile of Mediation Cases by CMCKL (2011 to 2013).”

<sup>482</sup> Warren, M. L. (2010), *op. cit.*

<sup>483</sup> Abraham, C., *op. cit.*

<sup>484</sup> *Supra* note 17.

<sup>485</sup> *Supra* note 9, *supra* note 11, and *supra* note 13.

<sup>486</sup> Warren, M. L. (2010), *op. cit.*

compelling because it is in the researcher's opinion that ADR or mediation specifically is not every judge's cup of tea. In other words, not every judge views this as an opportunity to enhance his or her judicial role by adopting mediation capabilities and skills such as identifying underlying issues, being empathic, enhancing negotiation skills, have innate passion or affinity to mediate, have humility, or even being a patient person.

On the other side of the coin, however, it can be seen that coming down hard on judges playing the role of mediators is the Australian National Alternative Dispute Resolution Advisory Council (NADRAC) as there is uncertainty in what actually constitutes judge-led mediation.<sup>487</sup> In total support of NADRAC's position is the Victorian Bar when it said that judges are appointed to judge, and not to negotiate or take part in commercial negotiations between commercial parties, and that judges are appointed not for their mediation skills, but for their judicial abilities.<sup>488</sup> However, judges could mediate under exceptional circumstances in which case the judge should not hear the case, and that the judge must be an accredited mediator.<sup>489</sup>

In addition, there are three other reasons which do not support the idea of having judges become mediators (Warren, 2010, p. 84).<sup>490</sup> The first reason is premised on the traditional notion that the judicial role is a pure one, and that it should not be diluted, which may hold true to its principle in the past.<sup>491</sup> However, in recent years with changing times, judges have been trained to have wider and practical perspectives on how to resolve disputes other than through the litigation process.<sup>492</sup>

Having judges mediate is not new news in developed countries such as Canada, the

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<sup>487</sup> National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General of the Commonwealth of Australia*, 2009, at [7.56]. The main concern was on the incompatibility with the constitutional role of judges exercising federal jurisdiction [7.42]. Other concerns included judges expressing opinion on the likely outcome which may be inconsistent with the principles of mediation and the role of a judge [7.42], being an inappropriate application of judicial authority [7.43], and the negative implication on the judiciary as a whole from dissatisfaction with judicial conduct of mediation by the judge [7.45].

<sup>488</sup> NADRAC, at [7.52].

<sup>489</sup> *Ibid.*, at [7.59]

<sup>490</sup> Warren, M. L. (2010), *op. cit.*

<sup>491</sup> *Ibid.*

<sup>492</sup> *Ibid.*

USA, and South Australia, just to name a few (Milford, 2003; Field, 2009, p. 417).<sup>493</sup>

A developing country such as Malaysia is already making efforts to promote free court-directed mediation programmes by having judges mediate cases through several CMCs which have been set up nationwide.<sup>494</sup> Hence, in the researcher's humble view, this reason may not resonate too well.

The second reason is that judges would be frowned upon when they are engaged in private sessions such as mediation because their roles must be conducted transparently and in public.<sup>495</sup> This statement is only true if trials are conducted by judges because all trials are to be conducted in a transparent manner. Hence, if judges conduct trials privately, that indeed is not only frowned upon but totally disallowed. However, what is discussed is court-directed mediation which does not concern trials but is about mediation which is conducted privately away from public glare. The only point to note is that the mediator is a judge. In other words, the researcher submits that this reason is inaccurate, and therefore does not hold water in the argument why judges should not mediate.

Lastly, where judges play the mediator role, the judicial resource is seen to be taken away from trials and appeals.<sup>496</sup> On this reason, the researcher is in full agreement. The court-directed mediation programme in Malaysia is conducted by judges and judicial officers who act as mediators on a part-time basis. They still have their roles in adjudication which require their undivided attention and focus on trials

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<sup>493</sup> For example, in Canada, Judicial Dispute Resolution has since 2001 become a permanent programme within the Edmonton Provisional Court which involved judges meeting litigants to discuss settlement, without prejudice and is confidential, and the judge will not hear the trial (See Ravindra, G. (2005). Virginia's Judicial Settlement Conference Program, *Just. Sys. J.*, 26, 293). In the USA, the Delaware Code, Title 10, Ch. 3, Sections 346-347 was passed in Spring 2003 where the jurisdiction of the Chancery Court was increased to allow its sitting judges to hear technology disputes and act as mediators in negotiations which are closed to the public. See Milford, M. (2003). Jurisdiction, judges' power expanded. *Wilmington News Journal*, June 16. In South Australia, Section 65 of Supreme Court Act 1935 provides judges with the capacity to engage in mediation. Please see Field, I. D. (2009). *Judicial Mediation and Ch III of the Commonwealth Constitution*, Ph.D Thesis, Faculty of Law, Bond University, Australia.

<sup>494</sup> *Supra* note 22, *supra* note 26.

<sup>495</sup> Warren, M. L. (2010), *op. cit.*

<sup>496</sup> *Ibid.*

and appeals. Until they become full-time mediators, this reason will be the most compelling reason why judges should not be mediators.

Further, it has been seen that full-time mediators recorded a higher settlement rate (at 35%) than judges who acted as mediators on a part-time basis (at a settlement rate of 5%) from the total of 816 cases which were successfully mediated over the three years at CMCKL.<sup>497</sup> Hence, the researcher submits that based on the said statistics, it is evident that the move to make judges and judicial officers full-time mediators is an effort which could be seriously looked at by the courts and judiciary to promote court-directed mediation in Malaysia as an ADR mechanism to facilitate settlement of disputes.

In terms of whether the courts have been playing a significant role in promoting court-directed mediation in Malaysia, the unanimous view from the respondents from the judiciary in this study was that Malaysian courts have already been doing so.<sup>498</sup> However, they cautioned that such a role requires constant and continuous support from the Bar Council for court-directed mediation to be efficient and effective. One judiciary respondent from Sabah provided the example of how the courts in Kota Kinabalu continuously engage with local business communities in their relentless effort to promote mediation as an ADR mechanism in order to sustain such an effort.

Specifically on judges who act as mediators, all respondents from MMC Panel of Mediators opined that judges and judicial officers who act as mediators need to first view mediation from a different perspective.<sup>499</sup> They opined that these court mediators must not conduct mediation in the same manner as they try cases, and that they must not exert pressure on the parties to reach a quick settlement. In other words,

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<sup>497</sup> See Table 4.3 on "Profile of Mediation Cases by CMCKL (2011 to 2013)."

<sup>498</sup> This view was shared by all 10 respondents from the judiciary in Mediation Interview – Part 2.

<sup>499</sup> This view was unanimously shared by all 17 respondents from the MMC Panel of Mediators in Mediation Interview – Part 2.

the respondents shared that court mediators must be trained to wear the “mediator hat” and not the “adjudicator hat” when they conduct mediation. Further, it was raised that while time may be of the essence in resolving disputes, court mediators must put the interests of the parties above all interests. Their view was that court mediators are required to genuinely and patiently look into these interests in accordance with the mediation process with a view to assist the parties to reach an agreed outcome which may not necessarily be a settlement.

Based on the views and thoughts from the respondents in this study, it can be summarised that to a great extent, the general view was that it is not recommended to have judges and judicial officers conduct court-directed mediation on a part-time basis while assuming their roles as judges and judicial officers at the same time although they may not mediate the cases they hear.<sup>500</sup> The researcher shares the same view because it is evident that such a dual and extended role would add to their current heavy workload and work schedule. In addition to that, it is also evident that the settlement rates achieved by the judges who act as mediators on a part-time basis were significantly lower than those recorded by their full-time counterparts who are not judges as shown in Table 4.3.<sup>501</sup>

Further, even with proper formal mediation training for judges and judicial officers to conduct court-directed mediation, the majority of the respondents opined that mediation may not be suitable for every judge or judicial officer because the personality of the person plays a key factor.<sup>502</sup> One judiciary respondent shared that if all judges and judicial officers are expected to be mediators, this may cause

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<sup>500</sup> There were a total of 27 respondents in Mediation Interview – Part 2, who comprised 10 from the judiciary, and 17 from the MMC Panel of Mediators.

<sup>501</sup> See also Table 4.3 on “Profile of Mediation Cases by CMCKL (2011 to 2013).”

<sup>502</sup> This view was shared by 16 of the total 27 respondents in Mediation Interview – Part 2, where 4 of these respondents were from the judiciary.

dissatisfaction among those who may not be interested to be mediators or may not have the predisposition to be one.<sup>503</sup>

#### 4.7 Ethics in Court-directed Mediation

Aside from the role of the courts and the judiciary, the other point to note is that when judges and judicial officers act as mediators, fundamentally, they must be guided by ethical standards when conducting mediation, which is provided for in standards of practice for court mediators.<sup>504</sup> In Malaysia, there are no standards of practice for court mediators although judges and judicial officers who act as mediators are guided by the general rules stipulated in the said Practice Direction, and the said Rules for Court Assisted Mediation.

The researcher observes that insofar as ethical standards of mediation practice are concerned, there are no such specific provisions stated in the said Practice Direction at all although there are two provisions which are related to ensuring ethical standards. One of the provisions provides that “unless agreed to by the parties, the Judge hearing the case should not be the mediating Judge,” and the other provision states that “unless agreed to by the parties, the Judge will not see the parties without their lawyers’ presence except in cases where the parties are not represented.”<sup>505</sup> In the researcher’s humble opinion, these are the only two relevant provisions in the said Practice Direction which relate to ethical aspects of court-directed mediation practice in an attempt to ensure that mediator impartiality, mediator neutrality and mediator biasness are not compromised.

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<sup>503</sup> More revelations from the eyes of the respondents in this study on the roles of judges and judicial officers as mediators, and the role of the courts and the judiciary in promoting court-directed mediation in Malaysia are shared in chapter 6 on *Mediation Interviews: Research Findings and Discussion*.

<sup>504</sup> For example, in Singapore, judges who act as mediators are guided under Clause 4 in Model Standards of Practice for Court Mediators of the Subordinate Courts where mediators are required to comply with the Code of Ethics for Court Mediators of the Subordinate Courts of Singapore. Please see Loong, S.O. (2009). Mediation. Chapter 3, *Laws of Singapore*, Singapore Academy of Law, updated on April 30, 2009. See official website of Singapore Academy of Law on Mediation page on <http://www.singaporelaw.sg/content/Mediation.html>.

<sup>505</sup> *Appendix A, supra* note 10, Section 1 and Section 3 respectively in Annexure A on “Judge-led mediation.”



As for the said Rules for Court Assisted Mediation, it is noted that this document does not categorically cover specific provisions on the required ethical standards for judges and judicial officers when they conduct court-directed mediation. Be that as it may, it is observed that there are several provisions in the said Rules which indirectly stipulate elements of the required ethical standards. In the researcher's opinion, this is evident in four sections of the said Rules where ethical relevance could be seen in the two-fold role of the mediator as a facilitator and an evaluator, in a no-conflict of interest situation, in the need to ensure confidentiality in the entire mediation process and in caucuses, and in imposing the best practice of the mediator not to try his or her own mediated cases when they are unsuccessful.<sup>506</sup>

Lastly, on the general information and general guidelines on court-annexed mediation programmes as issued by the CMCs, it is observed that there are also no specific provisions to ensure that court mediators adhere to the required ethical standards. The only provision which is fundamentally related to mediator's ethical standard is on confidentiality.<sup>507</sup>

Based on the said three sets of rules and guidelines on court-directed mediation in Malaysia, it is the researcher's view that while the said rules and guidelines do allude to related provisions on ethical elements, however, these rules and guidelines are somewhat fragmented in nature, where the various ethical elements, including the language used to describe the said elements, are not standardized. Further, it is also noted that the said elements as contained in the said rules and guidelines are incomplete and inconsistent across the three sets of rules and guidelines. In the researcher's view, what is lacking is a set of consistent model ethical standards which is to be adopted by all mediators in Malaysia, regardless of

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<sup>506</sup> *Appendix B, supra* note 16, Section 4 on "Basic function of a mediator," Section 8 on "Conflict of interest," Section 9 on "Confidentiality," and Section 14 on "Mediator should not try the case himself or herself."

<sup>507</sup> *Appendix C-2, supra* note 25.

whether they are judges and judicial officers who conduct court-directed mediation, or whether it is non-court-directed mediation which is conducted by non-judges and non-judicial officers.

#### **4.8 Chapter Summary**

This chapter analysed the current mediation guidelines governing court-directed mediation in Malaysia, namely, the said Practice Direction, the said Rules for Court Assisted Mediation, and general guidelines which are issued by CMCKL, and the other three CMCs. In the analysis the researcher outlined key sections within the said guidelines, which are relevant to the role of the mediator, mediation principles and concepts, mediation process, including a comparative analysis on the three sets of guidelines. The said analysis will not be complete without a review of the said Mediation Act 2012 which does not apply to court-directed mediation in Malaysia. The researcher's commentary and critique on the said current guidelines form the basis for a recommended set of mediation guidelines which could be considered in the practice of court-directed mediation in Malaysia. The said recommendation is revealed in the last chapter in this study.

Lastly, the discussion on the role of the courts and the judiciary in promoting court-directed mediation, and ethics in court-directed mediation, was able to shed insights into the expectations of the judge as the mediator, particularly in the context of the judge who is now required to juggle between two part-time roles, namely, as an adjudicator, and as a mediator.

Based on such revelations, library research in itself is not able to shed sufficient insight into finding the required answer to the said research question in this study. Hence, the research methodology chosen for this study is qualitative research, which is premised on three methods, namely, semi-structured interviews, analysis of

documents, and observation. This is the focus of the next chapter which details out the research methodology for this study.

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## **CHAPTER 5: RESEARCH METHODOLOGY**

### **5.1 Introduction**

As outlined in chapter 1, the purpose of this study is to examine whether there is a need to legislate court-directed mediation in Malaysia. To this end, this study examines the extent court-directed mediation has been practised under current mediation guidelines, namely, the said Practice Direction, the said Rules for Court Assisted Mediation, the said general guidelines as issued by CMCs, and the said Mediation Act 2012. It also gathers views and thoughts of current mediators on court-directed mediation in Malaysia.

This chapter discusses qualitative research which is the chosen research methodology employed for this study, including methods employed in the collection of data, and the respective data collection procedures. Also elaborated in this chapter is the process of selecting mediation practitioners in Malaysia which formed the sample, namely, judges who act as mediators, and mediators from MMC Panel of Mediators, where they are referred to as “respondents”. By gathering and including views and thoughts from the said respondents through semi-structured interviews, the researcher attempts to enrich data points for this study through inclusion of raw data gathered for this study. As seen in the previous chapter, limited learning and references from reported relevant studies and researches on court-directed mediation also play a part in the researcher’s choice of the research methodology for this study. Lastly, the chapter closes with an account of the types and extent of research limitations and challenges which were faced by the researcher in conducting this study.

## 5.2 Research Design

The researcher used qualitative research as the research methodology for this study. Qualitative research seeks to understand the meaning of respondents' views, thoughts, perceptions and experiences, and the way they make sense of their lives in specific and natural settings.<sup>508</sup> In other words, qualitative research provides richer textual accounts of individual and group experiences in terms of how respondents make sense of their world. It allows the researcher to understand the meaning respondents have constructed to provide a holistic overview of this study, where the perspectives are respondents' perspectives (from the inside) rather than from the researcher's perspectives (from the outside). Further, this is the main reason why the researcher chose to include qualitative research in this study because the reviews on reported relevant studies and researches as outlined in the previous chapter have not been able to provide the full and complete perspectives of the main research question, that is, whether court-directed mediation should be legislated in Malaysia.

Hence, it is in the researcher's opinion that qualitative research as the chosen research methodology is aimed at gathering raw data and information in the form of views and thoughts of practising mediators in Malaysia on the main research question and the three sub-questions. To that end, the researcher used three main methods, namely, semi-structured interviews, analysis of documents, and observation. This practice of using the said three methods is known as the triangulation of data whose purpose is to ensure the validity and reliability of data collected and gathered through a variety of sources to substantiate findings.

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<sup>508</sup> Merriam, S. B. (1988). *Case Study Research in Education. A Qualitative Approach*, Jossey-Bass Inc., San Francisco. Also see Merriam, S. B. (2009). *Qualitative Research: A Guide to Design and Implementation*, Jossey-Bass Inc., San Francisco.

### 5.2.1 Data Gathering Methods

The researcher is mindful of the misnomer of “collecting qualitative data” in qualitative research. It has been stated that,

“It should be kept in mind...the idea that we ‘collect’ data is a bit misleading. Data are not ‘out there’ waiting collection, like so many rubbish bags on the pavement. For a start, they have to be noticed by the researcher, and treated as data for purposes of his/her research...are determined by the researcher’s theoretical orientation...” (Merriam, 2001).<sup>509</sup>

In essence, the most common methods of gathering qualitative data are interview, analysis of documents, and observation.<sup>510</sup>

#### 5.2.1.1 Interview

For purposes of this study, data was gathered and collected through semi-structured interviews with respondents comprising MMC Panel of Mediators who practised private mediation and the judiciary who practised court-directed mediation. Semi-structured interviews were used as the main channel of gathering data to facilitate immediate responses to a set of interview questions which were posed by the researcher who played the role of the interviewer.

The researcher took cognisance of the reasons for selecting interview as the data collection method because...

“...we interview people to find out from them those things we cannot directly observe...we cannot observe feelings, thoughts and intentions.

We cannot observe behaviours that took place at some previous point

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<sup>509</sup> Merriam, S. B. (2001). *Qualitative Research and Case Study Applications in Education*, Jossey-Bass Inc., San Francisco.

<sup>510</sup> *Ibid.*

in time. We cannot observe situations that preclude the presence of an observer. We cannot observe how people have organised the world and the meanings they attach to what goes on in the world. We have to ask people questions about those things. The purpose of interview, then, is to allow us to enter into the other person's perspective" (Patton, 1990).<sup>511</sup>

The said interviews were conducted by the researcher in a number of modes, namely, face-to-face, on the telephone, or via email communication. For purposes of this study, those who were invited to participate in this study are referred to as "invitees." As this is a qualitative study, invitees who had agreed to be interviewed in this study are referred to as "respondents." It is believed that this method allows the researcher (the interviewer) and the said respondents (the interviewees) some latitude to clarify the respondents' responses and to probe the respondents further based on their given responses.<sup>512</sup>

This study first began with the first set of interviews which were conducted from April 2011 through September 2011 on mediation as an ADR mechanism in facilitating settlement of disputes. This was at the time when the said Mediation Act had not yet come into operation. When the said Mediation Act came into operation on August 1, 2012 where it is not applicable to court-directed mediation, this study continued to find out whether court-directed mediation should be legislated in Malaysia with the objective to cater for judges and judicial officers who act as mediators. A second set of interviews was designed for this purpose. The said interviews were conducted from October 2012 through February 2013.

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<sup>511</sup> Patton, M. Q. (1990). *Qualitative Evaluation and Research Methods*, 2<sup>nd</sup> ed., Sage Publications, Newbury Park, California.

<sup>512</sup> Gorman, G. E. & Clayton, P. (2005). *Qualitative Research for the Information Professional: A Practical Handbook*, 2<sup>nd</sup> ed., Facet Publication, London.

The researcher formulated two sets of interview questions, namely, Mediation Interview Questions – Part 1,<sup>513</sup> and Mediation Interview Questions – Part 2.<sup>514</sup> The said sets of interview questions were constructed based on the research purpose of this study which serves to achieve the following three objectives, namely:

1. To examine the extent court-directed mediation has been practised under current mediation guidelines;
2. To gather the views and thoughts of current mediators from both Peninsular Malaysia and East Malaysia on court-directed mediation in Malaysia on the role of the courts and the judiciary in promoting court-directed mediation in Malaysia; and
3. To examine whether court-directed mediation should be legislated in Malaysia based on the said views and thoughts.

As described in chapter 3, the previous reported studies and researches did not cover the scope of this study, and therefore, it was very challenging for the researcher to use the said reported studies and researches as the reference points to construct the required interview questions for this study. Hence, the researcher had relied on the said research purpose in constructing the interview questions. Be that as it may, insofar as to ensure that the interview questions were valid, relevant and reliable, the researcher developed sub-questions from the main research question. As seen in chapter 1, the three sub-questions were designed to demonstrate the researcher's entire thought process in the constructing the interview questions for purposes of this study, whereby the following rigour was applied by the researcher:

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<sup>513</sup> See *Appendix F* for Mediation Interview Questions – Part 1.

<sup>514</sup> See *Appendix G* for Mediation Interview Questions – Part 2.



1. In the first interview questions, Mediation Interview Questions - Part 1 were designed to set the context of mediation as an ADR mechanism in promoting settlement of disputes in Malaysia. This set of interview questions is relevant to this study given the fact that mediation is still in its infancy stage in Malaysia as described at length in chapter 1.<sup>515</sup> In order to achieve that purpose,
  - a. The researcher gathered views and thoughts of the respondents, comprising MMC Panel of Mediators and the judiciary who practised mediation, on whether mediation is capable of resolving disputes and whether mediation, in fact, facilitate settlement.
  - b. The researcher then asked the respondents for reasons why the cases which they mediated had settled, and why some cases did not settle, based on their professional experience.
  - c. The researcher then probed whether the mediator's role in the mediation process, mediator capabilities and behaviour, and confidentiality in mediation contribute to mediation effectiveness in the settlement of disputes in their professional experience as mediators.
2. Subsequently, in the second set of interview questions, Mediation Interview Questions – Part 2 were focused on drawing out views and thoughts from the respondents (MMC Panel of Mediators and the judiciary) on whether court-directed mediation should be legislated in Malaysia. This set of questions touched on the practice of court-directed mediation where judges and judicial officers act as mediators. The question of whether court-directed mediation should be legislated in Malaysia came to light when the said Mediation Act,

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<sup>515</sup> *Supra* note 8. See also section on “Background” in chapter 1 on *Introduction*.

which does not apply to court-directed mediation, came into operation on August 1, 2012. In essence, in order to find answers to that question, the researcher asked the respondents, probing into the details of their views and thoughts, on a step-by-step basis in order to reach to the core of finding answers to the main research question:

- a. What they thought of court-directed mediation in Malaysia.
- b. What their views were in terms of whether court-directed mediation should be legislated in Malaysia considering the fact that the said Mediation Act 2012<sup>516</sup> is not applicable to court-directed mediation where judges and judicial officers act as mediators.
- c. What their views were in terms of the said Practice Direction<sup>517</sup> and the said Rules for Court Assisted Mediation<sup>518</sup> are sufficient to serve its purpose, and if not, what areas would need to be reviewed.
- d. Whether judges and judicial officers should be mediators in their professional opinion.
- e. What challenges or obstacles judges and judicial officers face when conducting mediation sessions in their professional opinion.
- f. What their views on how the courts in Malaysia could play a more significant role in encouraging court-directed mediation amongst the judiciary and the parties.

Based on a set of pre-prepared questions which comprised open-ended questions, the researcher used probing questions to draw responses from the respondents until the responses were exhausted, and then moved on to the next

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<sup>516</sup> Appendix D, *supra* note 27.

<sup>517</sup> Appendix A, *supra* note 10.

<sup>518</sup> Appendix B, *supra* note 16.

question. The process repeated itself in this manner.<sup>519</sup> Such a process allowed the researcher to gather a collective view of respondents' insights, their professional experiences, perspectives, perception, views and thoughts. In this respect, open-ended questions were used in both the said interview questions. By using open-ended questions, the researcher was able to focus on the subjective experiences of the respondents in addition to providing the respondents the chance to reconstruct their previous mediation experiences according to their own sense of how they wished to share their views and thoughts.

In other words, these open-ended questions were able to confine the respondents' views and thoughts within the specific area to be explored by the researcher, and at the same time, they allowed the respondents to share their views and thoughts in any sequence they wished to do so. In short, the respondents had a free hand in relating their views and thoughts.<sup>520</sup> As such, in this process, the researcher did not presume answers from the respondents. Based on this method, this study attempts to present a relatively rich perspective, both in its description, and in its interpretation aspects, all from the subjective experiences and opinions of the respondents interviewed. Such richness was derived from data gathered from conducting semi-structured interviews with a sample of mediation practitioners who are experts in private mediation and court-directed mediation.

#### *5.2.1.2 Analysis of documents*

The second method of data gathering which the researcher employed for purposes of this study is the analysis of documents. According to one author, the term "documents" is an umbrella term to refer to a wide range of written, visual, and

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<sup>519</sup> Rubin, H. J. & Rubin, I. S. (2005). *Qualitative Interviewing: The Art of Hearing Data*, 2<sup>nd</sup> ed., Sage Publications, Thousand Oaks, California.

<sup>520</sup> *Appendix F, supra* note 513, and *Appendix G, supra* note 514.

physical materials which are relevant to the study in question, which commonly comprise major types of documents such as public/official records, personal documents, physical materials/objects, and researcher-generated documents.<sup>521</sup> For purposes of this study, the researcher relied on the various sources for the following types of documents, namely:

1. In terms of public/official documents, the researcher gathered data from findings of previous reported studies and researches as described and tabulated under 19 tables in chapter 2 where a dozen such studies and researches were reviewed.<sup>522</sup> Also included in this category of documents are newspapers, online news reports, press releases found on the Internet, speeches during judiciary functions, official website of Bar Council, Malaysia, and that of the Malaysian judiciary;
2. Another source of public/official documents came in the form of official statistics which were reported and issued by the CMCKL as outlined and described in three tables in chapter 4 on the profile of cases which were mediated and settled;<sup>523</sup> and
3. In terms of researcher-generated documents, the researcher was able to construct four tables comprising quantitative data which were produced by the researcher from the responses received from the respondents. The said tables depicted quantitative data on composition of the mediation interviews and the mediators interviewed, and the profile of the cases which they had mediated.<sup>524</sup>

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<sup>521</sup> Merriam, S. B., 2001, *op. cit.*

<sup>522</sup> See Table 3.1 to Table 3.19 from the 12 studies and researches in chapter 2 on *Review of Relevant Researches and Legislation*.

<sup>523</sup> See Table 4.1 to Table 4.3, as outlined in chapter 4 on *Court-directed Mediation in Malaysia*.

<sup>524</sup> See Table 5.1 in this chapter, and Table 6.1, Table 6.2 and Table 6.3 in chapter 6 on *Mediation Interviews: Research Findings and Commentary*.

It is to be noted that the researcher relied on library researches of the said relevant documents as references, materials such as journals, news reports and articles, other relevant reported studies and researches, which were sourced from several locations, namely:

1. The official premises of CMCKL;<sup>525</sup>
2. Tan Sri Profesor Ahmad Ibrahim Law Library at the University of Malaya, Kuala Lumpur, Malaysia;
3. Victoria University of Wellington Law Library in Wellington, New Zealand;
4. CJ Koh Law Library at the National University of Singapore, Kent Ridge, Singapore;
5. Law library at the Singapore Subordinate Courts, Research and Resource Centre, Level 7, Havelock Road, Singapore;
6. Singapore Supreme Court Law Library, Ground Floor, City Hall, Singapore;
7. Official websites of the High Court in Sabah and Sarawak;<sup>526</sup>
8. Official website of the Bar Council, Malaysia;<sup>527</sup>
9. Official website of the Malaysian judiciary;<sup>528</sup> and
10. Online searches on the Internet.

#### 5.2.1.3 *Observation*

The third method of data gathering which the researcher undertook for this study is observation which entails systematic non-judgmental noting and recording of events, descriptions of behaviours and artefacts in the natural setting chosen for study. According to Merriam (2009), the observation method is used “when it is systematic, when it addresses a specific research question, and when it is subject to

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<sup>525</sup> *Supra* note 23.

<sup>526</sup> *Supra* note 16.

<sup>527</sup> See official website of Bar Council, Malaysia at <http://www.malaysianbar.org.my>.

<sup>528</sup> See official website of the Malaysian judiciary at <http://www.kehakiman.gov.my>.

the checks and balances in producing trustworthy results.” Using this method, the researcher undertook to make overt observations during the face-to-face interviews with the respondents, and made recordings using observation recording sheets, checklists, and field notes based on the interview questions. The researcher was mindful to ensure a standardized way of gathering observation data where recording sheets and checklists were used, guided by the pre-prepared mediation interview questions, and views and thoughts which were provided by the respondents during the interview sessions. In addition to that, field notes were also gathered by the researcher which comprised open-ended narrative data.

This method allowed the researcher to be present physically at the location of the respondents with a view to look, listen and observe their physical actions, see and record subtle aspects of verbal behaviour, expressive behaviour, body language and demeanour during the interview sessions. As such, the researcher was able to have direct access to the said respondents, observe and record their behaviours during the face-to-face interview sessions. In this respect, the researcher was able to note the respondents’ body language and affect (such as a smile or a frown when responding to the interview questions) while they responded to the questions during the interviews.

Using the observation method during the interviews had provided the researcher the flexibility of an informal and non-structured approach to complement the data gathered through the interviews. In other words, the researcher was able to enhance the quality of data gathered using the said observation method through the process of triangulation, thereby was able to effectively complement the other two methods of data gathering.

### 5.3 Sample Size and Selection

For purposes of this study where the views and thoughts of mediators were gathered on a number of areas based on the said main research question, the invitees to the mediation interviews must be mediation practitioners, that is, any persons who conduct mediation in Malaysia, whether private mediation or court-directed mediation, including judges and judicial officers, lawyers and non-lawyers. As such, the researcher reached out to available published databases for names and contact information in search of invitees as samples for this study. The said available databases were obtained from the official website of the Bar Council, Malaysia, and that of the Malaysian judiciary.<sup>529</sup>

In defining sampling procedures for this qualitative study, the researcher presumed that the said Practice Direction, the said Rules for Court Assisted Mediation, CMCKL and other CMCs in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country were in full operation at the time of the study since their respective inception dates.<sup>530</sup> This means that all judges in the Sessions Court, High Court and Court of Appeal practised court-directed mediation, and were governed by the said mediation guidelines. As for private mediation, the researcher relied on the published list of mediators under the MMC Panel of Mediators as those who have been certified as mediators under the panel of mediators by the Bar Council, Malaysia.

As such, the researcher relied on information in the said available published databases in the official website of the Malaysian judiciary, and that of the Bar Council, Malaysia for the universe of the total number of all mediators in Malaysia for both court-directed mediation and private mediation. Based on the said lists, the

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<sup>529</sup> *Supra* note 527 and *supra* note 528.

<sup>530</sup> *Appendix A, supra* note 10; *Appendix B, supra* note 16; and *Appendix C-2, supra* note 25.

researcher presumed that the names listed in the said websites comprised “information-rich” mediators who were mediation practitioners who possessed knowledge and direct experience of having conducted mediation sessions, and had played the role of mediators. Details of the said mediator universe for Mediation Interview – Part 1 and Mediation Interview – Part 2 are shown in Table 5.1.

**Table 5.1:** Composition of mediator universe in Part 1 and Part 2

Mediation Interview Period		Mediators	Invited
Part 1	April 2011 ~ September 2011	Judiciary	117
		MMC Panel of Mediators	226
			<b>343</b>
Part 2	October 2012 ~ February 2013	Judiciary	139
		MMC Panel of Mediators	279
			<b>418</b>
			<b>761</b>

According to Table 5.1, the total mediator universe for Mediation Interview – Part 1 consisted of 343 mediators who were invited to be interviewed from April 2011 to September 2011. The breakdown is as follows:

1. Mediators on the MMC Panel of Mediators for the period of 2011-2012 consisted of 226 mediators, five of whom were not members of the Malaysian Bar;<sup>531</sup>
2. Judicial officers from the High Court in Sabah and Sarawak, and the Sessions Courts in Sabah Law Court and Sarawak Law Court, totalled 36 judicial officers;<sup>532</sup>

<sup>531</sup> See <http://www.malaysianbar.org.my/> as viewed on May 15, 2011.

<sup>532</sup> See [http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt\\_web/](http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/) as viewed on June 11, 2011. See also [http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/sabah/modules/highcourt\\_cap/components/publishing/index.php](http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/sabah/modules/highcourt_cap/components/publishing/index.php) as viewed on June 11, 2011. See also [http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt\\_cap/components/publishing/index.php](http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_cap/components/publishing/index.php) as viewed on June 11, 2011.



3. Judicial Commissioners and High Court Judges of the High Courts in Malaya and Sabah and Sarawak as at June 10, 2009 as posted in the official website, totalled 80 judicial officers;<sup>533</sup> and
4. One Court of Appeal judge of Malaysia.

Subsequent to that, a total of 418 mediators comprised the total mediator universe, were invited to participate in Mediation Interview – Part 2 which was conducted from October 2012 to February 2013. The breakdown is shown in Table 5.1, as follows:

1. Mediators on MMC Panel of Mediators as updated on September 6, 2012 in the official website of the Malaysian Bar, consisted of 279 mediators who were located in 11 states of Peninsular Malaysia, and 10 mediators who were not members of the Malaysian Bar;<sup>534</sup>
2. Judicial officers of The High Court in Sabah and Sarawak, Sabah Law Court, and Sarawak Law Court, as published in their respective websites.<sup>535</sup> They consisted of 65 judicial officers comprising judges, deputy registrars, and senior assistant registrars from the High Court, and judges, registrars, deputy registrars, and senior assistant registrars from the Sessions Court, who presided over cases in 10 locations in Sabah, and nine locations in Sarawak. These judicial officers covered single locations and/or multiple locations within one state (either Sabah or Sarawak), and some covered multiple locations across Sabah and Sarawak; and

<sup>533</sup> See <http://www.kehakiman.gov.my/> as viewed on June 11, 2011.

<sup>534</sup> See <http://www.malaysianbar.org.my/> as viewed on October 7, 2012.

<sup>535</sup> See [http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt\\_web/](http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/) as viewed on October 7, 2012. See also [http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/sabah/modules/highcourt\\_cap/components/publishing/index.php](http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/sabah/modules/highcourt_cap/components/publishing/index.php) as viewed on October 7, 2012. See also [http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt\\_cap/components/publishing/index.php](http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_cap/components/publishing/index.php) as viewed on October 7, 2012.

3. Judicial officers comprised one Court of Appeal judge, 48 Judges of the High Court, and 25 Judicial Commissioners of the High Court (except Criminal Division) in Peninsular Malaysia from Chief Registrar's Office Federal Court of Malaysia Official Website.<sup>536</sup>

For purposes of this study, the non-probability sampling method or purposive sampling was adopted where invitations were sent to the total of 761 invitees for Mediation Interview – Part 1, and Mediation Interview – Part 2. Of these, 61 invitees responded to state that they agreed to be interviewed, and that they agreed to share their views and thoughts in this study voluntarily, on condition of complete anonymity. It is in the researcher's humble opinion that a sample size of 61 is an acceptable adequate sample size for a qualitative research, where based on guidelines for actual sample size for qualitative research, most studies are based on samples between 30-60 interviews, according to Bernard (2000). In fact, Leech (2005) suggests that it is a mistake to presume that all qualitative research must inevitably use small samples.<sup>537</sup> For purposes of this study, the researcher gathered the views and thoughts from each of the 61 interviews where research findings are revealed in chapter 6. The detailed procedure of how the researcher gathered the data is explained in the next section.

#### **5.4 Data Collection Procedures**

In the effort to conduct the planned number of interviews for purposes of this study, the researcher undertook the following steps in the end-to-end process of

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<sup>536</sup> See <http://www.kehakiman.gov.my/> as viewed on October 7, 2012.

<sup>537</sup> Bernard, H. R. (2000). *Social Research Methods*, Sage, Thousand Oaks, California; Leech, N. C. (2005). The Role of Sampling in Qualitative Research. *Academic Exchange Quarterly*, 2005. See [http://www.thefreelibrary.com/The role of sampling in qualitative research-a0138703704](http://www.thefreelibrary.com/The+role+of+sampling+in+qualitative+research-a0138703704); Mason, M. (2010). Sample Size and Saturation in PhD Studies Using Qualitative Interviews. *Forum: 11 Qualitative Social Research* 3, Art. 8, September. See <http://nbn-resolving.de/urn:nbn:de:0114-fqs100387>.

conducting the said interviews. It is to be noted that the researcher maintains the principles of gathering views, thoughts, feedback and opinion from the respondents, and the meaning they make of their experiences as mediators in Malaysia.

First, from the total number of 343 invitees in Mediation Interview - Part 1, and 418 invitees in Mediation Interview - Part 2 (where majority of them had overlapped) who were listed in the said identified published databases where information on their email addresses had been included, each invitee was sent a Mediation Interview Invitation by email via the published email addresses in the respective official websites.<sup>538</sup> However, in some instances, no available email addresses were published, or where mail failure delivery notifications were received by the researcher either due to incorrect published email addresses or obsolete email addresses which were published in the same websites. In such situations, each invitee was then sent a Mediation Interview Invitation letter which was signed by the researcher, and then posted to each of their respective office postal addresses using the general postal addresses as published in the respective official websites.<sup>539</sup>

The written invitation contained the following information, namely:

1. An explanation on the objectives of this study;
2. An enquiry if they would like to share their views and thoughts on their mediation experience as a mediator; and
3. An assurance that their views and thoughts as provided by them in response to the interview are to be held in complete anonymity unless they explicitly request for such anonymity to be waived, in which case, it would have to be given in writing.

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<sup>538</sup> Appendix H for a sample of the Mediation Interview Invitation which was sent by email.

<sup>539</sup> Appendix I for a sample of the Mediation Interview Invitation which was sent in a signed letter of invitation by the researcher.

The time frame provided for this step was two weeks to allow time for the invitations to reach the invitees, and subsequently for them to read the invitations. At the end of the two-week period, the researcher tracked and recorded the progress of the said invitations. For those invitees who did not respond at all, two friendly reminders were sent to them, providing them with a further two weeks for each reminder to do so. It is in the researcher's humble opinion that as such mediation invitations are "cold" invitations to judges, lawyers and non-lawyers who are mediation practitioners, it is natural and expected of invitees to choose to completely ignore such invitations due to their busy work schedules. Furthermore, it is humbly submitted that the said invitees did not owe any obligation to respond to the unsolicited invitations which were sent out by the researcher.

Hence, it is in the researcher's humble opinion that it is only reasonable for the said invitation process to include two reminders which were sent to the said invitees over an interval of two weeks each per reminder. The researcher humbly submits that beyond the said two reminders (presumably, the entire invitation process could take up to six weeks from the first invitation) for those invitees who did not respond to the said invitations were deemed as not interested to share their views and thoughts for this study, and that no further follow ups were deemed by the researcher as necessary.

For those invitees who accepted the said invitations, based on their acceptance, the researcher then followed up with the agreed interview schedules and logistics, seeking for convenient time schedules, dates and venues for the intended interviews to take place with respondents who were located in the Klang Valley, where the researcher is based. This communication also included a Thank You letter or email, as the case may be. Although some of these respondents were located in the Klang Valley, they did not opt for face-to-face interviews.

Instead, some preferred telephone interviews, while others requested for a copy of the Mediation Interview questions so that they could respond to these interview questions at their own time after working hours, citing their busy work schedules. In such instances, the researcher acceded to their requests, and subsequently followed up with the interview responses which were returned to the researcher via email. In order to close the said interviews, the researcher followed up with the affected respondents on areas which needed further clarification in their responses.

In cases where the respondents resided in the other states of Malaysia outside of the Klang Valley, including those in other states of Peninsular Malaysia, and in Sabah and Sarawak in East Malaysia, such interviews were conducted either through the telephone or via email. It is to be noted that these alternative modes to conducting face-to-face interviews were largely determined by the respondents' availability, convenience, and their specific requests, because all interviews were voluntary in nature upon acceptance of the said interview invitations by the invitees.

In order to encourage higher acceptance of the researcher's mediation interview invitations, the researcher notified the respondents and assured them that complete anonymity will be maintained insofar as their views, thoughts and responses to the interview questions were concerned. In essence, all interviews are treated in the strictest confidence with complete anonymity maintained at all times unless such anonymity was waived upon specific requests by respondents. It is to be noted that the researcher did not record any specific request from any respondent to waive anonymity in the views and thoughts shared in response to the interview questions in this study.

Based on the number of respondents who had agreed to be interviewed, the researcher then proceeded to make the necessary preparation. For the face-to-face

interviews and the telephone interview, the researcher drew up a number of documents, namely, one set of interviewer personal notes in preparation for the scheduled interviews, the said two sets of interview questions which comprised a set of pre-prepared interview questions, and one set of consent form as part of research ethics.<sup>540</sup> The said consent form contained a statement where the respondents agreed to be involved in this study, and that they voluntarily provided their views and thoughts in response to a set of pre-prepared mediation interview questions. In other words, the respondents could choose to end the interviews at any time if they felt uncomfortable about continuing with the said interviews, and they could also choose to skip any particular question which they did not wish to respond to.

Of the 61 interviews, six were conducted face-to-face, one was conducted over the telephone, and 54 were conducted via email communication exchange. On the said six face-to-face interviews, and the one which was conducted over the telephone, the researcher manually recorded the said interviews by writing down the responses from the respondents. To the extent that was possible, the researcher captured the said responses verbatim in order to protect the richness of the shared views and thoughts from the respondents concerned.

In this respect, it is important to note that the interviews which were conducted face-to-face were not recorded on a tape recorder on request by the said respondents not to do so. At the end of the said seven interviews, the researcher then typed out each of the transcripts. This manual process was repeated until all seven transcripts were completed. As for the rest of the interviews which were conducted through email exchanges with the respondents, their responses were captured in the said email exchanges, including email exchanges which were required to clarify the said responses.

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<sup>540</sup> See *Appendix J* for a sample copy of the consent form for Consent for Participation in Mediation Interview Research.

Subsequently, as part of the data analysis process, the researcher used code indicators to label the said 61 transcripts. The main code indicators used were the location of the said respondents, specifically the Malaysian state which they practise mediation, and whether they were from MMC Panel of Mediators, or from the judiciary. The main reason for using the said code indicators was to protect the identities of the said respondents in the researcher's effort to maintain complete anonymity throughout the data analysis process. In respect of using location as one of the said code indicators, the main reason why location was used as a marker is to enable the researcher to sort and scan through the responses which were received as part of the data analysis process. The location information also provided insights into how widespread mediation has been practised in the Malaysian states.

In essence, the said code indicators had assisted the researcher in the administrative tasks of sending the interview invitations out to the various respondents and of following up with the respondents on their receipt of the said invitations, their acceptance or non-acceptance of the said invitations in the process of monitoring and tracking of the said acceptance or non-acceptance as the case may be while protecting the identities of the respondents.

## **5.5 Operationalizing Research Questions**

This section explains how the researcher operationalizes the main research question and the three sub-questions, including the use of a number of research techniques for purposes of this study, where details on each of the said questions are as described below.

### **Sub-question 1:**

***What is the current practice of court-directed mediation in Malaysia?***

This sub-question is answered in chapter 4 (Court-directed Mediation in Malaysia) and chapter 6 (Mediation Interviews: Research Findings and Commentary) through the use of the following research techniques, namely:

- a. Review of relevant materials from reference books, academic journals, speeches and papers presented during judiciary functions, data and relevant information received from CMCKL, online news reports, and semi-structured interviews which were conducted with mediation practitioners from MMC Panel of Mediators, and the judiciary, as depicted in chapter 4; and
- b. Semi-structured interviews were conducted with the said respondents, who comprised mediation practitioners from MMC Panel of Mediators, and the judiciary from Peninsular Malaysia and East Malaysia, as analysed in chapter 6.

**Sub-question 2:**

***Are the current guidelines on court-directed mediation sufficient to serve their purposes in court-directed mediation practice in Malaysia?***

This sub-question is examined in chapter 4 (Court-directed Mediation in Malaysia) and chapter 6 (Mediation Interviews: Research Findings and Commentary) through the use of the following research techniques, namely:

1. Use of current sources of court-directed mediation guidelines, namely, the said Practice Direction, the said Rules for Court Assisted Mediation, and the said general guidelines as issued by CMCKL and the other CMCs in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country, as described in chapter 4;
2. Reference to relevant legislation on mediation in Malaysia, namely, the said Mediation Act 2012 (Act 749) as discussed in chapter 4;<sup>541</sup> and

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<sup>541</sup> Appendix D, *supra* note 27.



3. Semi-structured interviews were conducted with MMC Panel of Mediators and the judiciary who were mediation practitioners, as discussed in chapter 6.

**Sub-question 3:**

***What is the role of the courts and the judiciary in promoting court-directed mediation as an ADR mechanism to facilitate settlement of disputes? What is the extent of this role?***

The last sub-question is discussed in chapter 1 (Introduction), chapter 4 (Court-directed Mediation in Malaysia), and chapter 6 (Mediation Interviews: Research Findings and Commentary) where the following research techniques were used, namely:

1. The historical and updates on the trail of mediation as an ADR mechanism in Malaysia in general, and of court-directed mediation specifically, was examined and analysed from a variety of sources including newspapers, online news reports, press releases found in the Internet, speeches during judiciary functions, and official website of the Bar Council, Malaysia, and that of the Malaysian judiciary, as depicted in chapter 1;
2. Review of current mediation guidelines and procedures, data from CMCKL, including the said Mediation Act 2012, and the role of the courts and the judiciary in promoting court-directed mediation in Malaysia, as depicted in chapter 4; and
3. Semi-structured interviews were conducted with mediation practitioners from MMC Panel of Mediators, and the judiciary to gather their views and thoughts on the role of the courts and the judiciary in promoting mediation as an ADR mechanism, as depicted in chapter 6.

**Main research question:**

***In the light of the said Mediation Act which does not govern court-directed mediation, should court-directed mediation be legislated in Malaysia?***

The said main research question was dealt with in chapter 2 (Review of Relevant Terms and Concepts), chapter 3 (Review of Relevant Researches and Legislation), chapter 4 (Court-directed Mediation in Malaysia), chapter 6 (Mediation Interviews: Research Findings and Commentary), and chapter 7 (Implementing Court-directed Mediation in Malaysia) via the following research techniques, namely:

1. Review of materials and resources from reference books, academic journals and publications, on mediation terms and concepts which were juxtaposed with views and thoughts from respondents in this study, as depicted in chapter 2;
2. Use of relevant reference books, academic journals, speeches and papers presented during judiciary functions, and online news reports on relevant researches on mediation and court-directed mediation, and legislation from other countries outside of Malaysia, as depicted in chapter 3;
3. Reference to relevant legislation mediation in Malaysia, namely, Mediation Act 2012 (Act 749) as analysed in chapter 4;
4. Semi-structured interviews which were conducted with MMC Panel of Mediators and the judiciary who were mediation practitioners, as analysed in chapter 6; and
5. Review of areas of concerns should legislation be enacted for court-directed mediation in Malaysia, as analysed in chapter 7.

## 5.6 Data Analysis

In analysing the collected data from the semi-structured interviews, the researcher did not use any computer-assisted analysis software. Instead, all interview transcripts were manually analysed by the researcher in a long-drawn process. The main reason for not using any computer-assisted analysis software was because of the limitation of time for the researcher to learn to use the said software during the period of this study. As the researcher undertakes this study on a part-time basis, the researcher was not able to take sufficient time off from work on a regular basis to focus on learning to use the said software, including applying it to analyse data. Instead, the researcher opted to embark on a manual data analysis process because this approach allows the researcher flexible time management such as after working hours during work days, and on weekends, that is, at the researcher's convenience.

In any case, in using the manual process which was relatively painstaking and long-drawn, the researcher's approach is described below:

1. First, for every interview question from Mediation Interview Question – Part 1, the transcript from each respondent was laid out against each question until all 34 transcripts were completed, which comprised 27 respondents from MMC Panel of Mediators, and seven respondents from the judiciary.
2. Next, concepts or themes were identified from the said transcripts using logical classification themes. The following four concepts or themes were used by the researcher under this step, namely:
  - a. Whether mediation is capable of resolving disputes, and whether mediation facilitates settlement of disputes;
  - b. Why mediated cases settled; why mediated cases did not settle;
  - c. Whether mediator's role, capabilities and behaviour, and confidentiality in mediation influence the prospect of cases getting settled; and

- d. Whether mediation is an effective ADR mechanism to facilitate settlement of disputes.
3. Then, using logical classification themes, the researcher developed groupings or categories. The following eight groupings or categories were formulated, namely:
  - a. Mediation promotes and facilitates settlement of disputes;
  - b. Mediators play an important role to facilitate settlement;
  - c. Reasons why settlement was reached;
  - d. Reasons why settlement was not reached;
  - e. Mediator's role, capabilities and behaviour in mediation;
  - f. Confidentiality in mediation;
  - g. Mediation is an effective ADR mechanism; and
  - h. Mediation is not an effective ADR mechanism.
4. Based on the said groupings or categories, the views and thoughts from the said respondents were marked accordingly in order for the researcher to formulate as results from this study.
5. The said results were used to formulate general opinions of the said respondents on whether mediation is capable of resolving disputes, the prospect of settlement, and factors which affect settlement of disputes.
6. The process was repeated in the analysis of the 27 transcripts from the second interview questions, that is, Mediation Interview Questions – Part 2, which were gathered from 17 respondents from MMC Panel of Mediators, and 10 respondents from the judiciary.
7. Lastly, the said groupings and categories were then mapped to the said main research question and the said three sub-questions in order to formulate the results from this study.

## 5.7 Reliability and Validity

This study used a triangulation process where more than one source of data was used to answer the main research question, and three sub-questions, where the researcher used three sources of data gathering and collection, namely, semi-structured interview, analysis of documents, and observation. The said three different sources of data gathering allowed triangulation to occur where it helped to enhance the reliability and validity of this study in terms of enabling the researcher to test the strengths of the researcher's interpretations by pulling together the identified sources of data in the study.<sup>542</sup> It also allowed the researcher to substantiate findings from this study.

Based on the said sources of data gathering and collection, in every step of the data analysis, the information was sieved and triangulated with the next step. As an example, the data gathered from the semi-structured interviews provided different perspectives, perception, views and thoughts of the said respondents as raw data, which were complemented with observations made by the researcher during the face-to-face interviews, while the information collected from the analysis of documents on relevant mediation terms and concepts as identified in chapter 2 helped to provide insights into existing mediation principles and theories which could be tested using the said semi-structured interviews, and juxtaposed for a richer perspective and interpretation of the said research questions in this study.<sup>543</sup>

In terms of content validity, this refers to the credibility and the soundness of the instruments used in research designs for measuring the construct of interest.<sup>544</sup> For purposes of this study, the researcher used exploratory research through the

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<sup>542</sup> Cavana, R. Y, Delahaye, B. L. & Sekaran, U. (2001). *Applied Business Research: Qualitative and Quantitative Methods*, 3<sup>rd</sup> ed., John Wiley & Sons.

<sup>543</sup> See chapter 2 on *Review of Relevant Terms and Concepts*.

<sup>544</sup> Sireci, S. G. (1995). The Construct of Content Validity. 45 *Social Indicators Research* 1/3, pp. 83-117.

analysis of documents to first understand the principles, terms and concepts of mediation as an ADR mechanism. Upon completion of the said analysis, the researcher proceeded to focus on the semi-structured interviews, which were used as the research instrument for this study to gather raw data where the interview questions were constructed based on the information gathered from the review of relevant terms and concepts as presented in chapter 2.<sup>545</sup>

The said interview questions were subsequently revised and refined within the research objectives and the research questions before they were used to investigate the views and thoughts of the respondents in this study who were mediation practitioners. Finally, observations made by the researcher during the face-to-face interviews played an important role in this study as they were used to complement and verify respondents' perceptions and views in response to the interview questions.

It is important to note at this point that this study was conducted without having conducted a pilot study first. The researcher was mindful of the benefits of a pilot study as it has been described as "small scale version or trial run in preparation for a major study" (Polit, Beck, & Hungler, 2001), and "a pilot study is often used to pre-test or try out" (Baker, 1994). Be that as it may, the researcher had seriously considered a number of challenges which befell this study, weighed the pros and cons of it, and ultimately, had consciously dispensed with the said pilot study. One key challenge was that the respondents may be reluctant to share their views and thoughts on their mediation experiences due to confidentiality in mediation, which is viewed as one of the fundamental tenets of mediation.<sup>546</sup>

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<sup>545</sup> See chapter 2 on *Review of Relevant Terms and Concepts*.

<sup>546</sup> Professor J. David (1992), *op. cit.*; Polit, D. F., Beck, C. T. and Hungler, B. P. (2001), *Essentials of Nursing Research: Methods, Appraisal and Utilization*, 5<sup>th</sup> ed., Lippincott Williams & Wilkins, Philadelphia; Baker, T. L. (1994). *Doing Social Research*, 2<sup>nd</sup> ed., McGraw-Hill, Inc., New York; van Teijlingen, E. R., and Hundley, V. (2001). The Importance of Pilot Studies, *Social Research Update*, Issue 35, Winter, University of Surrey, U.K.

The second challenge was the extremely low accessibility of the respondents who comprised mediators from the judiciary, and MMC Panel of Mediators. Due to their busy work schedules, many may not be readily available for face-to-face interviews for the pilot study. For the purposes of this study, the said interviews had to be arranged and scheduled from unsolicited communication. In addition to that, for the pilot study to be conducted, the researcher would first need to contact them first through such unsolicited communication before obtaining their required consent to be interviewed. The entire process would consume huge amounts of time. After much due consideration, the researcher submits that although a pilot study would have been a good preparatory move before embarking on to the actual interviews, the researcher made a conscious decision to dispense with the pilot study in the light of the said challenges.

At this juncture, it is important to note that the researcher had weighed reasons why the pilot study could bring more detriment than benefits to this study. One key concern was that contamination of data gathered from the pilot study may occur through two ways, namely, where pilot respondents are the same respondents who would be included in this study, or where new data are collected for this study from the same pilot respondents. Owing to the fact that the respondents in this study comprised mediators from the judiciary and MMC Panel of Mediators, not many of them would be readily available to provide their consent to be interviewed, especially the judges. Hence, it could be extremely difficult to exclude them from this study if they had already been included in the pilot study. Simply put, it would be highly probable for the same pilot respondents to be included in this study which would then contribute to the contamination concern.

In terms of reliability, this relates to the ability of other researchers to reproduce and to replicate the research results based on similar research objectives

and using similar research procedures.<sup>547</sup> In other words, the procedures used must be well documented, and are transparent to allow for relevant evidence to be traced and linked to the findings of the study. For purposes of this study, the views and thoughts collected from the respondents have been transcribed for those interviews which were conducted face-to-face, and for those interviews which were conducted via email and on the telephone, the said responses have been documented in soft copy, and filed accordingly, and therefore, are available upon requests for inspection and substantiation. In addition, observation recording sheets, and field notes have also been documented accordingly from the use of the observation method.

## **5.8 Research Limitations**

The researcher faced a number of limitations which are associated with this study of court-directed mediation due to the private and confidential nature of mediation as an ADR mechanism. One such limitation is related to using the said research instrument of semi-structured interviews. The interview process had been a time consuming effort owing to the fact that it was a one-on-one approach of gathering the views and thoughts from the respondents. Each interview session, whether it was face-to-face or through the telephone, took approximately 60-90 minutes to complete. Based on the interviews conducted, some respondents tended to digress to other areas when they were carried away with the details of the mediation sessions which they had conducted. The researcher found this trend to be rather commonplace amongst the respondents, and extra efforts were taken by the researcher to steer the respondents back on course in order to focus on the key aspects of the interview.

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<sup>547</sup> Yin, R. K. (2009). Case Study Research Design and Methods. In *Applied Social Research Methods Series*, Vol. 5, 4<sup>th</sup> ed., Sage Publications, Inc.



On these interviews, the researcher experienced a handful of challenges in the process of gathering such views and thoughts from the respondents due to their busy work schedules and non-availability for the said interviews. Further, the researcher spent substantial and significant amount of time on the follow ups on the respondents' availability for such interviews. Considering the fact that the respondents were mediators from MMC Panel of Mediators and the judiciary, they were not easily accessible through unsolicited communication by the researcher. Notwithstanding that, in cases where interviews were conducted via email on clarification of questions and responses, a great deal of time was also spent following up on such responses from these respondents.

In addition, as part of research ethics, the researcher made efforts to secure consent from the respondents on their participation in the said mediation interviews. Upon completion, the respondents were requested to sign a copy of the said consent forms.<sup>548</sup> The said signed forms confirmed their voluntariness to provide their views and thoughts in response to a set of pre-prepared mediation interview questions.<sup>549</sup> During this process, the respondents of this study had specifically requested for complete anonymity in sharing their views and thoughts during the interviews, which was honoured in the said consent forms. In the researcher's humble opinion, the entire interview process on the whole had consumed substantial time and effort.

It is to be noted that for purposes of this study, in trying to assess the current practice of court-directed mediation by judges and judicial officers, the researcher was tempted to sit in a number of such sessions as a non-participative observer to record observations on the following areas, namely:

1. The end-to-end mediation process in court-directed mediation sessions insofar as adherence to fundamental mediation principles is concerned;

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<sup>548</sup> Appendix J, *supra* note 540.

<sup>549</sup> Appendix F, *supra* note 513, and Appendix G, *supra* note 514.

2. The conduct and behaviour of the court mediators during the said sessions;  
and
3. The extent of adherence by court mediators to the current court mediation guidelines.

However, due to the private and confidential nature of mediation where this study is limited to interviews of mediators, and not of parties in dispute. Hence, considering the confidentiality nature of mediation, the researcher was not able to conduct non-participative observations on these court-directed mediation sessions. Consequently, no observation data were gathered from these court-directed mediation sessions on how these mediation sessions were conducted.

For purposes of this study, it is equally important to take cognisance of the weaknesses using qualitative research. Firstly, as qualitative research is used to describe personal experiences, perception, views and thoughts of a subject matter in question, therefore, its findings cannot be used to generalise other groups of people in other settings. This is because of the small sample size and how the participants in the qualitative research were selected. Suffice to state that the findings from a qualitative research may be relevant only to the selected participants in a particular study.

The second weakness of the qualitative research lies in the interpretation of the data and information gathered by the researcher. It is to be noted that there could deficient interpretations which are attributed by the nature of a qualitative research because this research methodology allows for personal interpretations of the researcher.<sup>550</sup> This could result in the inclusion of the researcher's bias in the findings

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<sup>550</sup> Creswell, J. W. & Plano Clark, V. (2007). *Designing and Conducting Mixed Methods Research*, Sage Publications, Inc., Thousand Oaks, California.

and results from such qualitative research where the said results could be laden with personal values and non-objectivity.

## **5.9 Chapter Summary**

This chapter covered the research methodology in great detail where the research design, data gathering procedure, data analysis process, and research limitations were discussed comprehensively. The key elements of the data gathering procedure, namely, the semi-structured interviews, analysis of documents, and observation, were guided by the researcher's focus to find answers to the said main research question, and sub-questions. However, in the researcher's quest to do so, the researcher faced a number of limitations and restrictions in this study which shaped and moulded the extent the research findings could have been formulated. In the next chapter, the researcher reveals the research findings which have been derived from this study within the described limitations of this study.

## CHAPTER 6: MEDIATION INTERVIEWS: RESEARCH FINDINGS AND DISCUSSION

### 6.1 Introduction

As discussed at length in chapter 1 and chapter 4, court-directed mediation has been continuously promoted by the courts and the judiciary in Malaysia since its formal inception in 2011 through the then KLCMC as a pilot project.<sup>551</sup> In subsequent years, a number of CMCs have since been formally instituted in major cities nationwide.<sup>552</sup> Such relentless efforts by the courts and the judiciary in promoting court-directed mediation in Malaysia are testamentary to the future direction of using judges and judicial officers as mediators in addition to private mediators. In fact, such a dual mode of mediation is recognised by the courts and the judiciary today.<sup>553</sup>

In other words, court-directed mediation in Malaysia has come a long way, and is here to stay in the long term. However, the researcher questions the role of the courts and the judiciary in ensuring that court-directed mediation is practised the way it ought to be. Are judges and judicial officers who also now act as mediators while in judicial office are fully equipped with adequate mediation skills, knowledge and experience? Are they equipped to conduct themselves as mediators in accordance with mediation standards and professional ethics as court mediators?

In terms of mediation standards and professional ethics for court mediators, are there any available in Malaysia? Are the parties (or litigants at large) aware of the difference between the said modes of mediation in judge-led mediation, and mediation by any other mediator? Do the parties think the role of the mediator who

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<sup>551</sup> *Supra* note 22, and *supra* note 485.

<sup>552</sup> *Supra* note 26.

<sup>553</sup> *Appendix A*, *supra* note 10, Section 5.1 (a) and (b), Annexure A (Judge-led mediation), and Annexure B (Mediation by any other mediator).

is a judge or judicial officer in court-directed mediation, is different from that of a mediator who is not a judge or judicial officer in private mediation?

Further, given the described circumstances, it begs the question whether the current mediation guidelines, rules and procedures in the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and other CMCs, are adequate to serve their intended purposes.<sup>554</sup> With the said Mediation Act which has come into operation since August 2012, are the mediation guidelines, rules and procedures consistent with those which are applicable to judges and judicial officers when they act as mediators?<sup>555</sup> Should there not be a common set of standardised guidelines, rules and procedures for all mediators in Malaysia, regardless of whether they are judges and judicial officers or not?

Therefore, given the described circumstances and challenges, the researcher raises the question whether court-directed mediation should be legislated in Malaysia to address the said challenges. Presumably, through legislation, it is envisaged that court-directed mediation would be given some form of legal effect as with private mediation through the enactment of the said Mediation Act. For purposes of this study, the views and thoughts of the respondents who practised court-directed mediation and private mediation were gathered in the researcher's attempt to provide a richer analysis of the main research question from the perspectives of these practitioners in Malaysia.

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<sup>554</sup> These are found in the said Practice Direction, the said Rules for Court Assisted Mediation, and those issued by CMCKL and the other court-annexed mediation centres in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country.

<sup>555</sup> *Appendix D, supra* note 27, Section 2 (b).

## 6.2 Composition of Respondents

For purposes of this study, the researcher conducted interviews through a number of channels, namely, face-to-face, over the telephone, and via email exchange with respondents who comprised the judiciary who were located nationwide, both in Peninsular Malaysia and in East Malaysia (Sabah and Sarawak), and registered mediators with MMC Panel of Mediators. Two sets of interview questions were designed to capture the essence of this study to cater for the different timing of the two events which occurred during the course of this study.<sup>556</sup> For purposes of this study, the said two mediation interviews were labelled as follows:

1. Mediation Interview - Part 1 which was conducted from April 2011 through September 2011, was based on nine interview questions;<sup>557</sup> and
2. Mediation Interview - Part 2 which was conducted from October 2012 through February 2013, was based on six interview questions.<sup>558</sup>

A total number of 61 interviews were conducted for purposes of this study, with 34 respondents in Mediation Interview - Part 1, and 27 respondents in Mediation Interview - Part 2, through a mixed mode of interviews, namely, face-to-face, over the telephone, and via email exchanges. There was a higher number of judiciary members who had accepted the interviews in Part 2. It was recorded that 10 members from the judiciary who had acted as mediators had been interviewed as compared to only seven who were interviewed in Part 1, making a total of 17 members from the judiciary. As for mediators from MMC Panel of Mediators, both Part 1 and Part 2

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<sup>556</sup> See chapter 5 on *Research Methodology*.

<sup>557</sup> *Appendix F, supra* note 513. A total of 117 members of the judiciary comprising judicial officers from The High Court in Sabah and Sarawak, and the Sessions Courts in Sabah Law Court, Sarawak Law Court, Judicial Commissioners and Judges of the High Courts in Malaya and Sabah and Sarawak. In addition to that, 226 mediators from MMC Panel of Mediators were included as respondents. See Table 6.1.

<sup>558</sup> *Appendix G, supra* note 514. A total of 139 members of the judiciary were invited from the High Court in Sabah and Sarawak, Sabah Law Court, Sarawak Law Court, Judicial Commissioners and Judges of the High Courts in Malaya, and Sabah and Sarawak. Further, 279 mediators from MMC Panel of Mediators were included. See Table 6.1.

interviews captured 44 respondents who had accepted the interview invitations. Details of the number of mediators who were invited from both MMC Panel of Mediators and the judiciary, and the total who were interviewed are shown in Table 6.1 below.

**Table 6.1:** Composition of mediation interviews in Part 1 and Part 2

Mediation Interview Period		Mediators	Invited	Interviewed	Total Interviewed
Part 1	April 2011 ~ September 2011	Judiciary	117	7	34
		MMC Panel of Mediators	226	27	
			343		
Part 2	October 2012 ~ February 2013	Judiciary	139	10	27
		MMC Panel of Mediators	279	17	
			418		
					61

In terms of the composition of the respondents, the researcher was able to gain access to the mediators from MMC Panel of Mediators who were located in all states in Peninsular Malaysia with the exception of Kelantan, Terengganu and Melaka where none of the respondents had accepted the requests for mediation interviews. As for the judiciary, interview invitations were accepted by judges and judicial officers who presided in Putrajaya, Kuala Lumpur, Shah Alam, Sabah and Sarawak. None were accepted by the judiciary from the other states in Peninsular Malaysia although invitations had gone out to them. Table 6.2 shows the breakdown of the mediators interviewed in the various locations.

The views and thoughts gathered from the sets of interview questions in Mediation Interview - Part 1 and Mediation Interview - Part 2 are elaborated and discussed in the respective sections below. Complete anonymity in all interview responses have been kept in the strictest confidence at the requests of the respondents. As stated previously in chapter 5, as part of research ethics, the researcher had made

substantial efforts to secure consent from the respondents who were interviewed on their voluntary participation in the said mediation interviews through signed consent forms.<sup>559</sup> Be that as it may, the sections below cover such views and thoughts for each of the questions asked during the said interviews.

**Table 6.2:** Composition of mediators interviewed by location

Mediators	Location of Mediators	Number of Mediators Interviewed	
		Part 1	Part 2
Judiciary	Peninsular Malaysia	1	5
	Sabah	2	3
	Sarawak	4	2
MMC Panel of Mediators	Johor	2	0
	Kedah	1	0
	Kuala Lumpur	12	11
	Negeri Sembilan	1	0
	Pahang	1	0
	Penang	5	2
	Perak	2	1
	Selangor	2	3
	Non-Bar	1	0
		<b>34</b>	<b>27</b>

### 6.3 General Views and Thoughts from Respondents

The focus of Mediation Interview - Part 1 was to establish if mediators in Malaysia view mediation as an effective ADR mechanism which facilitates settlement of disputes. 34 views from respondents who comprised practising mediators in the judiciary and MMC Panel of Mediators were collated across nine questions in mediation interviews over five months from April 2011 through September 2011.<sup>560</sup>

<sup>559</sup> Appendix J, *supra* note 540.

<sup>560</sup> Appendix F, *supra* note 513.



From the profile of mediated cases by the respondents, the researcher recorded basic information such as the number of years the respondents have been in mediation practice, the types of mediation cases, the number of mediation cases handled, and the number of such cases settled in their mediation experience. From the 34 respondents in Mediation Interview – Part 1, it was noted that the respondents' mediation experiences spanned from two years to more than a decade. Longer years of experience of more than ten years were more evident from the respondents from MMC Panel of Mediators who practised private mediation as compared to the judiciary who practised court-directed mediation. Table 6.3 has all the details on the profile of the said mediated cases.

In terms of the respondents from MMC Panel of Mediators, it was observed that those who have longer years of mediation experience, that is, in excess of ten years, were those who practise in Kuala Lumpur, Johor and Penang, when compared to their counterparts in the other states in Peninsular Malaysia. As a matter of fact, none of these who practise in the three states, namely, Melaka, Kelantan and Terengganu, responded to the mediation interview invitations.

The types of mediation cases which were handled by the respondents comprise a multitude of cases in various industries, namely,

1. those which were handled by the judiciary included civil cases involving monetary claims, disputes on building contracts, insurance claims and personal injuries in accident cases, specific performance, breach of contract, commercial disputes, divorce, construction, trespass, and defamation; while
2. those which were mediated by MMC Panel of Mediators included shareholders/partnership disputes, property matters, transport issues, commercial, matrimonial, child custody, corporate disputes, breach of

contract, nuisance/trespass, family estate, construction, civil, and services disputes.

**Table 6.3:** Profile of mediated cases handled by mediators

Mediators	Location of Mediators	No. of Years in Mediation	No. of Cases Mediated	No. of Mediated Cases Settled
Judiciary	Peninsular Malaysia	> 5	> 20	> 15
	Sabah	2 to 5	> 12	> 9
	Sarawak	2 to 3	12 to 56	8 to 50
MMC Panel of Mediators	Johor	> 10	NA	NA
	Kedah	6	5	0
	Kuala Lumpur	2 to 11	1 to 20	0 to 10
	N Sembilan	7	3	3
	Pahang	2	NA	NA
	Penang	7 to 10	3 to 16	2 to 12
	Perak	3 to 5	2 to 29	1 to 23
	Selangor	2 to 7	10 to 20	NA
	Non-Bar	7	43	37

From Table 6.3, in terms of the settlement rate of mediated cases, between the respondents from the judiciary and from MMC Panel of Mediators, the responses which were gathered showed that the settlement rate achieved through court-directed mediation by the judiciary was on an average 84% while that by MMC Panel of Mediators through private mediation was slightly lower, at an average rate of 73.3%. When compared amongst the states where MMC Panel of Mediators practised, higher settlement rates were reported from Negeri Sembilan (100%) and Non-Bar mediators (86%) followed up by Perak (79%), Penang (75%) and Kuala Lumpur (50%). No data was gathered from those in Selangor although 10-20 cases were mediated by those who were interviewed in that state.

Based on the views and thoughts gathered from the 61 respondents, the following section covers their general opinions on the listed multitude of topics relating to mediation and settlement of disputes, where each is illustrated in turn, namely:

1. whether mediation is capable of resolving disputes, and whether it does in fact facilitate settlement of disputes;
2. why mediated cases settled, and why some did not settle;
3. whether the mediator's role, capabilities and behaviour, and confidentiality in mediation influence the prospect of cases getting settled in mediation; and
4. whether mediation is an effective ADR mechanism to facilitate settlement of disputes in Malaysia.

#### **6.3.1 Whether mediation is capable of resolving disputes, and whether it does in fact facilitate settlement of disputes.**

All 34 respondents, comprising seven from the judiciary, and 27 from MMC Panel of Mediators, who had responded to this interview question under Mediation Interview – Part 1 affirmed that mediation as an ADR mechanism is capable of resolving disputes, and it does facilitate settlement of disputes. However, their statements are not without elaboration or caveats which have shed more light on the advantages and disadvantages of mediation, and challenges faced by mediators generally. Two key areas have been gathered from these views and thoughts of the respondents, namely:

##### ***6.3.1.1 Mediation promotes and facilitates settlement of disputes***

According to the respondents, court-directed mediation allows the judge or the judicial officer to participate actively in the mediation process unlike a formal trial. Here, both the judge or the judicial officer who acts as the mediator and the parties thrive in a win-win situation as opposed to a win-lose situation in a trial. Hence, the view was that although a case may not be settled through mediation, the mediation process helps to pave the way for the parties towards reaching a settlement.

The respondents stated that this is because through the mediation process from start to end the mediator would assist and guide the parties to:

1. realise the strengths and weaknesses of their dispute;
2. find various options and solutions to resolve their dispute;
3. realise that they could resolve the dispute much faster if each party is willing to accommodate each other's interests and needs;
4. realise that the amicable resolution approach is better than the adversarial "winner versus loser" approach; and
5. discover that proceeding to trial is counter-productive because it would be time consuming to reach to the end satisfactorily.

Further, it was opined that mediation helps the parties to re-establish constructive communication with each other, and empowers them to resolve the dispute in a way which suits them. The respondents saw that with mediation, the emphasis is on communication and understanding which allow the parties the opportunity to understand the reasons behind the other party's actions. On the same point, one interesting observation made by the respondents is that mediation brings out the parties' underlying interests and issues, and emotions and differing expectations, at the mediation session.

The respondents viewed that it is advantageous to use mediation because it is a quick solution to resolve disputes or to provide various options or solutions for the parties to consider. In their opinion, the parties would be required to meet face-to-face to iron out their differences during mediation. It is during mediation that they would be given the opportunity to understand and to realise the consequences of continuing with litigation versus using mediation as an ADR mechanism to resolve their dispute. In addition, the respondents raised the point that by the time the parties

opt for court-directed mediation, they would have narrowed down their issues in preparation for case management in the litigation process. Hence, it was felt that opting for mediation would be advantageous for the parties.

In addition, the respondents were of the view that the face-to-face meeting allows the parties to look at their respective claims or defences from a wider perspective, and not just be confined to their legal counsels' opinion and assessment. In the respondents' views, the parties may attempt to open up when the party speaks up, and probably, that would be the first time that they hear the other party speak during mediation. Further, the respondents believed that perhaps with such openness displayed, there could be less animosity between the parties through the course of the mediation process. It was opined that the parties could attempt to iron out the differences with the help from the mediator to facilitate the negotiations and discussions. However, it was highlighted that one of the key dependencies is that both parties must have a genuine desire and sincerity to resolve their dispute through mediation. It was stressed that only then would mediation be a useful method to reach settlement.

#### *6.3.1.2 Mediators play an important role to facilitate settlement*

Another consideration which was raised by the respondents is the role of the mediator in facilitating mediation to help the parties reach an agreed outcome. It was felt that there is a need to have a capable mediator who has the stature and the respect of the parties where the mediator plays a neutral, facilitative and effective role. It was emphasized that the mediator must allow both parties to vent out their true feelings and emotions which they would not be able to do so in a court room environment and setting. In short, it was felt that the informal setting of mediation allows the parties to communicate with each other directly with the assistance of the mediator.

Hence, the respondents felt that the role of the mediator is to observe the parties' expectations through their vented feelings and emotions, and based on these, the mediator guides and assists the parties to reach an amicable settlement. Based on the respondents' mediation experiences, they viewed that most disputes arose due to misunderstanding and pent-up frustration of the parties, and in their opinion, that it is more likely that such disputes could be resolved once these emotions have been "vented out" during mediation.

In this respect, all the respondents from the judiciary were of the view that they recognise and understand that mediation does promote and facilitate the settlement of disputes based on their mediation experiences. As such, they understand how mediation works as an ADR mechanism.<sup>561</sup> All the respondents from MMC Panel of Mediators echoed the same view.<sup>562</sup> However, their main concern is on the mediator's role in court-directed mediation, whether judges and judicial officers could really be professional mediators as they have been trained as adjudicators and not as mediators. The researcher shares the same concerns because the mediator is instrumental in ensuring that the parties adhere to the mediation process. At the same time, the mediator as the neutral third party is expected to play the orchestrator role to assist and guide the parties to reach their agreed settlement.

Be that as it may, the researcher argues that the mediator who has been trained as a judge or judicial officer may find it difficult to refrain from offering his or her professional opinion in mediation. The researcher further argues that the fact that court-directed mediation session which sometimes occurs in the judge's chambers does not help to alleviate the parties' perception that the judge who acts as a mediator would play the evaluative role to "hand down" his or her judgement instead of facilitating the mediation process as it should be.

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<sup>561</sup> This is the view from all 7 respondents from the judiciary in Mediation Interview – Part 1.

<sup>562</sup> There were 27 respondents from MMC Panel of Mediators in Mediation Interview – Part 1.

### **6.3.2 Why mediated cases settled, and why some did not**

The respondents had their fair share of views on why cases which were mediated were eventually settled, and some could not be settled through mediation. Their views are categorised accordingly, and are elaborated in turn as outlined below.

#### *6.3.2.1 Reasons why settlement was reached*

Based on the views and thoughts gathered from the interviews, it can be summarised that there are three key reasons why the parties successfully reached settlement in mediation. This is attributed to the mediator's role, the parties' role and attitude, and the mediation process itself. Each of these reasons is discussed in turn.

##### **(a) Mediator's role**

The respondents from both the judiciary and MMC Panel of Mediators stated that cases were settled in situations where the parties are given the opportunity to talk to each other, and a good mediator is able to facilitate the session where the parties eventually agree to a win-win solution.<sup>563</sup> According to them, when the parties begin to communicate with each other, they also begin to see things from each other's perspectives or they see the other side of the coin with the help from the mediator.

##### **(b) Parties' role and attitude**

The respondents stressed that generally, from their experience in mediation, it is the willingness of the parties which is the key factor in why mediated cases settled, and when the parties are ready for a full and frank disclosure which is aimed

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<sup>563</sup> Of the 34 respondents in Mediation Interview – Part 1, 9 of them cited this reason why mediated cases settled where 3 were from the judiciary.

towards settlement of their dispute.<sup>564</sup> Their view is that the parties want to see closure of the dispute as quickly as possible, especially in commercial disputes where time is money, and where business relationships do not become strained but are kept preserved. These respondents viewed that the parties must first have the genuine desire to resolve their dispute, and must be willing to put aside their ‘egos’. Hence, mediation allows the parties to vent out their feelings and emotions to clear misunderstanding, if any. However, it was commented that the parties would need a lot of encouragement and proof that mediation is an effective ADR mechanism to resolve disputes.

In such cases based on their mediation experiences, these respondents observed that in cases which settled, some of the parties were willing to accept less and to move on while other parties did not want to risk having to go for trials, and had agreed to pay higher sums of settlement. According to these respondents, it would be difficult to predict the outcome of the trial because it would largely depend on a handful of factors such as availability and admissibility of evidence, experience of lawyers, and the like.

It was viewed that cases could be settled when parties understand each other better in terms of their respective expectations and the extent of the reasonableness of their respective demands, positions or assumptions. One observation was that Malaysians are, by and large, a non-litigious society, and people tend to view litigation as detrimental to human relationships and business relationships. Hence, the view was that in cases where the parties resort to mediation to resolve their dispute, they would probably both emerge as winners if the dispute is resolved amicably. The respondents shared that in such a situation, the parties would then

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<sup>564</sup> From the 34 respondents in Mediation Interview – Part 1, this reason was cited by 14 of them of whom 3 were from the judiciary.



realise the importance of reaching an agreed settlement to avoid further stress and strain by proceeding with the trial if they had not agreed to a solution.

### **(c) Mediation process itself**

Generally, it was opined by the respondents that the mediation process itself is the second reason why cases settled.<sup>565</sup> It is worth noting that the respondents from the judiciary in Sabah and Sarawak were of the view that escalating cost of litigation is a key driving force why most parties resort to court-directed mediation which is rendered free of charge to all litigants.<sup>566</sup> The 12 respondents shared the view that mediation would relieve the parties of the long-drawn litigation process (including the right of appeal process) which could span over a few years.

At the end of the day, the respondents felt that the mediation process allows the parties to achieve a number of objectives and to gain several benefits, namely, the parties are able to express their sentiments, feelings and emotions; they are able to consider the reality of the situation at hand in respect of the dispute; they have control over the decision or outcome in mediation; they are able to avoid publicity and to protect their privacy; they have the opportunity to explore various possibilities to resolve the dispute at hand; and they could achieve a sense of satisfaction and achievement in the event they are able to resolve the dispute on their own with the guidance of the mediator.

#### **6.3.2.2 *Reasons why settlement was not reached***

Respondents were also asked for their views and thoughts on reasons why mediated cases did not settle. These views largely centre on two major setbacks

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<sup>565</sup> This reason was cited by 12 of the 34 respondents in Mediation Interview – Part 1, of whom 3 were from the judiciary.

<sup>566</sup> This view was shared by 3 of the 7 respondents from the judiciary from the total 34 respondents in Mediation Interview – Part 1.

which, in the opinion of the respondents and in their experiences, have hampered dispute resolution by the parties. These are the parties' attitude, the mediator's capabilities and skills, and influence from lawyers or interference from other parties. Of these reasons, the most popular one is the parties' attitude.<sup>567</sup> Each of these setbacks is outlined below.

#### **(a) Parties' attitude**

In the opinion of the respondents, the one thing which could break down the mediation process is the parties' attitude.<sup>568</sup> If the parties do not come to the mediation table with an open mind and with a genuine interest to resolve their dispute, or they lack the sincerity or the keenness to resolve their dispute, or are unwilling to adhere to the mediation process throughout the process, then the parties would not be able to reach an agreed settlement between them. In essence, they lack the sincerity or the keenness to resolve their dispute.

Often times, it was felt that the parties want "their day in court" so they do not mind going through the trial process, and would avoid attempts to resolve their dispute outside of the court process. The respondents shared that in such situations, the parties would be too adamant about exerting their legal rights, and would refuse to let go of or give in to certain areas of interests or to come to a midway resolution. The view was that even if the parties agree to come to the table to mediate, their antagonistic attitude would derail the mediation session. According to the respondents, this is true in situations where there is power imbalance between the parties where one party could be financially stronger than the other, and hence, would be more willing to take greater risks.

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<sup>567</sup> This reason was cited by 23 out of the total 34 respondents in Mediation Interview – Part 1, of whom 6 were from the total 7 respondents from the judiciary.

<sup>568</sup> *Ibid.*

Based on respondents' mediation experience, they shared that it is quite common for the parties to fear "losing face" if their case is settled, especially in defamation cases. To the respondents, pride would prevent the parties from resolving their dispute, for example, in situations where one party may feel that their BATNA is a better alternative than any other options tabled during the mediation process. Further, it was noted that the party who initiates the mediation session may be seen to be at the losing end, and that they may be seen not to have a strong case.

Another reason shared by the respondents is when the parties lack effective communication or refuse to communicate with each other during mediation due to the deep animosity between them, or they may be vengeful, and may adopt a bellicose attitude, or they could simply lack the ability to make a decision, or being indecisive when options are tabled during the mediation session. It was observed by the respondents that such situations arise because the parties may feel that they are entitled to more than what is tabled during mediation, especially when monetary settlement is involved. Further, it was highlighted that customary practices such as "face saving" and loss of pride could also hinder the parties' resolution of the dispute.

#### **(b) Mediator's capabilities and skills**

It was noted by the respondents that one of the key reasons why most mediated cases did not settle in court-directed mediation was due to the fact that the mediator lacks the capabilities of a professional mediator whereby the mediator could appear to judge the case rather than to facilitate the session and allow the parties to open up during mediation.<sup>569</sup> As explained by the respondents, the mediator may not be familiar with the mediation process, and hence, they tend to "analyse" and "judge" the situation instead of listening to the parties' grievances and facilitating the process.

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<sup>569</sup> This reason was cited by 7 of the total 34 respondents in Mediation Interview – Part 1 of whom 2 were from the judiciary.

Further, based on these respondents' observations, in situations where there were impasses or deadlocks during the mediation session, the mediators lacked the required capabilities and skills to break the impasses in order for the parties to reach an agreed outcome.

### **6.3.3 Whether the mediator's role, capabilities and behaviours, and confidentiality in mediation influence the prospect of cases getting settled in mediation**

In the mediation interviews, the respondents were asked for their views and thoughts on whether the mediator's role, capabilities and behaviour, and confidentiality in mediation are factors which influence the prospect of cases getting settled in mediation. More respondents (all except 2 from 34 of them) agreed that the mediator's role, capabilities and skills help to facilitate settlement of dispute between the parties with lower number of respondents (only 24 from 34 of them) who agreed that confidentiality in mediation is a factor to promote settlement of dispute. Each of these factors is discussed below.

#### **6.3.3.1 Mediator's role, capabilities and behaviour in mediation**

All but two respondents were of the view that the mediator's role, capabilities and behaviour are instrumental in increasing the prospect of the parties settling their dispute.<sup>570</sup> In essence, they viewed the mediator's role covers a range of responsibilities, namely, where the mediator is expected to narrow underlying issues at hand, to allow the parties to assess the strengths and weaknesses of their respective areas, to assist the parties to understand what they really want from the trial; and to provide assistance and guidance to the parties to work through the available options

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<sup>570</sup> Of the 34 respondents in Mediation Interview – Part 1, 32 of them affirmed this with all 7 from the judiciary and 25 (out of the 29) were from MMC Panel of Mediators. The other 2 were from MMC Panel of Mediators.

on how the dispute could be resolved and for the parties to reach an amicable settlement.<sup>571</sup>

From another perspective on the mediator's role in mediation, the respondents from MMC Panel of Mediators talked about the role of the mediator.<sup>572</sup> In their opinion, the mediator is someone with a reputation of being fair and reasonable when conducting mediation, and one who would go a long way to ensure that the parties resolve their dispute through mediation. This view was premised on two key ingredients which the mediator must possess to enable the parties to reach a settlement, namely, the ability of the mediator to inspire confidence and trust, and to understand the parties' underlying needs.

According to these respondents, this is where communication between the parties and the mediator during mediation is vital because the mediator must possess the ability to "open up" the parties' hearts by highlighting the strengths and weaknesses of their respective positions, and to clear misconceptions, if any. They also opined that this is also where the mediator needs to "break the ice," and to establish trust with the parties. Be that as it may, the respondents admitted that this is by no means an easy task for the mediator to strike the right balance.

Related to this point is the respondents' observation that to a great extent the parties look up to judges and judicial officers as persons with higher authority. According to them, the mediator would need to be someone who exudes confidence, and must be impartial throughout the mediation process. Here the researcher raises the question on whether the mediator is able to ensure that he or she plays an impartial and neutral role yet at the same time is able to ensure that the parties reach their agreed outcome or settlement as the case may be.

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<sup>571</sup> This view was shared by 6 of the 34 respondents in Mediation Interview – Part 1.

<sup>572</sup> This perspective was revealed by 6 out of the 27 respondents from MMC Panel of Mediators in Mediation Interview – Part 1.

In the context of impartiality and neutrality of the mediator, the researcher is reminded of the definition which states that impartiality is “a core requirement in mediation...an even-handedness, objectivity and fairness towards the parties during the mediation process.”<sup>573</sup> The definition of neutrality consists of four elements, namely, low or no power over the parties; high credibility with the parties; focus on process rather than outcome, and the importance of rationality and good information in achieving settlements.<sup>574</sup> Hence, the respondents stressed that the mediator must ensure that the process is fairly conducted, and should not be duly concerned with his or her own perception of the fairness of the agreed outcome or settlement.<sup>575</sup> It must be seen to be fair by the parties as they make the final decision, and not the mediator. There could be circumstances and considerations which the mediator may not be fully aware of. This is why the parties’ judgment should prevail, and not the mediator’s.

However, the mediator is not expected to stand by the side and watch the parties make their own decision. According to one respondent, this is where the role and responsibilities of the mediator is crucial to ensure that the parties fully understand the concept of settlement, and to help them reach an agreed settlement.<sup>576</sup> Where the parties insist to proceed on their agreed terms, the final outcome is for the parties to decide so long as the mediator has been impartial, unbiased, and neutral throughout the mediation process. This point is evident in the view of one respondent who shared that the parties tend to take the cue from the mediator who is expected to set the tone of how the mediation process will be conducted.<sup>577</sup> According to this respondent, attributes such as the mediator’s body language, tone of the mediator’s

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<sup>573</sup> Boulle, L., 1996, *op. cit.*

<sup>574</sup> Laue, J. H., 1982, *op. cit.*

<sup>575</sup> This point was raised by 2 respondents from MMC Panel of Mediators of the 34 respondents in Mediation Interview – Part 1.

<sup>576</sup> This was a respondent from MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>577</sup> This view was shared by one respondent from MMC Panel of Mediators in Mediation Interview – Part 1.

voice, words and language used by the mediator, are important considerations for the mediator to play his or her role professionally.

An example which was cited touched on the choice of words used which is viewed to be an important point.<sup>578</sup> The respondent explained that this is because the mediator must learn to handle the emotions displayed by the parties in that the mediator cannot be seen or heard to be partial or to provide his or her own opinion on the issues at hand. The view was that the mediator's role is to have a deep understanding of the issues at hand, and based on that, to raise relevant points to enable the parties to "see" the real issues where they could have missed out at the outset of their dispute.

In addition, one respondent stressed that the parties would feel more confident if the mediator possesses full knowledge of the technical aspects of the issues in dispute.<sup>579</sup> The parties would also be assured that such knowledge will be used by the mediator to provide assistance and guidance to the parties as they consider the various options and suggestions in their effort to reach an agreed outcome. Another respondent touched on an important point that the mediator would need to be seen to maintain impartiality at all times in the way they carry themselves, and how they conduct the mediation process.<sup>580</sup> Where the mediator possesses such technical knowledge, the parties would also view that the mediator is able to conduct the mediation process fairly given his understanding of the technicalities and the nature of the dispute at hand.

It would seem that the views from the respondents are consistent with the key principles in the role of the mediator which stipulates that the mediator must separate the people from the problem, be soft on the people but hard on the problem, focus on

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<sup>578</sup> This point was raised by one respondent from MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>579</sup> This was the view of one respondent from MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>580</sup> One other respondent from MMC Panel of Mediators shared this view in Mediation Interview – Part 1.

the parties' interests, not their positions, create options for parties' mutual gains, and finally to reach a win-win solution versus a win-lose solution.<sup>581</sup> In short, the role of the mediator can be summed up as: "the mediator's role is to direct the traffic, like a traffic officer, but the parties will be doing all the driving."<sup>582</sup>

In terms of the extent mediator capabilities and behaviour influence the prospect of cases getting settled, one respondent from the judiciary shared that mediation is both an art and a gift. This is elaborated to mean that a person who is always in touch with the world, with people's feelings, has a credible reputation, has the confidence of the legal fraternity, and has great legal acumen, makes the best mediator. This statement is true and is consistent with the words of wisdom which state that "mediation is only as good as the mediator," where the overall quality of the mediator is critical to the success of mediation.<sup>583</sup>

The respondents in this study were of the view that the mediator is a person who is sensitive to people's feelings and emotions, has empathy for the parties, has the ability to listen effectively, to take as much time as possible to hear the parties out, to determine the direction of the mediation session, and eventually to assist and guide the parties to reach an agreed outcome by applying his or her knowledge, experience, art and skills to facilitate a structured mediation process.<sup>584</sup> These have been identified as the key capabilities and skills of the mediator.

In other words, as simply put by one respondent, the mediator needs to understand the underlying issues, the common grounds, and to assist and guide the parties through their consideration of the various options and suggestions to enable the parties to negotiate, and eventually to reach an agreed outcome.<sup>585</sup> This view sums

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<sup>581</sup> Fisher and Ury (1991), *op. cit.*

<sup>582</sup> Boulle, L. (1996), *op. cit.*

<sup>583</sup> Henderson, D. A. (1996), *op. cit.*

<sup>584</sup> These were the views of 4 respondents where 1 of whom was from the judiciary, out of the total 34 respondents in Mediation Interview – Part 1.

<sup>585</sup> This respondent was from MMC Panel of Mediators in Mediation Interview – Part 1.



up the approach where the mediator puts forth all identified issues in a structured and objective manner, and assists and guides the parties to narrow them down for them to negotiate and to reach an agreed outcome at the end of the mediation process.

One respondent from the judiciary shared that although the parties may have “irreconcilable differences,” the mediator’s persuasion skills and mannerism could make a difference.<sup>586</sup> Based on the mediation experience, it was said that an effective mediator possesses several attributes, namely, has an approachable personality, one who looks at mediation as an informal session including an informal venue for the mediation session, who uses psychology, and who treats the mediation session as the best opportunity to find a successful resolution for both parties. It is in the researcher’s opinion that the respondents had high expectations of the mediator in terms of capabilities and skills. The researcher would add that the quality of mediators is important to ensure that the parties reach an amicable settlement through the assistance and guidance of effective mediators in an effective mediation process.

As revealed by one respondent from MMC Panel of Mediators, the key point is on the “how” to apply mediator capabilities and skills.<sup>587</sup> For instance, it is crucial that the mediator needs to maintain and control his or her composure and demeanour in conducting the mediation session as the parties would rely on the mediator’s assistance and guidance. In essence, it was opined by this respondent that the skilled mediator would rely on his or her mediator skills to navigate the parties step by step throughout the mediation process, pace the mediation steps, time the joint discussions or the caucuses, manage emotional outbursts by the parties, if any, and summarize the available options with identified pros and cons for the parties to consider.

Based on the views gathered from the respondents, the researcher is convinced that mediator capabilities and behaviour is a crucial factor to influence the

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<sup>586</sup> This view was shared by one of the 7 respondents from the judiciary in Sarawak in Mediation Interview – Part 1.

<sup>587</sup> One of the 27 respondents from MMC Panel of Mediators shared this view in Mediation Interview – Part 1.

prospect of their dispute getting settled through mediation as opposed to litigation. In fact, the researcher draws learning from qualities of a “resolutionary” person who is concerned with getting people past disputes and back to their lives, where they design what they need to get the job done, they create trust and the presence for people to open up into, they are not committed to a particular resolution, and above all, they listen with their entire presence and hear what is not said (Levine, 1999, p. 50).<sup>588</sup> In essence, its importance is equated to “as skill is to a craftsman.”<sup>589</sup> Simply put, the researcher contends that the mediator is expected to ensure that he or she is impartial and objective in conducting mediation in accordance to a fair and structured process.

#### 6.3.3.2 *Confidentiality in mediation*

In terms of whether confidentiality is a factor which contributes to mediation effectiveness or ineffectiveness, the majority of the respondents from both the judiciary and MMC Panel of Mediators agreed that confidentiality in mediation is a factor which contributes to parties settling their dispute.<sup>590</sup> However, there were those who did not agree shared that it varies from case to case, and is very dependent on the nature of the disputes, and on the facts and circumstances of the disputes. They noted that since most disputes would have commenced in the court, and the parties would not be concerned that such disputes are in the public domain, their view was that confidentiality becomes a non-factor in the settlement of disputes.<sup>591</sup> Further, in court-directed mediation cases, the trial dates would have already been allocated so as to prevent the parties from using mediation as a delay tactic, and the parties would

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<sup>588</sup> Levine, S. (1999). Resolutionary View – 10 Principles for Developing the Attitude of Resolution. *Law Practice Management* 46.

<sup>589</sup> This was the view of one respondent from 27 respondents from MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>590</sup> This was gathered from 24 out of the total 34 respondents in Mediation Interview – Part 1, where 5 out of the 7 respondents were from the judiciary.

<sup>591</sup> This view was shared by 2 respondents, one from the judiciary and another from MMC Panel of Mediators in Mediation Interview – Part 1.

already have been prepared for the trial. Again, in this situation, confidentiality would not be a key contributor to parties settling their dispute.

To those respondents who viewed confidentiality in mediation as a key contributor to the parties settling their disputes, they stressed on the point that the parties will be encouraged to come to the mediation table with an open mind knowing that there is confidentiality in the process where it allows the parties to explore options in their discussions.<sup>592</sup> According to them, this is how mediation is able to motivate the parties to try mediation because if mediation does not succeed, the parties could still proceed to trial as their last resort to resolve the dispute.

It was shared by one respondent that Asians, in general, and Malaysians, in particular, have a cultural norm or belief to maintain a certain degree of pride and privacy where they are not open for public scrutiny insofar as their private and business matters are concerned.<sup>593</sup> Hence, it was opined that there would be no limit to what the parties may disclose in mediation given there is confidentiality in mediation. However, it was felt that before such disclosure is made, the parties would want to be assured that such disclosure would be confined to the mediation session only.

Other respondents shared that even if mediation does not succeed, the parties know that they have the assurance that their admissions or concessions which were made during the mediation session will not be used against them at the hearing.<sup>594</sup> In these respondents' views, the parties would generally want to conceal their weaknesses in their respective areas because to a great extent, it is understandable that nobody wants to "wash dirty linen in public." Hence, the parties see this

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<sup>592</sup> This was shared by 3 of the 34 respondents in Mediation Interview – Part 1.

<sup>593</sup> This respondent was one of the 27 respondents from MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>594</sup> This point was raised by 3 of the 34 respondents in Mediation Interview – Part 1. All of them were from MMC Panel of Mediators.

advantage in mediation where what they say would be protected under the cloak of confidentiality.

On the point of the “face saving” culture which was raised by one respondent, it was felt that this is extremely important so that when cloaked under the veil of confidentiality in mediation, the parties would be open to lay their cards on the mediation table rather than in open court.<sup>595</sup> However, the view is that in mediation there is also a need for the parties to be heard as long as they have the assurance from the mediator that confidentiality in mediation is maintained by both parties and the mediator in accordance with the principles of the mediation process.

Other views which centred strongly on the “culture” point stated that the mediator’s skills come in handy to build the required trust from the parties.<sup>596</sup> According to these respondents, in essence, the assurance of confidentiality creates an environment of trust for both parties to express their concerns, and to communicate effectively. In other words, the view was that the “secrecy” between the parties and the mediator is seen to be the main contributor to the settlement of disputes. As stated by one respondent from MMC Panel of Mediators, “confidentiality protects reputation and brings about goodwill”.

Be that as it may, a lot would also depend on the facts and circumstances of the dispute in question. For example, if the party who insists that the confidentiality rule is to be observed but is unwilling to admit his or her mistakes and weaknesses, then such an attitude would impair any prospect of the parties reaching an amicable settlement. However, there would be situations where one party is open-minded about the facts which are kept in confidence, is also willing to acknowledge his or her weaknesses, and to accept the views of the mediator and the other party. Then the question is whether waiving the confidentiality rule would then resolve this issue.

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<sup>595</sup> One respondent from MMC Panel of Mediators shared this perspective in Mediation Interview – Part 1.

<sup>596</sup> This perspective was shared by 3 respondents from MMC Panel of Mediators in Mediation Interview – Part 1.

One view from the respondents was that the confidentiality rule should be waived only if the mediator is required to disclose by general law or with the consent of both parties, or if such disclosure is necessary to implement or enforce any settlement agreement.<sup>597</sup>

In fact, one respondent from the judiciary shared that confidentiality in mediation should not get in the way of mediation because full and frank disclosure is expected of the parties, which is a key factor to any settlement.<sup>598</sup> However, it was felt that there must be confidentiality between judges and judicial officers who act as mediators, and those who will be conducting the trial when mediation fails in order to avoid any partiality or biasness. In the researcher's opinion, this is one mediation rule which cannot be waived nor compromised especially in court-directed mediation where judges and judicial officers play a dual role, both in adjudication as well as in mediation.

On the same subject of ensuring judges and judicial officers maintain the confidentiality rule when they act as mediators, there was one view from a respondent that confidentiality in mediation is a key contributor only if mediation is conducted by private mediators.<sup>599</sup> It was explained that when mediation is conducted by judges and judicial officers in court-directed mediation, the parties would feel that the information which is shared by them during the mediation would eventually influence the final decision, which sometimes could trigger a settlement.

On this point, the researcher is mindful of the "unsettled" point on judges and judicial officers playing the dual role of adjudicating and mediating although they may not hear the cases which they mediate. The researcher's argument is that when judges and judicial officers are appointed as mediators, they should then be appointed

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<sup>597</sup> This point was raised by 2 of the 34 respondents in Mediation Interview – Part 2, both of whom were from MMC Panel of Mediators.

<sup>598</sup> This respondent was one of the 7 respondents from the judiciary in Mediation Interview – Part 1.

<sup>599</sup> This respondent was from the total of 27 respondents from MMC Panel of Mediators in Mediation Interview – Part 1.

as full-time mediators, and not as part-time mediators who may also preside over these cases in their adjudication role with the parties' consent.<sup>600</sup> At the end of the day, it would be extremely difficult for the judges and judicial officers to shut off their adjudication skills and expertise in cases where they act as mediators, and vice-versa, when they are required to wear their "adjudication hats" as they return to the bench to hear other cases. After all, judges and judicial officers have been trained to adjudicate, and not to mediate.

When the respondents were asked about their opinion from a Malaysian context, one view from the judiciary felt that mediation is still new in Malaysia, and as such the parties are mostly unaware of the right mediation process, and therefore, they are still cautious about disclosing all information for fear that such disclosure might jeopardise their case.<sup>601</sup> This point was stressed by the respondent that where corporations are involved, the consequences would be extremely grave should the confidentiality rule be breached.

Another respondent's view echoed that confidentiality is an important factor for the parties who need to feel that the mediator can be trusted.<sup>602</sup> The trust element is repeated here, and it was reiterated that many cases confidentiality contributes to the prospect of cases getting settled in mediation, especially in our Asian society. In today's day and age, more and more parties are conscious about their rights to privacy and confidentiality.<sup>603</sup> Lastly, it is in the researcher's opinion that based on the collective views and thoughts of the respondents, the abovementioned factors contribute positively to the prospect of cases getting settled through mediation. Some of the short quotations from the respondents tell a thousand words of wisdom where a number of them have deep meanings and revelations, namely:

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<sup>600</sup> *Appendix A, supra* note 10, Section 1 under Appendix A (Judge-led Mediation), and *Appendix B, supra* note 16, Section 2 and Section 14.

<sup>601</sup> This is one respondent's view from the total 7 respondents from the judiciary in Mediation Interview – Part 1.

<sup>602</sup> This is from one respondent from MMC Panel of Mediators in Mediation Interview – Part 1.

<sup>603</sup> This was another view from one respondent from MMC Panel of Mediators in Mediation Interview – Part 1.

“It (mediator capabilities and skill) is probably the most crucial factor.”

“The whole mediation process depends on the mediator’s capabilities, abilities, skills and knowledge. Not everyone can be a skilled mediator.”

“A mediator’s maturity, confidence in the law, and a generally a friendly behaviour will influence settlement.”

“The way the mediator carries and conducts the process will instil respect, confidence and trust by the parties. The application of communication skills will create an effective environment for the parties to be more willing to listen and to express themselves more openly.”

#### **6.3.4 Whether mediation is an effective ADR mechanism to facilitate settlement of disputes in Malaysia**

The views and thoughts gathered from the 34 respondents on the question on whether mediation is an effective ADR mechanism to facilitate settlement of disputes in Malaysia seemed to open up candid perspectives on why mediation is an effective mechanism, and why this is not the case in Malaysia.<sup>604</sup> Based on these revelations, the reasons why mediation is or is not an effective ADR mechanism are elaborated in turn.

##### *6.3.4.1 Mediation is an effective ADR mechanism.*

Three key reasons have been identified as to why mediation is an effective ADR mechanism, where each is discussed in turn, namely:

1. Mediation is an efficient process;
2. Mediation preserves relationship between the parties; and
3. Professional behaviour and attitude of mediators.

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<sup>604</sup> There were 34 respondents in Mediation Interview – Part 1 where 7 were from the judiciary and 27 were from MMC Panel of Mediators.

### **(a) Mediation is an efficient process**

A respondent from the judiciary opined that based on mediation experience, a majority of judges who act as mediators have been effective in assisting the parties reach settlement. It was opined that judges have been encouraged to mediate complex cases with many witnesses, which may only take a day's trial. Other respondents were of the view that mediation has helped clear the backlog of cases which have been filed in the courts and to facilitate settlement of disputes.<sup>605</sup>

Two judiciary respondents shared that they have been greatly encouraged to use mediation as an ADR mechanism to litigation as they felt that litigants now have an alternative channel to resolve their dispute.<sup>606</sup> According to these respondents, as judicial officers who act as mediators, their time spent in mediation would be recorded as part of their KPI assessment, including the number of successful mediation cases. Further, using mediation as an ADR mechanism has received positive encouragement from the respondents where they felt that mediation is gaining ground in Malaysia, and that the parties are beginning to realise that there is a cheaper and faster way to resolve disputes.<sup>607</sup> It was felt that with escalating costs and the long-drawn process of litigation, many parties are willing to give mediation a try to see if it is an effective ADR mechanism to help them resolve their dispute amicably and to reach a settlement.

A number of respondents from MMC Panel of Mediators agreed that mediation is definitely an efficient and inexpensive way to get the parties to speak and listen to each other, to understand the underlying issues from each other's perspectives, and with the assistance and guidance of the mediator, to try to reach an agreed outcome, one which they can both live with.<sup>608</sup> Their view was that

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<sup>605</sup> This view was shared by 2 of the 34 respondents in Mediation Interview – Part 1, where one of them was from the judiciary in Sarawak.

<sup>606</sup> The 2 respondents were from the judiciary in Sarawak.

<sup>607</sup> This view was shared by 5 respondents, 4 of whom were from MMC Panel of Mediators.

<sup>608</sup> This point was raised by 3 out of the 27 respondents in Mediation Interview – Part 1.



Malaysians are no different from the parties from other countries as people want their views to be heard, they want other people to understand why certain decisions were made, and why certain actions were taken. In short, it was felt that the parties want to be seen as reasonable people.

At the end of the day, based on such revelations, the researcher humbly concludes that mediation is an effective ADR mechanism because it is an efficient process in terms of time and cost efficiencies. The parties would realise that much time and money could have been saved from expensive trials, including the stress, pain and suffering endured by the parties in the litigation process. In fact, two respondents cautioned that there is the perception of the general public that the success achieved in a trial may not necessarily bring about the final desired outcome in cases where the losing party refuses to comply with the court order or court decision.<sup>609</sup> Further to that, they pointed out that appeals against such court decisions may be filed in some cases, thereby causing further delays.

#### **(b) Mediation preserves relationship between the parties**

A number of respondents raised the point that mediation allows for the preservation of the relationship between parties in dispute.<sup>610</sup> Their view is that mediation promotes better long term relationship between the parties through its facilitative approach in understanding underlying issues and interests of the parties. They also felt that mediation allows the parties to adopt the “give and take” attitude as compared to the parties having to resort to litigation which allows them to assert their legal rights in an adversarial manner.

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<sup>609</sup> Both these respondents were from MMC Panel of Mediators.

<sup>610</sup> 3 respondents raised this point when asked whether mediation is an effective ADR mechanism to facilitate settlement of disputes. All 3 were from MMC Panel of Mediators.

This is one of the advantages of mediation whereby the philosophy of mediation emphasizes on the preservation of the relationship between the parties by focusing on their underlying “interests” rather than their “rights,” thereby making mediation a non-adversarial approach towards reaching an amicable settlement.<sup>611</sup> In other words, the researcher contends that the emphasis of mediation is really on communication and understanding of the issues bothering each party and reasons behind each party’s actions. At the end of the day, the parties would be able to enjoy this advantage of mediation where their relationship could be preserved, especially in business or commercial relationships, if an agreed outcome could be reached.

Be that as it may, the respondents cautioned that a greater portion of these cases had been successful only in those disputes which touched on the element of relationships, feelings, and where the disputes were not technical in nature, such as family disputes, divorce, just to name a few. Hence, this view stressed that mediation would be effective in some types of disputes only, and would not be applicable or practical for all types of disputes in Malaysia, just like in any other country.

### **(c) Professional behaviour and attitude of mediators**

As mediators, the respondents explained that their principal task is to persuade the parties to understand mediation as a mode of ADR.<sup>612</sup> As these respondents are also mediators, they also confessed that there is a feeling of satisfaction and achievement when the dispute is successfully mediated. According to one respondent’s experience, the parties had deferred their dispute until they were satisfied that the mediator was the impartial one who guided them to resolve the dispute in a professional manner.<sup>613</sup> In other words, based on the views gathered on

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<sup>611</sup> See chapter 2 on *Review of Relevant Terms and Concepts* on “Mediation.”

<sup>612</sup> This view was gathered from 4 respondents, all of whom were from MMC Panel of Mediators, where there were a total of 27 such respondents in Mediation Interview – Part 1.

<sup>613</sup> This was the view of one respondent from the judiciary.

this point, the researcher contends that this view is consistent with other researches which show that there is a positive correlation between professional behaviour and attitude of the mediator, and effectiveness of mediation.<sup>614</sup>

#### 6.3.4.2 *Mediation is not an effective ADR mechanism*

The researcher gathers five reasons from the views and thoughts of the respondents on why mediation is not an effective ADR mechanism, where each is discussed in turn.<sup>615</sup>

##### **(a) Lack of awareness, publicity and education on mediation as ADR mechanism**

This is by far the most popular view from the respondents on why mediation is not an effective ADR mechanism – that as far as private mediation is concerned (that is, mediation which is not conducted by judges and judicial officers who act as mediators), the public at large have not realised or are unaware of its real advantages, and therefore, should be educated accordingly.<sup>616</sup> However, they shared that court-directed mediation, on the contrary, seems to be “working pretty well” although they elaborated that mediation as an ADR mechanism is presently still at its infancy stage in Malaysia, and has not been widely publicised or used as an ADR mechanism to reach settlement. In fact, most mediators are still on the mediation learning curve.

One respondent suggested that all stakeholders concerned including the Government, organizations, agencies, judges, lawyers, and the public, must first be sufficiently educated on the benefits of mediation as an ADR mechanism to facilitate

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<sup>614</sup> Lim & Carnevale (1990), *op. cit.* It was stated that “mediators who facilitated communication and provided clarification and insights were most likely to achieve settlement.” See also Thoennes and Pearson (1988), *op. cit.* It was stated that the most important predictor of mediator behaviour was the “perceived ability of the mediator to facilitate communication between the parties.”

<sup>615</sup> There were 34 respondents in Mediation Interview – Part 1 where 7 were from the judiciary, and 27 were from MMC Panel of Mediators.

<sup>616</sup> This view was garnered from 7 out of 34 respondents where all were from MMC Panel of Mediators.

settlement of disputes.<sup>617</sup> Once that is effectively completed, these stakeholders would be open to change their mind-sets, and to consider mediation as an ADR mechanism to facilitate settlement of disputes. This requires cohesion amongst the judiciary, the Bar, the business community, and the Government in order to create mediation awareness and to promote mediation.

However, one other respondent cautioned that mediation would only be effective if it is properly administered and publicised whereby the parties must understand and appreciate the essence of the mediation process; that they are willing to submit to mediation; and that they are amenable to resolve the dispute.<sup>618</sup> An example was cited where the dispute could have been resolved if the parties had talked to each other instead of having to face a number of incidents of communication breakdown which led them to litigate the dispute instead.

Other respondents revealed that mediators would gain more experience if mediation is more widely recognised, and if used as an ADR mechanism to help the parties reach a settlement.<sup>619</sup> According to these respondents, the experienced mediators have found mediation to show positive results while inexperienced ones have faced challenges in their mediation practice. Their view is that although mediation is a powerful tool, the public at large suffers from a lack of awareness, publicity and education on mediation as an ADR mechanism whereby mediation has not been seen as recourse for many parties in dispute because they are unaware of the mediation concept, process, practice and its benefits. The researcher agrees to this view, and submits that it is the conundrum facing mediation practice today in Malaysia.

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<sup>617</sup> This was a respondent from MMC Panel of Mediators.

<sup>618</sup> This caution came from another respondent from MMC Panel of Mediators.

<sup>619</sup> 3 other respondents from MMC Panel of Mediators shared this view.

To the researcher, this is the chicken-and-egg story in Malaysia. Without the support of the stakeholders, mediation will not live past its infancy stage. Yet at the same time, unless the stakeholders have been brought up to speed in terms of the basics on awareness, publicity, promotion, and education on what mediation actually is, what it does, and what its benefits are, there will be not be a growing demand for mediators. All these would then translate into mediation not being able to deliver what it is supposed to do in the first place, that is, to be an effective ADR mechanism to assist the parties to reach an agreed and amicable settlement.

**(b) There is no legislation on court-directed mediation**

The view from one respondent is that mediation has not been effective in facilitating settlement of disputes because court-directed mediation is not legislated and has not been given its proper place in ADR.<sup>620</sup> According to this respondent, although there has been some measure of success in mediation by judges and judicial officers in respect of pending civil suits this could probably be due to the “element of compulsion present” with these court mediators. This contention forms the main research question of this study, whether court-directed mediation should be legislated in Malaysia.<sup>621</sup>

**(c) Judges and judicial officers are not full-time mediators**

The view from the respondents touched on the point that judges and judicial officers play a dual role, both as adjudicator and as mediator although they may not hear the cases which they mediate.<sup>622</sup> They opined that mediation is not conducted on a full-time basis in court-directed mediation. Further, the same could be said about

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<sup>620</sup> This view was shared by one respondent from MMC Panel of Mediators.

<sup>621</sup> See “Research Findings and Commentary” in the next section of this chapter.

<sup>622</sup> This reason was raised by 3 respondents where 2 of them were from the judiciary.

private mediation where MMC Panel of Mediators does not act as mediators on a full-time basis insofar as lawyers in private practice (members of the Malaysian Bar) are concerned.

On this point, the researcher is mindful of the “unsettled” point on court mediators who play the said dual role. The researcher contends that court mediators should be appointed as full-time mediators rather than on a part-time basis for several reasons. One such reason is that being part-timers, it is evident that the settlement rates of mediated cases have not been encouraging as evidenced in the statistics shared by CMCKL in chapter 4. As part-time mediators, they also preside over other cases in their adjudication function, or in their own trial list with consent from the parties, which may bring about negative perception on their partiality and biasness.

#### **(d) Mediators lack capabilities and skills in mediation**

One judiciary respondent was of the view that whether mediation is effective as an ADR mechanism to facilitate settlement of disputes in Malaysia depends on a few factors at hand such as the personality and the individual skills of the mediator or the parties. In other words, the mediator plays the role of a “peacemaker.”

#### **(e) Poor perception of lawyers on mediation**

The respondents were also of the opinion that lawyers in Malaysia have not fully embraced mediation as an ADR mechanism, and that lawyers are too ready to go for trial.<sup>623</sup> They felt that in most cases, lawyers tend to dominate the mediation process, and some may not be fully aware of the mediation process and what could be achieved through this ADR mechanism in resolving disputes. The researcher contends that this is the one of the reasons cited why settlement was not reached is

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<sup>623</sup> This view was shared by 4 respondents, one of whom was from the judiciary.

due to the influence of lawyers.<sup>624</sup> The researcher is also reminded of one argument that lawyers have traditionally been trained in law schools to be adversarial and combative in nature when putting forth arguments on legal issues. Hence, the principles of mediation which are conciliatory in nature are technically incongruent with what they have been trained to think and act in the legal profession.<sup>625</sup>

## **6.4 Research Findings and Commentary**

Based on the main research question and the three sub-questions, the researcher conducted Mediation Interview – Part 2 in an attempt to explore the views and thoughts of mediators in Malaysia to find answers to the three sub-questions, and the main research question, that is, whether court-directed mediation should be legislated in Malaysia.

### **6.4.1 What is the current practice of court-directed mediation in Malaysia? Are current guidelines on court-directed mediation adequate to serve their purposes?**

The question on the adequacy of current guidelines, rules and procedures on court-directed mediation to serve their intended purposes centred on the views and thoughts gathered on the said Practice Direction only.<sup>626</sup> No views and opinion had been shared by the respondents on the other two sets of mediation guidelines on court-directed mediation, namely, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCs.<sup>627</sup> For purposes of this study, this development is recorded as either the respondents presumably had no previous knowledge of the

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<sup>624</sup> See earlier section of this chapter on “Reasons why settlement was not reached.”

<sup>625</sup> Bok, D. (1983), *op. cit.*

<sup>626</sup> Appendix A, *supra* note 10.

<sup>627</sup> There were 27 respondents in Mediation Interview – Part 2 where 10 were from the judiciary and 17 were from MMC Panel of Mediators.

said guidelines, or had no previous experience of using them, or had consciously refrained from commenting on the said guidelines. Hence, this section discusses the adequacy of the said Practice Direction for its intended purpose in court-directed mediation.

More than half of the respondents interviewed agreed that since its inception, the said Practice Direction has been useful in providing guidance and reference on court-directed mediation to judges and judicial officers who act as mediators.<sup>628</sup> It is in the opinion of a few respondents from the judiciary that the said guidelines are sufficient for a start to serve its purpose with its basic rules because prior to this, there were no guidelines or basis upon which court-directed mediation could be undertaken.<sup>629</sup> In their view the said Practice Direction only lays down broad principles and basic rules, and would be sufficient in the short-term because court-directed mediation is a fairly recent practice in Malaysia.

Further, another respondent stressed that the said Practice Direction does give the court mediator the discretion to “identify” issues which are suitable to be mediated, and to direct the parties to mediate.<sup>630</sup> However, it was cautioned that the said Practice Direction would subsequently become insufficient as long as the courts are not backed or supported by appropriate legislation on court-directed mediation, and that the need may arise to review the said guidelines for the long term.<sup>631</sup>

As elaborated in chapter 4, amongst areas which may require review in the said Practice direction could include the boundaries, scope and extent of the mediation process and its procedures, the role, responsibilities and duties of the mediator to be elaborated to include the do’s and don’ts of judges and judicial officers

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<sup>628</sup> The view was gathered from 14 out of 27 respondents in Mediation Interview – Part 2, where 9 of them were from the total 10 respondents from the judiciary. One respondent from the judiciary refrained from providing the view.

<sup>629</sup> This view was shared by 4 respondents where 3 of them were from the judiciary (2 from Peninsular Malaysia, and the other from Sabah) and one from MMC Panel of Mediators.

<sup>630</sup> This was the view of one respondent from MMC Panel of Mediators.

<sup>631</sup> This view came from 2 respondents from the judiciary, where one was from Peninsular Malaysia, and the other from Sarawak.



who act as mediators, the fundamental ethics on the conduct of mediators on impartiality, neutrality and conflict of interest, which are seen to be areas of shortcomings of the current rules and guidelines. It is in the researcher's opinion that by including such a review on the specified areas this would provide more depth to the current generic guidelines in the said Practice Direction.

As opined by one respondent, the said Practice Direction as it currently stands seems to have stipulated all relevant guidelines on important issues in terms of when mediation should be suggested by the mediator judge, type of cases to be mediated, and the mode of settlement.<sup>632</sup> According to this respondent, the said Practice Direction provides that it is only a set of guidelines for the parties to reach a settlement wherein the mediator judge and the parties are allowed to suggest or introduce any other modes of settlement subject to approval of the parties in dispute.<sup>633</sup>

Based on the above revelations, it is in the researcher's opinion that the current guidelines in the said Practice Direction have been well-received by mediation practitioners from both the judiciary respondents and those from MMC Panel of Mediators. It is also safe to conclude that the said guidelines are a good start and could serve its purpose in the short term because court-directed mediation is still in its infancy stage in Malaysia having been introduced through the said Practice Direction in August 2010.<sup>634</sup> However, as the public at large, the legal profession, the judiciary become more and more educated about court-directed mediation, and as the parties become more comfortable to use court-directed mediation as an ADR mechanism to facilitate settlement of their dispute, the time will come for the current guidelines to be reviewed and improved.<sup>635</sup>

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<sup>632</sup> This view was shared by one respondent from the judiciary in Sabah.

<sup>633</sup> *Appendix A, supra* note 10, Section 2.2.

<sup>634</sup> *Supra* note 11.

<sup>635</sup> See chapter 7 on *Implementing Court-directed Mediation in Malaysia*.

On the other side of the coin, some strong views were garnered from respondents who did not view that the said Practice Direction is adequate to serve its intended purpose.<sup>636</sup> These views centred on the scope and extent of the said Practice Direction in terms of its inadequacy and general nature of the guidelines. In sharing such views, the respondents also provided suggestions on areas which may need to be reviewed and improved. One comment touched on the boundary and scope of the mediation process where information on the details of the step-by-step mediation procedures to be undertaken by the mediator, and the required time frames of the end-to-end mediation process, are absent.<sup>637</sup> As such, they viewed the said Practice Direction as very generic and brief in nature.

Be that as it may, it is to be noted that the said Practice Direction does in fact expressly stipulate that it “is intended to be only a guideline for settlement, and that the Judge and the parties may suggest or introduce any other modes of settlements so long as such suggestions or directions are acceptable to the parties.”<sup>638</sup> As such, the researcher notes that notwithstanding the said Section, the said guidelines merely state that options are available for court-directed mediation, without offering or providing further details in the said document on what procedures ought to be undertaken and/or adhered to in respect of “*any other modes of settlements.*”

Still on the point of the said guidelines being too generic and brief, a few other respondents shared their views that the said Practice Direction is not sufficiently precise on what judges and judicial officers who act as mediators are required to do.<sup>639</sup> As such, according to these respondents, court mediated cases may end up having mediators who perform cursory attempts to mediate, which may result in the cases being delayed further, or when fairness of the final agreed outcome of the

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<sup>636</sup> This study picked up this view from 9 out of the 27 respondents in Mediation Interview – Part 2.

<sup>637</sup> This comment came from 4 of the 9 respondents, and they were all from MMC Panel of Mediators.

<sup>638</sup> Appendix A, *supra* note 10, Section 2.2.

<sup>639</sup> This view came from 3 of the 9 respondents, where all were from MMC Panel of Mediators.

parties could become compromised through bias, partiality, non-neutrality and unethical behaviour of the mediator.

In essence, the said guidelines do not contain rules on the dos and don'ts of a court mediator. This begs the question on the need for a code of conduct for court mediators as with all private mediators, who comprise certified mediators by MMC, are all bound by MMC Mediation Service Code of Conduct.<sup>640</sup> It also begs the question whether there ought to be one common set of standards and code of conduct or ethics in Malaysia which binds all mediators – court mediators and private mediators.

In the researcher's opinion, standards and guidelines exist to define what is ethical, and what unethical mediator behaviour is. Although standards may reduce uncertainty concerning ethical behaviour, they do not eliminate it. Further, a common set of standards and code of conduct or ethics should contain the whole essence of the mediator's conduct and role: to be able to prioritise issues, to help the parties to communicate effectively with one another, to encourage them to develop and to consider options, and to add further options, to encourage the parties to brainstorm, and to help direct the mediation process towards an outcome which is to be decided and agreed by the parties.

This set of common standards and code of conduct or ethics should help ensure that the mediator is perceived as trustworthy and is committed to the resolution of the issue, and that the mediator is seen as competent, honest, empathetic, is one who is genuinely concerned about the issues and the parties, who is scrupulous about maintaining trust, impartiality, neutrality, and is one who is unbiased. Simply put, it

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<sup>640</sup> See *Appendix K* for MMC Mediation Service Code of Conduct.

should contain more than brief terms on confidentiality, impartiality, neutrality, withdrawal as the mediator, and evaluative style of mediation.<sup>641</sup>

For example, the Mediation UK Practice Standards require mediators to ensure voluntary participation by parties where it is stated that voluntariness “is a relative concept and it is unlikely that many people come to mediation entirely without pressure of some kind...”<sup>642</sup> In terms of conducting mediation, it provides that mediators maintain conditions which will exclude violence, threats, shouting and discriminatory or provocative language “by adequate preparation and by temporary or permanent abandonment of the mediation if necessary.”<sup>643</sup>

On the major point on bias, impartiality, neutrality and ethical behaviours of mediators, one observation was that the said guidelines do not stipulate the mandatory rule that judges and judicial officers who act as mediators must not hear the mediated cases in trials in the event mediation failed.<sup>644</sup> The researcher is of the view that the current phrase in the said Practice Direction, “*unless agreed to by the parties*” ought to be removed.<sup>645</sup> This view is premised on the experience of the respondents that there had been complaints whereby the parties had been “coerced” into reaching a settlement when they see that the same judge or judicial officer who acts as the mediator is hearing the case in situations where the mediation was not successful.

In fact, one of the respondents raised the concern that there is no assurance that the said guidelines are fully adhered to by the judges and judicial officers who act as mediators in terms of the enforcement of such guidelines to ensure that there is consistent application by all court mediators.<sup>646</sup> Even at the present moment, court mediators have two sets of mediation guidelines, rules and procedures to refer to,

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<sup>641</sup> Appendix K, *supra* note 640, Section 2 on “Impartiality”, Section 4 on “Confidentiality”, Section 6 on “Withdrawal”, and Section 8 on “Evaluation.”

<sup>642</sup> Mediation UK, Mediation UK Practice Standards, Bristol, 1993, Article 5.

<sup>643</sup> *Ibid*, Article 4.

<sup>644</sup> This point was specifically raised by one respondent from MMC Panel of Mediators.

<sup>645</sup> Appendix A, *supra* note 10, Section 1, Annexure A (Judge-led mediation).

<sup>646</sup> This view was shared by one respondent from MMC Panel of Mediators.

namely, the said Practice Direction, and the said Rules for Court Assisted Mediation. The main point of having one common set of such guidelines for all mediators including court mediators must be first addressed before the issue on enforcement of such guidelines could be effectively handled. Further, another observation touched on the point that the said guidelines do not stipulate the required mediation training pre-requisites and qualifications for court mediators.<sup>647</sup> It was suggested by this respondent that mandatory training should be stipulated accordingly for all court mediators.

Moving on to another point on the inadequacy of the said Practice Direction, the need to obtain agreement from the parties that the judge or judicial officer acts as their mediator, and for the parties to submit to court-directed mediation, is of paramount importance. In the opinion of the researcher, this point is relevant to the requirement for the parties to complete the mediation agreement in the given “Form 1”.<sup>648</sup> The said Form 1 which is the “Agreement to Mediate” form records the consent of the parties for the matter to be referred to mediation “for the purpose to reach an amicable settlement and to the satisfaction of all parties.” However, the researcher observes that the said Form 1 does not contain a requirement for the parties and/or their lawyers to agree that the judge or judicial officer acts as their mediator, and that they submit to court-directed mediation. The researcher surmises that the said Form 1 could be seen as generic in nature, and may be insufficient to cater for specific reference to be made to court-directed mediation.

Given the shortcomings in the present sources of mediation guidelines, rules, procedures, and the non-existence of standards and professional ethics for court mediators as revealed in this study, one immediate option on the table is to review the said guidelines, rules and procedures, and to introduce standards and professional

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<sup>647</sup> This was the view from another respondent from MMC Panel of Mediators.

<sup>648</sup> *Appendix A, supra* note 10, Section 6.1, Agreement to Mediate.

ethics in mediation. In taking on this option, efforts should also include introducing a common set of the said guidelines, rules, procedures, standards and professional ethics to include all mediators, whether they are court mediators or private mediators. As seen in previous sections of this chapter and also in chapter 4, elaborate discussions have covered specific provisions in the present sources of mediation guidelines which require review, potential provisions to be considered, and aspects of standards and professional ethics which may be included in the said review.<sup>649</sup>

The alternative option is to pass a legislation laying down the common set of mediation guidelines, rules, procedures, standards and professional ethics for court mediators in the light of the said Mediation Act which applies to private mediators but not court mediators. Based on the views and thoughts of the respondents on the role of the courts and the judiciary in promoting court-directed mediation in Malaysia, and the current practice of court-directed mediation in Malaysia, the perspectives of the respondents would form the basis to determine whether court-directed mediation should be legislated in Malaysia.

#### **6.4.2 Role of the courts and the judiciary**

It is of paramount importance that the courts and the judiciary in Malaysia play their role in ensuring that the practice of court-directed mediation is in accordance with mediation principles and process. The most common description of mediation which could be referred to is that mediation is a process by which,

“the parties, together with the assistance of a neutral third party [*in this case, the judge or judicial officer – emphasis added by the researcher*], systematically isolate dispute issues, in order to develop

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<sup>649</sup> See chapter 4 on *Court-directed Mediation in Malaysia*.

options, consider alternatives and reach consensual settlement that will accommodate their needs. Mediation is a process which emphasises the parties' own responsibilities for making decision that affect their lives" (Folberg & Taylor, 1984).<sup>650</sup>

It has been said that the courts and the judiciary have played a significant role in encouraging court-directed mediation in Malaysia.<sup>651</sup> An example cited was that the courts in Sabah and Sarawak have established a Mediation Centre or Corner in their respective courts to educate the public and/or litigants on the benefits of mediation, and to encourage potential litigants to settle their disputes through mediation in the courts even before they file their claims in court. It was also suggested that proper mediation centres should be set up in every court complex nationwide.<sup>652</sup>

This idea seems to have materialised with the opening of KLCMC in August 2011 as a pilot project which is located inside the Kuala Lumpur Court Complex, a court building.<sup>653</sup> The CMCKL and the other CMCs in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country have since started to offer court-directed mediation to all litigants as "a free mediation programme using judges as mediators to help the disputing parties in litigation find a solution."<sup>654</sup>

The point on whether court-directed mediation in Malaysia practises true mediation principles is an interesting one. Much would depend on the mediators who comprise judges and judicial officers. The view from one respondent stated that although court-directed mediation has been relatively successful, it is debatable

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<sup>650</sup> Folberg, J. P., & Taylor, A. (1984), *op. cit.*

<sup>651</sup> This view came from one respondent in the judiciary in Sabah.

<sup>652</sup> This suggestion came from a respondent from MMC Panel of Mediators.

<sup>653</sup> *Supra* note 23 and *supra* note 26.

<sup>654</sup> *Supra* note 22.

whether the method of mediation practised is “pure mediation,” or that it could be a mix of mediation and settlement conference.<sup>655</sup> It was felt that court-directed mediation is very much a part of the litigation process where it is applicable to court-filed cases which would be mediated by court mediators.<sup>656</sup>

In fact, one view stressed that court-directed mediation is no different from private mediation because they are both subject to the same true mediation principles and process, where the mediation style adopted should remain generally facilitative, although it could be interspersed with the evaluative style, but must not be adjudicative at all.<sup>657</sup> It was explained that the facilitative style requires the mediator to play the role of a neutral third party where the mediator is regarded as a facilitator, and not someone who has a higher authority even if the mediators are judges and judicial officers. Hence, it was opined by the respondent that the mediator assists and guides the parties to develop options and alternatives for their consideration and negotiation purposes so that the parties would not be pressured into accepting the terms of any settlement without their mutual agreement.

However, based on some other mediation experiences and observations which were shared by the respondents, they revealed that court-directed mediation in Malaysia is highly unregulated where mediation practice is inconsistent and incoherent because each judge or judicial officer adopts his or her own method of mediation, whether it is facilitative, evaluative or therapeutic.<sup>658</sup> According to them, the large majority of court-directed mediation is based on the evaluative model, and the parties could have been “pressured” to settle their disputes by judges and judicial officers who act as mediators. In other words, the judge or the judicial officer as the mediator failed to play his or her role as the neutral and impartial third party to guide

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<sup>655</sup> This was the opinion of one respondent from the judiciary in Sabah.

<sup>656</sup> This view was shared by one respondent from the judiciary in Sarawak.

<sup>657</sup> One view from the total 17 respondents from MMC Panel of Mediators was recorded.

<sup>658</sup> This view was gathered from 5 of the 17 respondents from MMC Panel of Mediators in Mediation Interview – Part 2.



and assist the parties to ensure that there is party autonomy for a fair outcome as agreed by both parties.

The researcher humbly submits that all these views and thoughts comprise very important observations on how court-directed mediation is practised today by judges and judicial officers, that is, not all of them practise court-directed mediation based on mediation principles and process. The question is therefore, what is the role of the courts and the judiciary to ensure that court mediators consistently practise mediation in accordance with mediation principles and process at all times. This is because any dissatisfaction from the parties on how their mediated cases are handled by judges and judicial officers could reflect negatively upon the reputation and impartiality of the courts and the judiciary as a whole.

As such, the role of the courts and the judiciary in promoting court-directed mediation in Malaysia, and the current practice of court-directed mediation, is discussed from several aspects, namely:

1. whether judges and judicial officers have adequate skills and experience to act as mediators;
2. whether there are standardised mediation guidelines, rules, procedures, standards and professional ethics;
3. whether the public is aware of and is educated on court-directed mediation; and
4. what are the challenges faced by judges and judicial officers as mediators.

#### *6.4.2.1 Do judges and judicial officers have adequate skills and experience to act as mediators?*

One of the roles of the courts and the judiciary is to ensure that judges and judicial officers are adequately equipped in terms of skills, knowledge and experience in order for them to perform their mediator role accordingly, and to conduct

mediation in accordance with mediation principles and process as elaborated in chapter 2. Training judges and judicial officers to be mediators is one way to achieve this objective.

The researcher submits that whether judges and judicial officers are equipped with adequate skills and experience is a fundamental question which needs to be answered first. The respondents in this study had shared that this is not the case based on their mediation experiences where more details of their views and thoughts are shared in the accompanying paragraphs in this chapter. It is in the researcher's opinion that the courts and the judiciary cannot assume that judges and judicial officers know how to play their role as mediators because the role of a mediator is very different from that of a judge.

This begs the question on the pros and cons of using judges as mediators. In fact, more than half of all respondents who were interviewed stated that judges and judicial officers should not act as mediators.<sup>659</sup> More respondents from MMC Panel of Mediators were opposed to having judges and judicial officers mediate cases as compared to the respondents from the judiciary.<sup>660</sup> Could there be substantial advantages to be reaped by having judges and judicial officers act as mediators assuming that they have been properly and formally trained to be mediators?

Fundamentally, one of the major advantages of using judges to mediate is that there are a number of traits and behaviour, which is innate in the judge and these, could be advantageous and beneficial to the judge as he or she acts as the mediator, such as impartiality, neutrality, biasness, being process-oriented, punctuality, and using the evaluative style. The said traits which are consistent with and similar to those of the mediator should presumably be adopted by the judge in his or her role as

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<sup>659</sup> This view was shared by 13 of the total 27 respondents in Mediation Interview – Part 2.

<sup>660</sup> Of the 17 respondents from MMC Panel of Mediators, 11 of them were of the view that judges and judicial officers should not be mediators. As for the respondents from the judiciary, only 2 out of the total 10 respondents stated that they should not be mediators.

the mediator. In essence, the researcher contends that switching from the role of the judge to that of the mediator would not entail a case of day and night as similarities do exist which are common in both roles as described above. Further, these judges and judicial officers are legally and judicially trained people who could grasp facts and issues fast.

Secondly, as judges and judicial officers are also adjudicators, they would be able to appreciate the strengths and weaknesses of the dispute brought about by both parties. As mediators, presumably, they would possess the capabilities and skills to guide and assist the parties to explore the possible options in order for them to reach an agreed outcome or an amicable settlement. In this respect, however, it would be advantageous for judges and judicial officers to possess the required competencies and knowledge in the subject matter which they mediate in order to help the parties to identify the issues, to help them weigh the strengths and weaknesses of the case, and to assist them to develop options.<sup>661</sup>

It was also revealed by the respondents that in their mediation experience, the parties do give the judges and judicial officers when they act as mediators, higher levels of confidence as they are considered people “of higher authority”. It was opined that they are also given a lot of respect by virtue of the fact that they are a knowledgeable lot. In fact, in difficult cases, it has been said that “the gravitas of a judge would increase the likelihood of a settlement because parties do respect the bench and the mantle of the judicial office” (Warren, 2010, p. 83, 84).<sup>662</sup>

On this point, the view is that judges and judicial officers do command a lot of respect because people respect the bench which has traditionally been seen as the place of higher authority and wisdom. Hence, when judges and judicial officers act

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<sup>661</sup> Folberg, J. P., & Taylor, A. (1984), *op. cit.*

<sup>662</sup> Warren, M. L. (2010), *op. cit.* See also chapter 4 on *Court-directed Mediation in Malaysia* on “Role of the Courts and the Judiciary in Promoting Court-directed Mediation.”

as mediators, the parties would unconsciously view their mediation advice and guidance more seriously due to their high credibility. Simply put, the view is that the parties would presumably benefit from having judges and judicial officers mediate their case because the parties perceive that mediation would be conducted in a more professional manner and that they would be in better and more capable hands.

On the other side of the coin, it must be recognised that there are disadvantages of using judges and judicial officers as mediators. The researcher is reminded of earlier discussions on how hard NADRAC and the Victorian Bar have come down on judges, where it was quoted by the Victorian Bar that “judges are appointed, and not to negotiate or take part in commercial negotiations between commercial parties. Judges are appointed not for their mediation skills, but for their judicial abilities.”<sup>663</sup>

There are also practical views from other authors which are consistent with the views and thoughts from the respondents on why judges should not be mediators. Essentially, one such view is premised on the thinking that the judicial role should not be diluted, that it is frowned upon to have judges be engaged in private sessions like mediation when they must be seen to conduct matters transparently and in public, and that there would not be sufficient judges to carry on with hearing cases if they also act as mediators.<sup>664</sup>

Based on the abovementioned reasons why judges and judicial officers should not be mediators, the researcher is inclined to agree to these reasons except the one on judges conducting their cases in private (in their chambers) versus in public (in open court). The argument is that even in non-mediation matters such as divorce matters, judges do conduct such matters in their chambers. Further, by having judges

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<sup>663</sup> NADRAC at [7.52], *supra* note 487, and *supra* note 488. See chapter 4 on *Court-directed Mediation in Malaysia* on “Role of the Courts and the Judiciary in Promoting Court-directed Mediation.”

<sup>664</sup> Warren, M. L. (2010), *op. cit.*

and judicial officers perform the said dual role this would result in spreading the resources too thin over two functions and roles.

On the same point, it was revealed by one respondent that in Malaysia some judges and judicial officers may be too junior, and therefore, lack the required experience and confidence to conduct proper mediation sessions and/or to provide sound alternatives and options to the parties. Hence, the same view stressed that it would not be a practical solution to have them as mediators as they are looked upon as persons of authority and persons of high credibility. The psychological effect is that parties may feel intimidated by their positions on the bench, which consequently may impair fairness of the outcome as the settlement reached by the parties could in the likelihood be less independent and less voluntary.

Further, a few respondents felt that judges and judicial officers are already hard pressed for time, and are an over worked lot.<sup>665</sup> This reason presumes that it would be difficult to expect them to have sufficient time and patience to facilitate the mediation process from end to end. In addition, based on the respondents' experience, it was observed that due to the high volume of cases, the judges and judicial officers are generally quick to pressure the parties to reach a settlement on some occasions. They noted that the reason could be attributed to the fact that the judges and judicial officers do not have sufficient time or the patience to assist and guide each party to look at the other party's perspective.

In this respect, it begs the question whether judges and judicial officers *could* be mediators. The view was that not everyone can be a mediator or trained to be one because the personality of the person plays a key factor.<sup>666</sup> It is opined that if all judges and judicial officers are expected to be mediators, this may cause dissatisfaction among those who may not be interested to act as mediators or may not

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<sup>665</sup> This view came from 3 respondents from MMC Panel of Mediators.

<sup>666</sup> This view was shared by 4 respondents, 3 of whom were from the judiciary.

have the predisposition to be one. It was felt that there may be those who are not interested to act as mediators, and that they should take up the mediator role on a voluntary basis. The reason is that for mediators to do a good job and be effective, they must have an interest in doing so in order to ensure that they conduct mediation in a professional manner.

This view assumes that they have been formally trained in the first place. In fact, the view of the judiciary respondents was that some judges may not possess the qualities of a good mediator, while some judges may not be inclined to be mediators at all.<sup>667</sup> Based on this observation, it was opined that only interested judges should become mediators. The researcher shares this view because the mediation process demands intensive focus on strict governance of the process, good discipline and high ethical standards of mediators. Most importantly, the researcher submits that the mediator is a much more difficult role to play as compared to the judge because of the personality factor. According to some authors, to be an effective mediator, he or she must possess a set of desirable attributes which includes articulateness and persuasiveness, flexibility and patience, good listening, problem analysis and problem solving ability, creativity, and good negotiation skills.<sup>668</sup>

These could be summarised as the required soft skills of a good mediator which are different from those of a judge. As the mediator, the judge must possess the ability to communicate effectively with the parties in order to facilitate discussions and negotiations between the parties, and to guide and assist them to reach an agreed outcome. In addition, it is the researcher's view that the effective mediator should possess four basic attributes, namely, innate passion and affinity,

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<sup>667</sup> This view was shared by 4 out of the 10 respondents from the judiciary in Mediation Interview – Part 2.

<sup>668</sup> Boulle, L. and Teh, H. H. (2000), *op. cit.*

empathy, humility, and patience.<sup>669</sup> Hence, in the researcher's humble opinion, not all judges and judicial officers could be mediators.

Providing mediator training to judges and judicial officers has been a major focus area of the courts and the judiciary in Malaysia. Since 2010 the judiciary have started work on drafting the said Practice Direction for parties in dispute to be encouraged to mediate instead of going to trial where mediation should be the "preferred" way for parties to resolve their disputes in Malaysian courts.<sup>670</sup> Some respondents in this study had also shared that judges and judicial officers have been undergoing formal mediation training although their view was that there is a pressing need for continuous and proper formal mediation training for these court mediators.<sup>671</sup>

More than half of the respondents stressed the importance of providing formal mediator training to judges and judicial officers who conduct court-directed mediation because the role of the mediator is different from that of a judge.<sup>672</sup> It was noted by one respondent that it is important that judges and judicial officers who act as mediators must be trained to wear the "mediator hat", and not the "adjudicator hat" when conducting mediation sessions.<sup>673</sup> This is because they have traditionally been trained in adjudication, and to be exclusively evaluative throughout the trial process in their approach of viewing issues in order for the parties to reach a settlement. This is unlike mediation where the traditional approach has been more facilitative in nature. In this respect, they should be properly trained in the facilitative style of mediation where the mediator is a neutral party who provides a neutral form of support for the parties to negotiate.<sup>674</sup>

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<sup>669</sup> See chapter 2 on *Review of Relevant Terms and Concepts* on "Mediator capabilities and skills."

<sup>670</sup> *Supra* note 9.

<sup>671</sup> The majority comprised 5 out of the total 7 respondents from the judiciary.

<sup>672</sup> Of the 27 respondents in Mediation Interview – Part 2, 14 of them shared this view, of which 5 were from the judiciary.

<sup>673</sup> This was a respondent from MMC Panel of Mediators.

<sup>674</sup> This view came from 2 respondents from MMC Panel of Mediators.

Although the mediator could also adopt the evaluative style of mediation in the same mediation session, it must be cautioned that the mediator must exercise this style with utmost care. This is especially the case in situations where he or she conducts reality testing to check whether a party is being realistic about the viability of proposals or the strength of the party's position or the mediator may be requested by the parties to provide an evaluation of the position or to a settlement range. In fact, the respondents were of the view that the mediator could conduct such reality checks on the parties' respective positions and the proposed options.<sup>675</sup>

Hence, the mediator must make it clear to the parties that his or her evaluative view has no binding effect on the final outcome of the dispute but that it could influence the parties to adjust or change their positions to what they could perceive to be their respective rights and obligations. Be that as it may be, the mediator must realise and be aware that there is always the risk that such an evaluative style of mediation may be perceived as compromising his or her mediator impartiality, mediator neutrality and bias in conducting the mediation session.

In this respect, it cannot be overemphasized that mediators must be aware of ethical aspects of the mediation process and of mediator's practices. They must behave ethically as they do promote resolution of the parties' dispute. This means that mediation training should confront the issue of ethics and ethical dilemmas directly, and is more than discussing ethical standards which serve as guidelines for mediators' behaviours and conduct. It is suggested that mediation training programmes should develop a sense of awareness and sensitivity to the mediators' role in resolving disputes.

Mediators must understand clearly what constitutes appropriate ethical behaviour, and what codes of conduct apply to the mediators because ethical issues

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<sup>675</sup> This view was shared by 2 of the 4 respondents from MMC Panel of Mediators.



potentially pose the most difficult challenges on the role of the mediators and their conduct of mediation. On this important point, the New South Wales Law Reform Commission (1989) had this to say...“Mediators need to behave ethically. Ethical violations are more likely to result from ignorance and poor training than intent. Training which address substantive ethics and provides a model of ethical behaviour will promote a more ethical service for customers” (p. 23).<sup>676</sup>

This means that judges and judicial officers must understand that mediation is an informal, voluntary and flexible process, and that their role as mediators is to assist and guide the parties to reach an agreed outcome, and not to push the parties to reach a settlement. The same views were shared by the respondents from MMC Panel of Mediators when they said that judges and judicial officers must first view mediation from a different perspective, and that they must not conduct mediation in the same way they try cases, and they must not pressure the parties to reach a settlement quickly.<sup>677</sup> In other words, as court mediators they need to allocate sufficient time and patience to ensure that they conduct mediation fairly in accordance with the principles and process although time is of the essence in almost all mediation cases. As mediators, they must put the interests of the parties above all other interests. This is because they need to look into such interests genuinely in order to assist and guide the parties to reach an agreed outcome.

On the point about judges and judicial officers who are in judicial office who also conduct court-directed mediation on a part-time basis, it was stressed by an respondent that this is not a sustainable arrangement if the courts and the judiciary are serious about ensuring that court-directed mediation is here to stay for a long

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<sup>676</sup> New South Wales Law Reform Commission (1989). *Alternative Dispute Resolution: Training and Accreditation of Mediators*, Discussion Paper 21, October. The Commission found the following subjects to be most commonly included in a mediation training programme: (1) Understanding conflict; (2) Mediation theory and procedures, including negotiation; (3) Mediation skills; (4) Substantive knowledge, that is, knowledge relevant to the context of the dispute; (5) Mediation ethics and practice; New South Wales Law Reform Commission, at p. 28.

<sup>677</sup> This was the view of 4 out of the 17 respondents from MMC Panel of Mediators in Mediation Interview – Part 2.

time.<sup>678</sup> The researcher is also of the same opinion that they must be appointed as full-time mediators, and not on a part-time basis.

The main concern surrounding the full-time/part-time issue of these court mediators is premised on the notion that judges and judicial officers may not be able to devote their working time in entirety when conducting court-directed mediation on a part-time basis. The settlement rate of their mediated cases could be severely impacted. In fact, based on available statistics on settlement rates which were recorded by CMCKL and other CMCs, it is evident that full-time mediators were able to deliver a substantially higher rate of settlement in the cases they mediated as opposed to their part-time counterparts as depicted in Table 4.3 as shown in chapter 4.

To a great extent, it is to be noted that these court mediators could also preside over other cases in their adjudication function, or they may hear their own trial list with the consent from the parties, an arrangement of which is allowed and provided for in the said Practice Direction, although it is strictly prohibited by the said Rules for Court Assisted Mediation.<sup>679</sup> At this juncture, based on the provision in the said Practice Direction, the researcher submits that in some instances in Malaysia, it is entirely possible and probable for the trial judge and the mediating judge to be the same judge on the same case. If the mediation fails then it will revert to the original judge to hear and complete the case.”<sup>680</sup>

In other words, if both parties agree to have the trial judge as the mediating judge, then the trial judge will conduct the mediation, and upon completion of the mediation session, the mediating judge will then continue to complete the case as the

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<sup>678</sup> This view was stressed by one respondent from the judiciary in Peninsular Malaysia.

<sup>679</sup> See Practice Direction in *Appendix A*, *supra* note 10, Annexure A (Judge-led mediation), and the said Rules for Court Assisted Mediation in *Appendix B*, *supra* note 16, Section 14 on “Mediator should not try the case himself or herself.” The conflicting provisions, and the researcher’s observations and suggestions to address such a situation are discussed in chapter 4 on *Court-directed Mediation in Malaysia*.

<sup>680</sup> *Appendix A*, *supra* note 10.

trial judge. Hence, where mediation is successful, the settlement agreement will be recorded before the trial judge (who mediated the case), and where mediation has failed, the case will continue to be heard before the trial judge (who mediated the case). The researcher humbly states that it is safe to conclude that the parties are given the option to choose whether they want the trial judge to mediate their case. Hence, it is not an express prohibition for the trial judge not to mediate the same case.

The researcher submits that there are conflicting provisions on whether the mediator should or should not try his or her own cases, which have been discussed and elaborated in chapter 4. To say the least, in this instance where two conflicting provisions co-exist, the risk which arises is that such a situation allows judges and judicial officers to have the option to choose either provision depending on the situation. That is the reason why on this same point, one respondent felt strongly that they should not hear cases which they mediate once they are appointed as mediators.<sup>681</sup>

This practice of judges and judicial officers who mediate and also try their own cases in the event the mediated cases did not get settled must be strictly prohibited to protect the impartiality, neutrality and biasness of both the judge and the mediator specifically, and the overall reputation of the courts and the judiciary as a whole. If this practice is allowed to continue, it would also fuel confusion amongst the parties on what exactly is the role of the mediator and that of the judge in a mediated case during mediation and post-mediation in the event mediation does not succeed. The researcher contends that most parties look up to judges and judicial officers as having “higher authority” even when they act as mediators because the parties place legal gravitas on the bench and the judicial role.

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<sup>681</sup> This was the view of one respondent from MMC Panel of Mediators.

This perspective of court-direction mediation practice in Malaysia was also raised by other respondents who shared that court-directed mediation is only appropriate where judges and judicial officers are not directly involved in the court-filed case or are not the presiding judge in the said case.<sup>682</sup> This point stressed that the same judge who presides the case does not act as the mediator because this would compromise mediator impartiality, neutrality and biasness, and therefore defeats the purpose of having the parties reach an agreed outcome voluntarily. The suggested solution is for the case to be mediated by a different judge from the one hearing the case, provided the judge has sufficient time and is sufficiently trained to conduct mediation.

In any case, it is believed that court-directed mediation would be more effective when mediation is conducted by independent mediators, that is, neutral third parties who have no previous or prior involvement with the cases to be mediated.<sup>683</sup> As shared from a respondent's mediation experience, court-directed mediation has worked effectively where the judge or the judicial officer is not the adjudicator, and where he or she has undergone adequate mediation training.<sup>684</sup>

Judging from the findings in this study, it could be surmised that the courts and the judiciary should look at more innovative ideas and suggestions to ensure that judges and judicial officers become more equipped with the required skills, knowledge and experience of being mediators. One of the ideas which were tabled by the respondents was to reach out to specialists to supplement the bench of judges and judicial officers who may not have the expertise in specific areas of the law.

Judges and judicial officers who have vast experience in certain areas of the law such as family law, construction law, commercial law, and the like, should focus

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<sup>682</sup> This view was gathered from 6 respondents, one of whom was from the judiciary, from the total 27 respondents in Mediation Practice – Part 2.

<sup>683</sup> This view was shared by one respondent from MMC Panel of Mediators.

<sup>684</sup> This was the view of another respondent from MMC Panel of Mediators.

on the respective cases when these cases are brought up to be mediated.<sup>685</sup> In the researcher's opinion, this is a relatively sensible idea as it allows these court mediators to develop specialists in their respective areas of the law. For the mediator, such technical knowledge could come in handy when conducting the mediation sessions as it allows the mediator to fully understand the underlying issues and interests of the parties.

Another idea is to open up court-directed mediation practice to mediators from MMC Panel of Mediators (that is, private mediators), and the KLRCA, where court-directed mediation should not just be restricted to judges and judicial officers to act mediators.<sup>686</sup> In the researcher's humble opinion, this could be a potential idea as current rules or guidelines governing court-directed direction do not restrict court-directed mediation to be conducted by judges and judicial officers only. In fact, the said Practice Direction does provide for the mode of mediation which is conducted by any other mediator.<sup>687</sup>

One other suggestion is for the courts to appoint lay members who are legally qualified to act as mediators in conducting court-directed mediation, which would enhance the entire mediation experience.<sup>688</sup> In the researcher's opinion, this is a practical suggestion to widen the professional mediator community. In this respect, the researcher offers a suggestion to appoint retired judges to join the court mediator fraternity. There are several advantages of using retired judges as court mediators in the CMCs which are currently located in several cities and towns nationwide which is discussed at length in chapter 7.<sup>689</sup> As an example, Norfolk Circuit Court in the USA brought in retired Circuit Court judges to conduct settlement conferences in

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<sup>685</sup> This view was from one respondent from the judiciary in Mediation Interview – Part 2.

<sup>686</sup> This view was shared by one respondent from MMC Panel of Mediators in Mediation Interview – Part 2.

<sup>687</sup> Appendix A, *supra* note 10, Annexure B (Mediation by any other mediator).

<sup>688</sup> Another respondent from MMC Panel of Mediators offered this view.

<sup>689</sup> See chapter 7 on *Implementing Court-directed Mediation in Malaysia*.

complex cases.<sup>690</sup> As with the successful implementation of the Norfolk programme, the researcher's suggestion is to formulate a set of standard requirements to allow effective implementation of the said programme using retired judges in Malaysia.

Based on this finding on the adequacy of mediator skills, knowledge and experience of judges and judicial officers when they act as mediators, there is much to be accomplished by the courts and the judiciary to promote court-directed mediation in Malaysia, and to ensure that these court mediators practise mediation in accordance with mediation principles and process as outlined in chapter 2. The question is whether legislating court-directed mediation could address this area of concern.

#### *6.4.2.2 Are there standardised mediation guidelines, rules, procedures, standards and professional ethics?*

On mediation guidelines, rules, procedures, and professional ethics for judges and judicial officers who act as mediators in Malaysia, there are two questions which need to be answered. One is whether there are such guidelines, rules, procedures, and professional ethics for court mediators? And secondly, if they do exist, are they standardised, and are they common with those which apply to private mediators? Based on the findings in this study, the researcher attempts to answer these questions.

First, as elaborated in chapter 4, judges and judicial officers as court mediators rely on the current three sources of mediation guidelines, rules and procedures, namely, the said Practice Direction, the said Rules for Court Assisted Mediation, and the general guidelines as issued by CMCKL and other CMCs. However, as discussed in chapter 4, the said guidelines, rules and procedures are not

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<sup>690</sup> Ravindra, G. (2005), *op. cit.* In order to ensure that the programme works, comprehensive training in mediation and settlement conference techniques of 16 hours were conducted to a pre-selected group of retired Circuit Court judges.

as comprehensive as those which are contained in the said Rules for Court Assisted Mediation. In fact, when studying the said guidelines, rules and procedures in the said Practice Direction and comparing those in the said Rules for Court Assisted Mediation, the researcher has commented that those in the said Practice Direction are relatively too general in nature, and therefore, lack the depth and precision in several areas such as the scope of the mediation process and its procedures, the role, the responsibilities and duties, the dos and don'ts of the mediator, the fundamental ethics on the conduct of mediators on impartiality, neutrality, and conflict of interest.

In addition, the other observation is that there is one provision in the said Practice Direction which conflicts with that in the said Rules for Court Assisted Mediation. This is the provision which allows the parties to decide if they choose to have the judge who is hearing their case to be the mediating judge.<sup>691</sup> However, a very different provision is found in the said Rules for Court Assisted Mediation which expressly states that the mediator should not try the case himself or herself.<sup>692</sup>

Therefore, it is very evident that the two provisions conflict with each other where one set of guidelines allows the parties to choose their mediator even if the mediator is the hearing judge. Further, such inconsistent provisions in the said two sources of mediation guidelines, rules and procedures for court mediators allow judges and judicial officers to choose which set of guidelines, rules and procedures they wish to make reference to or to rely on. The researcher questions the role which the courts and the judiciary play in ensuring that there is a standardised set of mediation guidelines, rules and procedures for court mediators.

On the point on whether there are standards and professional ethics to govern the conduct of court mediators today in Malaysia, there is none as reviewed in chapter 4. It is believed that practice standards are required for mediators for public policy

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<sup>691</sup> Appendix A, *supra* note 10, Section 1, Annexure A (Judge-led mediation).

<sup>692</sup> Appendix B, *supra* note 16, Section 14 on "Mediator should not try the case himself or herself."

reasons in order to provide clear standards that are both consistent and practical.<sup>693</sup> It has been said that “mediators also need a systematic ethical code or set of guidelines to assist them in making decisions about appropriate strategies and behaviours” (Moore, 1983, p. 86, 87).<sup>694</sup>

Further, there are a number of advantages of having a code of ethics for mediators including being educational for practitioners, who may not be familiar in mediation, helps promote consistency and competence in practice, and ensures the quality of mediation. Therefore, it is noted that a code of ethics “enables practitioners to get a sense of their basic commitments as professionals and offers them an understanding of the elements that must be weighed in making difficult decisions (Schneider, 1988, p. 86).”<sup>695</sup> Be that as it may, it is worth noting that the role of these standards and ethics is to provide a prescriptive list of do’s and don’ts, and can be a barometer of existing ethical philosophy and practice to mediators.<sup>696</sup>

However, the same cannot be said about mediation guidelines, rules, procedures, standards and professional ethics which apply to private mediators, namely, mediators who are certified by MMC. MMC has its own rules for purposes of mediator accreditation. Its panel of 271 accredited mediators include lawyers and other professionals who must have completed 40 hours of mediation skills training workshop which is conducted by the Bar Council or other recognised bodies.<sup>697</sup> The mediation process which is conducted by MMC is governed by MMC Mediation Rules which bind both the parties and the mediator.<sup>698</sup>

Essentially, the set of Mediation Rules covers 21 areas of the mediation process from end-to-end including key sections on the initiation of mediation,

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<sup>693</sup> Bush, R. A. B., 1992, 1994, *op. cit.*

<sup>694</sup> Moore, C. W. (1983). Training Mediators for Family Dispute Resolution. In Lemmon, J. A. (ed.), *Successful Techniques for Family Breakup*, 2 *Mediation Quarterly*, Jossey-Bass, San Francisco.

<sup>695</sup> Schneider, C. (1988). A Commentary on the Activity of Writing Codes of Ethics. 19 *Mediation Quarterly* 83.

<sup>696</sup> Morris, C. (1997), *op. cit.*

<sup>697</sup> Subramaniam, G. (2012). The Practice of Mediation in Malaysia. Presentation at the Seminar on Malaysia’s New Mediation Act, organised by Law Revision and Reform Division, Attorney-General’s Chambers, Putrajaya, Malaysia, July 3, 2012.

<sup>698</sup> See *Appendix L* for MMC Mediation Rules, Section 1 on “The Mediation Process.”



appointment of mediator, disqualification of mediator, mediation agreement, authority of mediator, settlement agreement, privacy and confidentiality, termination of mediation, and stay of proceedings. In addition to the said Mediation Rules, the panel of accredited mediators of MMC is also required to adhere to MMC Mediation Service Code of Conduct.<sup>699</sup> The said Code of Conduct contains eight areas which focus on mediator impartiality and neutrality, confidentiality, withdrawal by the mediator and under what circumstances for such withdrawal to take effect, and for the mediator to refer to the said Mediation Rules for further guidance.

Based on the above observations on the current situation which confronts court-directed mediation in Malaysia as far as mediation guidelines, rules, procedures, standards and professional ethics are concerned, the researcher surmises that there is no standardised mediation guidelines, rules and procedures which bind both court mediators and private mediators alike. It is the researcher's contention that court mediators must also be subject to the same standards and professional ethics on their conduct as with private mediators who are bound by the said Mediation Rules and the said Code of Conduct.

In terms of the professional conduct of court mediators, a handful of respondents shared that there have been cases where the parties could have been compelled to undergo mediation by judges and judicial officers who act as mediators.<sup>700</sup> This revelation was based on their experiences as practising mediators, that on rare occasions where court-direction mediation was successful, these cases were conducted under "court-coerced" circumstances, and not genuinely derived from a true mediation perspective. According to these respondents, while mediation is a means to help the parties to resolve their dispute, however, in court-directed

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<sup>699</sup> Appendix K, *supra* note 640.

<sup>700</sup> This view came from 6 respondents from MMC Panel of Mediators.

mediation, their view was that parties were pressured to reach an “apparent” resolution, and that the issues were not really mediated.

According to one of these respondents, it was revealed that the standard mediation process, or mediator do’s and don’ts in mediation did not seem to have been adopted in those cases of court-directed mediation. This respondent elaborated that in such situations it was observed that the mediators did not effectively convey to the parties the true meaning or purpose of mediation to enable the parties to reach an agreed outcome. This respondent also observed that the parties felt that the mediators had not sufficiently created a neutral forum for the parties to reach a compromise. Further, it was revealed that the parties felt that the mediator did not listen to their “story,” and that they felt compelled to settle and to accept the “offer” for fear of the escalating cost in litigation, and/or damages to be paid in the event they lost the case.

These revelations on the conduct of the mediator seem to question whether the mediator conducted mediation fairly. The questions which would arise would include whether the parties were given an adequate opportunity to express their views, or their views were ignored, overlooked, or not taken seriously, whether the mediation process was handled fairly, whether the dispute was responded to, managed, and processed fairly, whether the parties perceived that the mediator was fair and impartial in dealing with their case, and whether each party heard what the other party had to say. In some cases, the perception of unfairness can arise in relation to the micromanagement of the process itself. For example, how much speaking time is allowed, whether those involved in the settlement discussions are really listening, or even whether the other party has unfair advantage over the other (maybe, one party has access to legal representation, or may have expert advice, for instance), or perhaps not being treated with respect.

In essence, it is important for the mediator to fully appreciate the need to treat the parties with dignity and respect, and control over his or her own decision making process, and not to berate the parties who hesitate to accept the mediator's evaluation as the basis for settlement, or making threats regarding the consequences of failing to settle. With the judge as the mediator, the power inherent to the judges' position, and perhaps fuelled with the gravitas of the judge, could be coercive, whether inadvertently or intentionally. Such heavy-handed techniques and tactics displayed by the mediator have been referred to as "muscle mediation."<sup>701</sup> In short, for the parties to feel fairly treated within the mediation process, they must feel that their issues are given serious consideration. They must experience at least a minimal level of comfort with their role in the process as it unfolds.

Based on the above revelations, the researcher submits that when conducting mediation, judges and judicial officers refer to different and separate sources of mediation guidelines, rules, procedures, and to some extent the professional ethics on the conduct of mediators, namely the said Practice Direction, and the said Rules for Court Assisted Mediation. Further, the said sources are also different from those which private mediators refer to and are bound by the said MMC Mediation Rules, and the said MMC Mediation Service Code of Conduct. Therefore, it is evident that the current practice of court-directed mediation in Malaysia may not be totally perfect.

Further, the said revelations and observations on the conduct of court mediators as shared by the respondents in this study cannot be ignored. It is undeniable that the described conduct of court mediators to the extent which has been surfaced in this study is unacceptable because they are bordering in the realm of mediator impartiality, mediator neutrality, and fairness in the mediation process. If

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<sup>701</sup> Folberg, J. P., & Taylor, A. (1984), *op. cit.*

such conduct is allowed to persist this would tarnish the image of the courts and the judiciary as a whole with all the negative perception received. The researcher further submits that other key elements of mediation on party autonomy, self-determination, and fairness of the mediation process could be severely compromised in court-directed mediation practice in Malaysia.

Certainly, there is much room for further improvements which the courts and the judiciary must play their role if they are serious about having judges and judicial officers continue to conduct court-directed mediation professionally and ethically in Malaysia. There need to be safeguards against these judges' and judicial officers' inherent power and the potential coercion of the parties during mediation. Having a standardised and common set of mediation guidelines, rules, procedures, standards and professional ethics, which apply to all types of mediation in Malaysia, whether it be court-directed mediation, or private mediation, could be a good start.

#### *6.4.2.3 Are the public aware of and educated on court-directed mediation?*

Court-directed mediation has taken the spotlight in pushing ADR in Malaysia to the next level since its pilot implementation in the form of KLCMC in 2010.<sup>702</sup> Subsequent to that, a number of CMCs have mushroomed nationwide in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country. Such continuous efforts by the courts and the judiciary to promote mediation as an ADR mechanism should be applauded and encouraged. To say the least, this positive progress was acknowledged by a majority of the respondents in this study where they appreciated the fact that court-directed

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<sup>702</sup> *Supra* note 22, *supra* note 23, and *supra* note 26.

mediation has resulted in a lot of cases being cleared and disposed of since its introduction by the courts a few years ago; it has been timely, and is needed.<sup>703</sup>

It was observed by a handful of respondents that the courts have been aggressively promoting mediation as an ADR mechanism both in Peninsular Malaysia, and in Sabah and Sarawak.<sup>704</sup> According to them, notices have been put up in court premises across the country informing litigants that mediation is encouraged by the courts. It was pointed out by these respondents that litigants could request for such an alternative method to resolve their disputes so they could choose either to proceed via court-directed mediation where judges and judicial officers act as mediators, or by private mediators from MMC Panel of Mediators.

These respondents understood that court-directed mediation is mediation suggested, encouraged or directed by judges and judicial officers to the litigants on cases already filed in the courts.<sup>705</sup> They also recognised that when the litigants agree to take up the mediation as the suggested ADR mechanism, mediation may be conducted by way of judge-led mediation under court-directed mediation, that is, mediation is conducted by the judge or judicial officer or by a private mediator agreeable by both parties.<sup>706</sup> However, a handful of respondents opined that the public at large, too, need to be aware of mediation, whether mediation is conducted by judges and judicial officers, or private mediators, which is conducted as an ADR mechanism could help them to resolve disputes.<sup>707</sup>

In other words, there is the need to educate the man on the street on the advantages and benefits of both types of mediation, including the opportunity for the parties to negotiate and agree to an outcome which both parties can accept, the

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<sup>703</sup> This view was gathered from a majority of 22 respondents from the total 27 in Mediation Interview – Part 2. Of these, 9 of them were from the total 10 respondents from the judiciary.

<sup>704</sup> This view was categorically shared by 3 respondents from the judiciary in Sabah and Sarawak.

<sup>705</sup> *Appendix E, supra* note 394. However, with the introduction of Practice Direction No. 2 of 2013 on “Mediation Process for Road Accident Cases in Magistrates’ Courts and Sessions Courts,” all claims for personal injuries and other damages due to road accidents must be automatically referred to court-directed mediation prior to the cases being fixed for hearing.

<sup>706</sup> *Appendix A, supra* note 10, Section 1, Annexure A (Judge-led mediation).

<sup>707</sup> This view was shared by 6 out of the total 27 respondents where 5 of them were from the judiciary.

opportunity for them to save litigation cost and trial time, and the types of disputes which could be effectively resolved by mediation as it may not be practical or applicable to all types of disputes. The respondents viewed this as one area which the courts and the judiciary in Malaysia could do more, that is, to play a more significant role to encourage the public to consider mediation as an ADR mechanism.

Continuing with this view, it was opined that in the absence of any legislation on court-directed mediation where the said Mediation Act is not applicable to court-directed mediation, the public at large may not be fully aware of the availability of court-directed mediation where judges and judicial officers act as mediators, and that it is conducted in court premises. As such, the researcher submits that the courts continue to make practical attempts to persuade litigants and to promote court-directed mediation as an ADR mechanism. It is felt that such encouragement by the courts is a good attempt to make the parties realise that issues can still be resolved without involving litigation via the courts.<sup>708</sup>

The researcher contends that the said CMCKL and other CMCs have been provided with separate infrastructure and facilities although they are still located on court grounds. This is for the convenience of litigants, and for judges and judicial officers who are mediators. This means that court-directed mediation sessions must no longer be conducted in the court rooms and/or in the judges' chambers. Such a physical change also helps to instil in the public's minds that the courts are serious about court-directed mediation, and that even the courts encourage and support mediation as an ADR mechanism for litigants to resolve their dispute towards an agreed outcome.

As elaborated in chapter 4, it could be surmised that since the formal inception of CMCKL and subsequent establishment of CMCs in identified cities nationwide, a

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<sup>708</sup> On how the courts in Malaysia can play a more significant role in encouraging court-directed mediation amongst the judiciary and the parties, this has been discussed in chapter 4 on *Court-directed Mediation in Malaysia*.

steady rise of cases has been registered at these CMCs over the last few years, with a slow increase of settlement rates recorded where the highest rates are evident in CMCKL which was the pioneer CMC.<sup>709</sup> However, the extent to which these CMCs is sufficiently successful to replicate the same framework and model in the other court premises nationwide remains to be seen.

It has been observed that the parties still view the courts as the “appropriate” forum to conduct court-directed mediation in that they perceive the courts as having the “higher authority” and “higher credibility.”<sup>710</sup> According to one of the respondents, sentiments on “higher authority” and “higher credibility” could be attributed to the general perception of Asians having more confidence towards a judge or a judicial officer as the mediator who “is in authority” or “has the authority.”<sup>711</sup>

In this respect, the researcher humbly opines that this perspective of the courts being the appropriate forum to conduct court-directed mediation is consistent with the notion that judges should be mediators. To support the researcher’s reasoning, the researcher relies on the view of an author that in complex and difficult cases, “the gravitas of a judge would increase the likelihood of a settlement because the parties do respect the bench and the mantle of the judicial office.”<sup>712</sup> This could mean that for the parties to trust mediation, the gravitas of a judge is needed.

Further, while the parties may opt out of traditional litigation, many could still voluntarily choose to stay within the shadow of the court through court-directed mediation. This means that judges and judicial officers as court mediators presumably offer and extend the capability of the courts and the judiciary to serve public interest. By doing so, the courts and the judiciary could be seen to be continuing to foster trust

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<sup>709</sup> *Supra* note 453, *supra* note 454, *supra* note 455, and *supra* note 456.

<sup>710</sup> This view was gathered from 9 out of the 10 respondents from the judiciary.

<sup>711</sup> This view was shared by one respondent from the judiciary in Sarawak.

<sup>712</sup> Warren, M. L. (2010), *op. cit.*

in the system of justice, and relevancy of the courts and the judiciary. In short, court-directed mediation seems to have “the force of the law” because it is conducted by judges and judicial officers where some parties appear to be more receptive to options or suggestions tabled by these court mediators.<sup>713</sup>

#### *6.4.2.4 What challenges do judges and judicial officers face as mediators?*

When asked for their opinions on the kind of challenges or obstacles faced by judges and judicial officers when they conduct mediation sessions, the views and thoughts gathered from the respondents could be summarised in three main perspectives, namely, from the lawyers, from the parties, and from the judges.<sup>714</sup> The major challenge faced by judges and judicial officers when they act as mediators is the general attitude of lawyers.<sup>715</sup> According to these respondents, there have been cases where lawyers did not encourage their clients (the parties) to have an open mind to understand the perspectives from the other party. It was also revealed that based on their previous experiences some lawyers advised their clients to stick to their stand or positions from the beginning until the end of the mediation session. In other words, the parties may be influenced by their lawyers’ advice not to resolve the dispute through mediation.

In short, as summed up by one respondent, lawyers too ought to be more “mediation-minded” instead of being “litigation-minded”.<sup>716</sup> Others were also of the opinion that lawyers in Malaysia have not fully embraced mediation as an ADR mechanism, and that lawyers are too ready to go for trial.<sup>717</sup> They felt that in most cases, lawyers tend to dominate the mediation process, and some may not be fully

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<sup>713</sup> This view was shared by one respondent from MMC Panel of Mediators.

<sup>714</sup> A total of 27 respondents’ views were gathered in Mediation Interview – Part 2, comprising 10 from the judiciary and 17 from MMC Panel of Mediators.

<sup>715</sup> This view was shared by 6 of the 27 respondents, where the majority of them were from the judiciary (4 out of 6).

<sup>716</sup> This view was shared by one respondent from the judiciary in Peninsular Malaysia.

<sup>717</sup> This view was shared by 4 respondents, one of whom was from the judiciary.



aware of the mediation process and what could be achieved through this ADR mechanism in resolving disputes. The researcher is also reminded of one argument that lawyers have traditionally been trained in law schools to be adversarial and combative in nature when putting forth arguments on legal issues. Hence, the principles of mediation which are conciliatory in nature are technically incongruent with what they have been trained to think and act in the legal profession.<sup>718</sup>

One respondent stated that some lawyers tend to ask questions on facts alone and cannot appreciate the issues of position and interest.<sup>719</sup> It is opined that interference from lawyers during mediation could derail the mediation process and deprives the clients (parties in dispute) of the opportunity to resolve their dispute through mediation. Also of relevance is the discussion on the poor attitude of lawyers which is one of the identified reasons why mediation is not an effective ADR mechanism in the settlement of disputes between parties.<sup>720</sup>

In the view of one respondent, the attitude of the parties is yet another challenge in terms of whether they are genuinely keen to resolve their dispute out of court, and through mediation as an ADR mechanism.<sup>721</sup> It was felt that if the parties do not come to the mediation table with an open mind and with a genuine interest to resolve their dispute, or they lack the sincerity or the keenness to resolve their dispute, or are unwilling to adhere to the mediation process throughout the process, then the parties would not be able to reach an agreed settlement between them. In essence, they lack the sincerity or the keenness to resolve their dispute.<sup>722</sup>

Often times, the issue is that the parties want “their day in court” so they do not mind going through the trial process, and would avoid attempts to resolve their

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<sup>718</sup> Bok, D. (1983), *op. cit.*

<sup>719</sup> One respondent from MMC Panel of Mediators shared this view.

<sup>720</sup> See earlier section of this chapter on “Whether mediation is an effective ADR mechanism to facilitate settlement of disputes in Malaysia.”

<sup>721</sup> This was the view of one respondent from MMC Panel of Mediators.

<sup>722</sup> This reason was cited by 23 out of the total 34 respondents in Mediation Interview – Part 1, of whom 6 were from the total 7 respondents from the judiciary.

dispute outside of the court process. The respondents shared that in such situations, the parties would be adamant on their positions, and would refuse to let go of or give in to certain areas of interests or to come to a midway resolution. The view was that even if the parties agree to come to the table to mediate, their antagonistic attitude would derail the mediation session.

On the types of challenges which are faced by judges and judicial officers when they conduct mediation, the view was that these challenges also stemmed from their own attitude, mind-set and behaviour.<sup>723</sup> According to these respondents, as mediators, these judges and judicial officers must not try the cases and they must not “sit in judgement” when conducting mediation because it is the parties who make the decision on the final agreed outcome, and not the mediator. In essence, the chief obstacle which judges and judicial officers face when conducting mediation sessions is their own mind-set which needs to be adapted to the mediation mind-set.

It was opined that as the mediator, the role is to facilitate and to assist the parties to arrive at an agreed outcome in their attempt to resolve the dispute through mediation. As an illustration, in the final stages of the mediation process, the role of the mediator would involve helping parties to negotiate all available options between them, which may trade options, give-and-take bargaining, where parties may modify their positions, so that the final outcome of their dispute is agreed by and accepted by both parties, one which they can live with.<sup>724</sup> Simply put, the role of the mediator is best explained by this metaphor - The mediator’s role is to direct the traffic, like a traffic officer, but the parties will be doing all the driving.<sup>725</sup>

At this juncture, the researcher is reminded of the role of the mediator which has been described as one which is required to separate the people from the problem,

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<sup>723</sup> The majority comprises 16 out of 27 respondents in Mediation Interview – Part 2, where 13 of them were from MMC Panel of Mediators.

<sup>724</sup> Haynes, J. (1993), *op. cit.*

<sup>725</sup> Boulle, L. (1996). *Mediation: Skills and Techniques*, Sydney: Butterworths.

be soft on the people and hard on the problem, focus on interest, not positions, create options for mutual gain, and reach win/win solutions instead of win/lose outcomes.<sup>726</sup> The researcher's humble view is that judges and judicial officers should possess the passion or interest in understanding the parties' underlying interests and needs in the process of assisting and guiding them to reach an agreed outcome. The parties would be at the losing end if they are not guided or assisted professionally by capable mediators.

This is elaborated to mean that a person who is always in touch with the world, with people's feelings, has a credible reputation, has the confidence of the legal fraternity, and has great legal acumen makes the best mediator. This statement is true and is consistent with the words of wisdom which state that "mediation is only as good as the mediator," where the overall quality of the mediator is critical to the success of mediation.<sup>727</sup> Given that the mediator role is therefore very different from that of the judge presumably much time would be required by judges and judicial officers who act as mediators to adapt to this change which would affect their attitude, mind-set and behaviour when conducting mediation.

In this respect, the researcher agrees that such a mind-set adaptation required of these judges and judicial officers requires time for it to be changed, and for them to undergo proper formal and professional training on mediation. This stems from the fact that their professional and technical training in their adjudication role differs from that of the mediator role. Presumably, it would be difficult for these judges and judicial officers to interchange their "adjudicator's hat" with that of the "mediator's hat" and vice versa. Such a dilemma is even more acute where judges and judicial officers have served longer years on the bench in their adjudication role. In short, as

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<sup>726</sup> Fisher, R. and Ury, W. R. (1991), *op. cit*; Haynes, J. (1993), *op. cit*.

<sup>727</sup> Henderson, D. A. (1996), *op cit*.

one respondent put it, they need to think “outside of the box” because the entire mediation process differs from the litigation process and court proceedings.<sup>728</sup>

To add to the complexity, contrary to the above description of the role of the mediator, the majority of the respondents shared that in reality when judges and judicial officers conduct mediation sessions, they tend to look at the merits of the case, and to arrive at their own conclusions.<sup>729</sup> These respondents cautioned that bias may prevail when the parties are “coerced” into accepting settlement terms through “muscle mediation” which may be based on the conclusions of the judges and judicial officers as mediators.<sup>730</sup> In addition, one respondent felt that a settlement which is reached under such circumstances may not be sustainable because the parties may feel that they have been pressured to reach such a settlement in the first place.<sup>731</sup>

Further elaboration was shared where the facilitative style of mediation may not be adopted by judges and judicial officers when they conduct mediation as they may not be familiar with the said style. Their main priority would be to ensure that their cases are heard and decided expeditiously. As such, they may be tempted to push forward their views, or to exert extra pressure for a settlement to be reached, or to conclude the mediation session in their attempt to close off the file as soon as possible in order to achieve their KPIs.

It is to be noted that constraint of time seems to be the main issue driving judges and judicial officers to dispose of their daily load of cases expeditiously where they may not have sufficient time to handle mediation cases as well, and to conduct mediation in accordance with its due process.<sup>732</sup> This could result in them having to rush, push and pressure the parties or force the parties to reach a conclusion. The risk and consequence of such a practice may arise in the form of bias and partiality on the

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<sup>728</sup> This view was shared by the respondent from the judiciary.

<sup>729</sup> *Supra* note 723.

<sup>730</sup> *Supra* note 701 where “muscle mediation” was previously discussed in the earlier section of this chapter.

<sup>731</sup> This view was shared by the respondent from MMC Panel of Mediators.

<sup>732</sup> This view was shared by 6 respondents, 3 of whom were from the judiciary.

part of these judges and judicial officers as they could be perceived to apply improper and unethical methods and approaches when conducting court-directed mediation.

The researcher points out that such “time” factor becomes a challenge or obstacle faced by these judges and judicial officers because of their dual role, both as a judge and as a mediator although they may not mediate their own trial lists. In other words, as long as they are not full-time dedicated court-directed mediators, the “time” challenge will always persist.<sup>733</sup> However, it was felt that where these mediation cases are properly and specifically assigned and organised on a weekly or fortnightly roster, there could be greater focus with increased time efficiency and better outcome.

Of all the described challenges and obstacles which judges and judicial officers face when conducting mediation, the challenge of their own attitude, mind-set and behaviour has the most impact on the role of the mediator to ensure that mediation is conducted fairly, and that the parties have been treated fairly during mediation. This is because these judges and judicial officers have been entrusted by the courts and the judiciary to act as mediators to conduct mediation ethically, with full impartiality, neutrality and non-biasness throughout the mediation process.

## **6.5 Should court-directed mediation be legislated in Malaysia?**

This is the main research question where the researcher questions whether court-directed mediation should be legislated in Malaysia in the light of Section 2(a) of the said Mediation Act which stipulates that the said Mediation Act does not apply to “any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in court.”<sup>734</sup> Based on the perspectives gathered

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<sup>733</sup> See earlier section of this chapter on “Whether mediation is an effective ADR mechanism to facilitate settlement of disputes in Malaysia.”

<sup>734</sup> *Appendix D, supra* note 27.

from the respondents, the researcher attempts to find answers to the main research question of this study.

The view that court-directed mediation should be legislated in Malaysia formed the majority view from the respondents in this study.<sup>735</sup> There was an equal split of opinion from the judiciary where half of them shared this view. However, more respondents from MMC Panel of Mediators supported the view to legislate court-directed mediation in Malaysia.<sup>736</sup> One perspective was that the courts and the judiciary ought to be given the power to order mediation when they feel that the case is suitable for mediation; hence such legislation is required.<sup>737</sup> It was elaborated by other respondents that although the said Practice Direction and the said Rules for Court Assisted Mediation provide sufficient guidelines to regulate mediation within the judicial system, however, the fact remains that the said guidelines will remain as mere guidelines because they do not have any legal effect even if they are revised and improved for the long term.<sup>738</sup>

Another perspective from the respondents in support of legislation covered the advantages and benefits this approach brings to the parties. For one, it ensures that standards of conduct by the mediator, the parties, and the lawyers are regulated and properly observed.<sup>739</sup> The researcher humbly submits that one potential reason why court-directed mediation should be legislated in Malaysia is to ensure that all conduct of court-directed mediation has the “force of the law” and “legal effect”, and is governed by common guidelines, rules, procedures, standards and professional

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<sup>735</sup> This view was gathered from 14 out of the 26 respondents in Mediation Interview – Part 2 (one respondent did not respond) where 5 of them were from the judiciary. There were a total of 10 respondents from the judiciary.

<sup>736</sup> 9 out of the 14 respondents who shared this view were from MMC Panel of Mediators as compared to only 7 respondents from the MMC Panel of Mediators who did not think that court-directed mediation in Malaysia should be legislated. *Supra* note 465, and *supra* note 466.

<sup>737</sup> This was the view of one respondent from the judiciary in Sabah.

<sup>738</sup> This view was shared by 2 respondents from the judiciary.

<sup>739</sup> This was one view from the respondent from MMC Panel of Mediators.

ethics. At this juncture, it is to be noted that private mediation (non-court-directed mediation) is already legislated under the said Mediation Act.<sup>740</sup>

It is interesting to note at this point that the same reasons why the said Mediation Act was enacted for private mediation could and should also be applicable and relevant to court-directed mediation. One of the reasons is that it is acknowledged that “legislation on mediation could provide a predictable legal framework within which mediation can be conducted in Malaysia.”<sup>741</sup> It is understood that such a proper and predictable legal framework could provide a good platform for further development of mediation in a proper and healthy manner, in addition to addressing some areas of the law which are uncertain such as confidentiality, privilege, enforcement of mediation agreement and settlement agreement, and mediator’s liability, just to name a few.<sup>742</sup>

The second reason for such legislation is for “legitimization” purposes which serve as the stamps of approval of the process by the Malaysian Government and the legislature, in addition to helping to advance the acceptance of mediation by the legal profession and the public at large.<sup>743</sup> In specific reference to the general public, thirdly, such enactment is seen from the public education perspective where “a well-drafted and lucid statute on mediation could inform the general public (as well as professionals who are involved in ADR) about mediation,” specifically on what mediation is, how it works, and what can be achieved by making proper use of mediation as an ADR mechanism.<sup>744</sup>

Therefore, a mediation statute could serve to promote mediation to the general public, the legal profession, and Malaysia as an international dispute resolution (IDR)

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<sup>740</sup> *Appendix D, supra* note 27.

<sup>741</sup> *Supra* note 28.

<sup>742</sup> *Supra* note 29.

<sup>743</sup> *Ibid.*

<sup>744</sup> *Ibid.*

centre.<sup>745</sup> The “role model” cited was the KLRCA which has successfully been established as an IDR centre, and with the said Mediation Act could help demonstrate to the international business community that Malaysia is in the forefront in developing herself as an IDR centre through KLRCA.

The researcher submits that based on the described same reasons for enacting the said Mediation Act, by enacting such legislation on court-directed mediation, this would ensure that there is uniformity and standardization in the overall mediation practice, governance, and ethical standards. As such, judges and judicial officers who act as mediators would be bound by the same principles of mediation when they conduct court-directed mediation as with the private mediators from MMC Panel of Mediators would be governed by the said Mediation Act. In other words, such a move would also ensure that the same standards of competency, and the same rules and regulations on mediation apply to all mediators without exception.

Be that as it may, the researcher raises a point specifically on what it *really* means for court-directed mediation to be legislated in the light of the said Mediation Act which governs non-court-directed mediation in Malaysia. A handful of the respondents was of the view that the said Mediation Act should perhaps be amended to cover all mediators, whether they are judges and judicial officers who act as mediators or private mediators from MMC Panel of Mediators, and all forms of mediation, whether it is court-directed mediation or private mediation.<sup>746</sup> Alternatively, could or should a separate legislation be enacted to cater for court-directed mediation to supplement the said Mediation Act? What are the pros and cons of either option? Further, it would also be relevant to understand the reason or reasons why court-directed mediation was excluded in the said Mediation Act in the first place.

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<sup>745</sup> *Ibid.*

<sup>746</sup> This was the view from 6 respondents, all of whom were from MMC Panel of Mediators.



It is understood that as far back as 2005 the judiciary has since taken an active role in the use of mediation as an ADR mechanism in its arduous effort to clear the backlog of cases in its civil courts.<sup>747</sup> In fact, the courts and the judiciary have also been encouraging the use of mediation during the pre-trial case management stage as stipulated under Order 34 rule 2(2)(a) of the recently revamped Rules of Court 2012, where the reference to mediation can also be traced to Order 59 rule 8(c) in the said 2012 Rules, concerning the exercise of a court's discretion as to costs. Further, in early 2010, discussions had taken place to draft a Practice Direction to encourage the parties to mediate instead of going to trial where mediation should be the "preferred" way for parties to resolve their disputes in Malaysian courts.<sup>748</sup> On August 16, 2010, the said Practice Direction which governs court-directed mediation came into operation.

Hence, in the effort to enact the said Mediation Act, it is understood that in order "to avoid the possibility of a mediation statute stifling the conduct of court-directed mediation, it was requested the said Mediation Act does not deal with court-directed mediation, and allow it to be handled specifically by the judiciary."<sup>749</sup> Subsequently, the said request was duly considered and was taken into account which resulted in having court-directed mediation to be handled by the judiciary and was then excluded from the said Mediation Act. Be that as it may, court-directed mediation is now governed by the mediation guidelines in the said Practice Direction and the said Rules for Court Assisted Mediation during its pre-trial case management stage.

Specifically on the said Mediation Act, it was viewed as being too general, and it does not cover specifics. As such, these respondents suggested that necessary

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<sup>747</sup> *Supra* note 17.

<sup>748</sup> *Supra* note 9.

<sup>749</sup> *Supra* note 28.

amendments are required to cater for judges and judicial officers who act as mediators. One view was that the said Mediation Act does not have enough “teeth” because it does not contain provisions governing the standards of competency for mediators.<sup>750</sup> One example which was cited was on provisions which stipulate the minimum requirements or pre-requisites of training hours for mediators. It was also suggested that co-mediating arrangements be allowed whereby the number of required hours for co-mediating is stipulated, and is a pre-requisite before a mediator is allowed to act as one.

For example, under the Uniform Mediation Act 2001 (USA), which is one of the best known model laws on mediation, this legislation lays down the requisites for training and accreditation of mediators, which has since attracted wide support and paved the way for the enactment of state legislation in a number of states in the USA.<sup>751</sup> In the states in the USA where there is no legislation, mediator accreditation is handled through professional bodies such as SPiDR, where a set of ethical standards for mediators is adopted, and a special commission on certification is established (Astor and Chinkin, 1991, p. 213).<sup>752</sup> However, in countries such as Australia where there are no legislative guidelines as to appropriate behaviour for mediators, the codes of conduct have been developed by the New South Wales Law Society Dispute Resolution Committee and the Council of the Law Institute’s Standards of Practice for Lawyer Mediators in Family Disputes.<sup>753</sup>

Hence, considering the reasons behind why court-directed mediation was deliberately excluded from the said Mediation Act, the feasible approach may not seem to be either of the suggested two options, namely, either to revise related provisions in the said Mediation Act to cater for court-directed mediation, or to enact

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<sup>750</sup> This view was shared by one respondent from MMC Panel of Mediators.

<sup>751</sup> *Supra* note 28. See also chapter 2 on *Review of Relevant Terms and Concepts*.

<sup>752</sup> Astor, H. and Chinkin, C. (1991). Mediator Training and Ethics. 2 *Australian Dispute Resolution Journal* 4, November.

<sup>753</sup> “Guidelines for Solicitors Who Act as Mediators,” approved by the Council of the Law Society of New South Wales in May 1988, reprinted in 26 *Law Society Journal* 29, 1988.

a separate legislation specifically on court-directed mediation. Alternatively, there may not be any compelling reason why court-directed mediation should be legislated in Malaysia.

Instead, in addressing the shortcomings of the said Practice Direction and the said Rules for Court Assisted Mediation, one recommended approach could be to review related provisions in the two said sources of document, and to create a common set of mediation guidelines, rules, procedures, standards and professional ethics for all mediators, including judges and judicial officers when they act as mediators, and private mediators. In fact, the view that court-directed mediation should not be legislated in Malaysia was shared by fewer than half of the respondents in this study.<sup>754</sup> It is to be noted that the respondents from the judiciary were split equally on this view in terms of whether to legislate court-direction in Malaysia. Additionally, there were fewer respondents from MMC Panel of Mediators who shared the view that court-directed mediation should not be legislated.<sup>755</sup>

According to the respondents, there must be compelling reasons to be considered in order for court-directed mediation to be legislated in Malaysia. It was felt that the mere reason of the responsible position of a judge or judicial officer, who now also acts as a mediator, is not sufficient reason to warrant legislation for court-directed mediation in Malaysia. The sentiment of the respondents was that mediation is an informal process which depends on the dynamics of mediation. They opined that this principle applies to both private mediation which is conducted by non-court mediators, and therefore, ought to also apply to court-directed mediation which is conducted by judges and judicial officers.

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<sup>754</sup> 12 out of 26 respondents in Mediation Interview – Part 2 shared this view (one respondent did not respond), where 5 of them were from the judiciary. *Supra* note 469, *supra* note 470, *supra* note 741, and *supra* note 742.

<sup>755</sup> *Supra* note 465, *supra* note 466, *supra* note 735, and *supra* note 736.

One other view was that mediation should remain as informal a process as possible so that it contributes to the flexible exchange of information and communication, and negotiation between the parties, where the process is focused on a “dialogue-based” approach rather than on a rigid framework of regulations which presumably may stifle the mediation process.<sup>756</sup> Hence, this view questioned the existence of any compelling reason why court-directed mediation should be legislated in Malaysia.

In any case, the view was for court-directed mediation not to be governed by any relevant legislation. Should the need arise to amend any of the current guidelines as stipulated in the said Practice Direction, it would be easily executed without having to go through the complexity of getting amendments effected in a statutory legislation. This view also touched on the time factor which should be taken into consideration for any of the said amendments to take effect in the legislation process.

One other reason which was raised by one of the respondents is related to the framework and model of the CMCKL and other CMCs which provide free of charge court-annexed mediation programmes to all litigants using judges as mediators to help the parties in dispute to find a solution.<sup>757</sup> In elaboration, the respondent was of the view that the structure of the CMCKL is principally sufficient to serve its purpose to ensure that court-directed mediation is conducted appropriately based on the mediation procedures as issued by the CMCKL.<sup>758</sup> Accordingly, the view was that the courts are already overseeing court-directed mediation through the said CMCs, and that there is no need to enact legislation for this purpose.

Incidentally, the described views which were against legislation of court-directed mediation were similar to those which were raised when enactment of the

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<sup>756</sup> This was shared by one respondent from MMC Panel of Mediators.

<sup>757</sup> This view was shared by one respondent from MMC Panel of Mediators; *supra* note 22.

<sup>758</sup> *Appendix C-1*, *supra* note 24, and *Appendix C-2*, *supra* note 25.

said Mediation Act was first tabled. Traditional arguments against enacting legislation on mediation have always focused on the nature of mediation which is a voluntary process and that the parties cannot be compelled to agree to use mediation as an ADR mechanism.<sup>759</sup> The said arguments reasoned that it would be a waste of time because unwilling or non-voluntary parties would be unlikely to be genuine about resolving their dispute through mediation, and that the likelihood of the parties reaching an agreed outcome would be slim. Further, other arguments against legislation touched on the fact that mediation is a flexible process which involves a range of variables in terms of the nature of the dispute, who the parties are, and their respective background, the mediation styles to be adopted by the mediator, and the skills, capabilities and behaviour of the mediator.

As such, legislation would be unnecessary as it would not be able to address the said variables through a predictable framework.<sup>760</sup> The final argument went as far as citing that it would be counter-productive to enact such legislation because this would create an impression that mediation is legalistic, and therefore, would impose unnecessary limits on the mediation process. Such concerns on mediation would affect the healthy development of mediation as an ADR mechanism.<sup>761</sup>

In addition to these concerns, the researcher humbly submits that even if court-directed mediation were legislated there is no guarantee that it would promote or facilitate settlement of dispute between the parties. Of greater importance is to instil best practices in court-directed mediation amongst mediators, lawyers, and the parties (litigants), including the attitudes of these stakeholders. The researcher is reminded of the fact that for mediation to be even considered as an ADR mechanism, the first step is for the parties to accept mediation as an effective ADR mechanism,

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<sup>759</sup> *Supra* note 28.

<sup>760</sup> *Ibid.*

<sup>761</sup> *Ibid.*

that they agree to come to the mediation table, and that they have the genuine interest to resolve their dispute through mediation.

Further, for court-directed mediation to be successful, the parties, their lawyers, and the judges and judicial officers who act as mediators, must not treat court-direction mediation as “another form of process to get parties to settle the dispute.”<sup>762</sup> It is in the researcher’s opinion that court-directed mediation should be treated and conducted as mediation in the full meaning and spirit of it, just like how private mediation is.

One of the respondents shared the view that a judge could still act and behave as a judge even if he or she performs the role of a mediator, even if court-directed mediation were legislated.<sup>763</sup> Hence, there is no guarantee that by legislating court-directed mediation that the judge would be assured to play his or her role as the mediator in accordance with the legislated provisions, especially where ethical standards of mediators are to be adhered to. On the same note, this respondent stressed that legislating court-directed mediation could inhibit or discourage judges and judicial officers from taking on the role of the mediator.

In fact, standards and codes of conduct could be legislated to ensure uniform behaviour of mediators which concern subjective judgements during mediation, provided they do not dictate the mediators’ ideologies or motivation. Instead, the mediators must address his or her biases, predispositions, values, and attitudes which may influence the mediation process. In other words, the researcher submits that there may not be a particular set of guidelines, rules, procedures, standards and professional ethics through legislation which could provide a complete and adequate remedy for the various quandaries which mediators frequently face during mediation.

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<sup>762</sup> This was the view of one respondent from MMC Panel of Mediators.

<sup>763</sup> This view was shared by one respondent from the judiciary in Sabah.

Simply put, mediators would first need to confront their attitudes and values which are related to impartiality, neutrality, bias and fairness. In other words, it can be seen that there exist limitations on the extent the standards and codes of conduct could be legislated although legislating such standards and conduct would be seen as the first step to ensure consistency and professionalism in the practice of court-directed mediation in Malaysia. In the final analysis, legislation of court-directed mediation could only provide a predictable legal framework within which such mediation practice could be conducted by judges and judicial officers. It would also only provide legitimization to the conduct of mediation by these judges and judicial officers with the stamps of approval from the Government of Malaysia and the legislator.

Be that as it may, the researcher opines that in order to fully address the question of whether court-directed mediation should be legislated in Malaysia, the final analysis in this chapter has covered three levers, namely,

1. reasons why court-directed mediation was deliberately excluded from the scope of the said Mediation Act when it was first enacted;
2. whether the adequacy of current sources of mediation guidelines, rules and procedures could be sufficiently remedied; and
3. the feasibility of creating a common set of such guidelines, rules and procedures, combined with mediation standards and professional ethics for all mediators, including judges and judicial officers, and private mediators.

## **6.6 Chapter Summary**

This chapter has attempted to provide answers to the main research question and its three sub-questions. The research findings revealed that court-directed mediation should be legislated in Malaysia based on a number of reasons, ranging

from ensuring all conduct of court-directed mediation has the “force of the law” as the current mediation guidelines have no legal effect, to ensuring standardisation of mediation practice in all types of mediation, governance and ethical standards in both court-directed mediation and private mediation in Malaysia.

Be that as it may, the researcher argues that even if court-directed mediation were legislated, there is still no guarantee that it would promote or facilitate settlement of disputes between the parties. The researcher further submits that based on the views and thoughts gathered from the respondents, there seem to be a number of areas of concerns which have been identified on court-directed mediation practice in Malaysia. The said areas of concerns are as listed below, namely:

1. lack of consistency and standardization in mediation process and governance;
2. lack of consistency and standardization in mediator competency and its assessment;
3. there are no standards and professional ethics governing judges and judicial officers who act as mediators;
4. current mediation guidelines on court-directed mediation are inadequate;
5. trial judges could mediate their own cases with the consent of the parties where the mediator and the trial judge could be the same person in the same case;
6. there is no guarantee that the settlement rate of mediation cases will be increased if legislation is introduced;
7. courts are viewed as having higher authority; and
8. judges and judicial officers are part-time mediators as they are also adjudicators.



In the next chapter the researcher reviews the extent legislating court-directed mediation in Malaysia could or could not address each of the said areas of concerns in finding the best answer to the main research question in this study - in the light of the said Mediation Act 2012 which does not govern court-directed mediation, should court-directed mediation be legislated in Malaysia?

University of Malaya

## CHAPTER 7: IMPLEMENTING COURT-DIRECTED MEDIATION IN MALAYSIA

### 7.1 Introduction

Chapter 6 revealed eight areas of concerns in the current practice of court-directed mediation in Malaysia, which is currently not legislated under the said Mediation Act.<sup>764</sup> The question is whether legislating court-directed mediation could be one possible solution to address the said concerns in the light of the already legislated private mediation under the said Act. This chapter discusses various matters when considering whether court-directed mediation should be legislated. Of importance is also the extent such legislation could overcome the said areas of concerns.

A further issue that is discussed is the possibility of a uniform mediation legislation to govern both court-directed mediation and private mediation which is already legislated under the said Mediation Act. The remaining section in this chapter explores other potential solutions which could be considered as potential alternatives to legislating court-directed mediation practice in Malaysia where legislation may not be able to address *all* of the said areas of concerns. Essentially, if the recommended solution is that court-directed mediation should not be legislated, the next question lies in regulating and standardising court-directed mediation practice with that of private mediation, and how the said areas of concerns could be addressed accordingly.

As elaborated in chapter 1, recent developments on court-directed mediation in Malaysia have raised the question whether legislative provisions should be

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<sup>764</sup> *Appendix D, supra* note 27, Section 2 on Non-application of the Mediation Act 2012 (Act 749).

introduced with a view to establish the legal position of court-directed mediation, and the integrity of its process in the light of the key findings in this study. Court-directed mediation in Malaysia has since been formalised with the launch of the first CMC in Kuala Lumpur in 2010, named as CMCKL, and with similar centres in Kota Kinabalu, Kuching, Johor Bahru, Muar, Kuantan, Ipoh, Shah Alam and others planned in parts of the country.<sup>765</sup> On August 1, 2012, the said Mediation Act 2012 came into operation.<sup>766</sup>

It is envisaged that such legislation could serve to regulate the practice of court-directed mediation by judges and judicial officers where they act as mediators, lay down the rights, obligations and protection of the parties to mediation, the mediators, and third parties, and to establish court-directed mediation as a process. Presently, court-directed mediation practice in Malaysia currently operates outside any enacted legislation guidelines. Further, there is no legal endorsement on court-directed mediation as an ADR mechanism unlike private mediation.

## **7.2 Areas of consideration if legislation is introduced**

In formulating legislation for court-directed mediation, there are a number of areas which should be taken into consideration. First, it must be clear that the area of mediation practice in question is court-directed mediation as previously defined in chapter 1.<sup>767</sup> Based on the definitions on mediation and court-directed mediation as provided in chapter 1, there does not seem to be any cause to vary mediation principles, process, procedure and governance which would warrant a separate or specific legislation on court-directed mediation per se.<sup>768</sup>

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<sup>765</sup> *Supra* note 22, and *supra* note 26.

<sup>766</sup> *Appendix D*, *supra* note 27.

<sup>767</sup> *Supra* note 8.

<sup>768</sup> On mediation principles, process, procedure and governance see chapter 2 on *Review of Relevant Terms and Concepts*, and chapter 5 on *Court-directed Mediation in Malaysia*.

In fact, as private mediation is already legislated through the said Mediation Act, it could make better sense by amending the said Mediation Act to include court-directed mediation instead of enacting a separate legislation on court-directed mediation. By having both types of mediation under the same legislation where there would be uniform mediation legislation, this would lead to a greater degree of consistency in mediation law in Malaysia.

The next matter to be considered is which provisions are applicable and which ones are not applicable to court-directed mediation in the said Mediation Act. Based on these, one would need to consider which provisions are to be excluded as they may not be relevant to judges and judicial officers who act as mediators, and whether there are any relevant new provisions to be added. According to Carroll (2002), there are regulatory provisions which relate to the practice of mediation that establishes standards of mediator competency, including minimum qualifications, and an approval process or registration scheme where power is conferred on an appointing or accrediting body to confer and revoke accreditation or registration in appropriate circumstances.<sup>769</sup> The other types of provisions such as protection of the confidentiality of the process, privilege and immunity constitute beneficial provisions.<sup>770</sup>

In essence, as elaborated in chapter 4, the said Mediation Act covers the following key features, namely, the mediation agreement, settlement agreement, issue of enforceability of agreements, mediation process, confidentiality and privileges, and mediator's liability.<sup>771</sup> It is in the researcher's opinion that the said provisions are applicable to court-directed mediation save for one, that is, Section 7(8) which stipulates that "The mediator may be paid a fee or given any other

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<sup>769</sup> Carroll, R (2002). Developments in mediation legislation. 5 *ADR Bulletin* 5, Article 5.

<sup>770</sup> *Ibid.*

<sup>771</sup> See chapter 4 on *Court-directed Mediation in Malaysia*.

consideration as agreed between the parties,” where this is not applicable to judges and judicial officers when they act as mediators because they are not compensated with mediator fees or any other form of remuneration in relation to their role as the mediator.<sup>772</sup>

On the other hand, there are a number of provisions in the said Mediation Act which are similar to those contained in the current sources of mediation guidelines and procedures on court-directed mediation, namely, the said Practice Direction, and the said Rules for Court Assisted Mediation. In comparing the said Mediation Act and the said Practice Direction, it can be seen that:

1. **Section 6** on “*Mediation agreement*” in the said Mediation Act has a similar provision under **Section 6.1** on “*Agreement to mediate*” in the said Practice Direction.
2. **Section 7** on “*Appointment of mediator*” in the said Mediation Act, where parties are allowed to appoint a mediator to assist them in the mediation, is also provided for under **Section 5** on “*Modes of Mediation*” in the said Practice Direction under Annexure B (Mediation by any other mediator).
3. **Section 13** on “*Settlement agreement*” in the said Mediation Act which is similar to **Section 3** on “*Settlement agreement*” as provided for under Annexure B (Mediation by any other mediator) in the said Practice Direction.
4. The provision on confidentiality in mediation can be seen in **Section 15** in the said Mediation Act and in **Section 6.2** in the said Practice Direction.

Several similar provisions are evident in the said Mediation Act and the said Rules for Court Assisted Mediation such as:

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<sup>772</sup> Appendix D, *supra* note 27. See Section 7 on Appointment of mediator.

1. *Section 9* on the “*Role of the mediator*” in the said Mediation Act, and *Section 4* on “*Basic function of a mediator*” in the said Rules for Court Assisted Mediation.
2. *Section 11* on “*Conduct of mediation*” in the said Mediation Act is similar to *Section 5* on “*Introducing the process*” in the said Rules for Court Assisted Mediation.
3. *Section 11(3)* in the said Mediation Act is similar to *Section 16* on “*Termination of mediation*” in the said Rules for Court Assisted Mediation.
4. *Section 12* on “*Conclusion of mediation*” and *Section 13* on “*Settlement agreement*” is similar to *Section 15* on “*Conclusion of successful mediation*” in the said Rules for Court Assisted Mediation.
5. The provision on confidentiality in mediation can be found in *Section 15* in the said Mediation Act and in *Section 9* in the said Rules for Court Assisted Mediation.

Given the similarities in the said provisions, it is in the researcher’s opinion that it is highly possible to consolidate and streamline the said provisions from the various sources, namely, the said Practice Direction, and the said Rules for Court Assisted Mediation, into one single source, that is, the Mediation Act, albeit that it may require certain amendments. By doing so, this would lead to consistency and standardization of all versions of mediation guidelines and procedures on court-directed mediation practice through the single source of mediation legislation.

Be that as it may, there are a number of relevant general mediation provisions in the said Rules for Court Assisted Mediation which could be considered for inclusion in the said Mediation Act, where these have not been expressly provided for in the said Mediation Act. Some of the said provisions are listed below:

1. The said Mediation Act is silent on the point on voluntariness of mediation where the mediator is required to ensure that the parties have come to the mediation table voluntarily, and that the mediator cannot compel the parties to go for mediation to resolve their dispute. However, this provision can be found in **Section 6** in the said Rules for Court Assisted Mediation.
2. The said Mediation Act contains one sub-section on mediator's conflict of interest under Section 7(7) whereas there is a whole provision on ***"Conflict of interest"*** under **Section 8** in the said Rules for Court Assisted Mediation.
3. The said Mediation Act is silent on the authority to settle which rests with the parties but is provided for under **Section 7** in the said Rules for Court Assisted Mediation.
4. The said Mediation Act is silent on the extent of the authority of the mediator while it is provided for under **Section 13** in the said Rules for Court Assisted Mediation.
5. The provision which is specifically relevant to judges and judicial officers who act as mediators as stipulated under **Section 14** on ***"Mediator should not try the case himself or herself"*** in the said Rules for Court Assisted Mediation where a similar provision can also be found in the said Practice Direction under **Annexure A (Judge-led mediation)**, should be included in the said Mediation Act to cater for court-directed mediation practice.

### **7.3 What Legislation Could and Could Not Achieve**

The question of whether court-directed mediation should be legislated in Malaysia can best be answered by first reviewing what such legislation could and could not achieve with respect to addressing the said eight areas of concerns on the practice of court-directed mediation in Malaysia. Essentially, the researcher contends

that only a majority of the said concerns could be addressed by enacting such legislation, *but not all of them*. However, it begs the question of whether court-directed mediation should *really* be legislated, or whether *all* of the said areas of concerns could still be addressed through other potential alternatives to the said legislation. What such legislation could and could not achieve to address the said eight areas of concerns is elaborated and discussed in turn.

### **7.3.1 Concern 1: Lack of consistency and standardization in mediation process and governance.**

One important area which legislation could achieve is to ensure that there is consistency and standardization in the mediation process and governance in both types of mediation, namely, court-directed mediation and private mediation. The researcher contends that for mediation to be promoted and encouraged as an ADR mechanism to the parties there must be consistency and standardization in mediation practice across the board regardless of who the mediators are. This key point alludes to the need to standardise court-directed mediation process and governance which is presently not legislated while private mediation has already been legislated through the said Mediation Act.<sup>773</sup>

Be that as it may, this “disparity” does seem to fuel the need to ensure that mediation practice, whether court-directed mediation or private mediation, and whether mediators are judges and judicial officers, lawyers and non-lawyers are all bound by the same mediation principles, process, procedure and governance.<sup>774</sup> Presently, all private mediators practise mediation in accordance with the said Mediation Act which contains provisions on regulatory, beneficial and procedural elements on mediation agreement, settlement agreement, issue of enforceability of

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<sup>773</sup> Appendix D, *supra* note 27.

<sup>774</sup> On mediation principles, process, procedure and governance, see chapter 2 on *Review of Relevant Terms and Concepts*, and chapter 4 on *Court-directed Mediation in Malaysia*.



these agreements, mediation process, confidentiality and privileges, and mediator's liability.<sup>775</sup> On the other hand, judges and judicial officers who act as mediators take guidance from the said Practice Direction and the said Rules for Court Assisted Mediation which provide the required guidelines on court-directed mediation practice during the pre-trial case management stage.<sup>776</sup>

Hence, it is evident that there is more than one single common source of reference on mediation practice by mediators in Malaysia. By having different sources of reference which apply to mediators who are judges and judicial officers, and those who are not, the "disparity" will continue to widen. In the effort to consider implementing consistency and standardization in mediation practice where court-directed mediation is new in Malaysia, the researcher argues whether it is fair to impose the same standards of mediation practice to judges and judicial officers because other mediators who have been in private mediation practice are from MMC Panel of Mediators.<sup>777</sup>

On this point, it is to be noted that MMC Panel of Mediators are accredited mediators, comprising lawyers and other professionals, who have completed 40 hours of mediation skills training workshop which is conducted by the Bar Council or other recognised bodies.<sup>778</sup> Presently, as far as the judiciary is concerned, no mediator accreditation has since been formalised for judges and judicial officers who act as mediators although continuous but ad-hoc training sessions on mediation have been conducted for judges and judicial officers to enhance their skills in mediation.<sup>779</sup> Be that as it may, the researcher submits that the mediation training gaps between these court mediators and private mediators can easily be addressed.<sup>780</sup> In other words, in

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<sup>775</sup> Appendix D, *supra* note 27.

<sup>776</sup> Appendix A, *supra* note 10, and Appendix B, *supra* note 16.

<sup>777</sup> *Supra* note 22, and *supra* note 26.

<sup>778</sup> Subramaniam, G. (2012), *op. cit.*

<sup>779</sup> Appointment speech as the 13<sup>th</sup> Chief Justice of Malaysia delivered by The Right Honourable Tan Sri Arifin bin Zakaria, Chief Justice of Malaysia, Putrajaya, Malaysia, September 14, 2011. See also 15<sup>th</sup> Malaysian Law Conference, "Mediation and the Courts – The Right Approach," Kuala Lumpur, July 30, 2010.

<sup>780</sup> See the later section in this chapter on "Lack of consistency and standardization in mediator competency and its assessment."

the researcher's opinion, there is nothing wrong or unfair to subject the same standard of mediation practice to court mediators as with their private mediator counterparts.

This is because there are greater advantages to be enjoyed with legislating court-directed mediation where it allows judges and judicial officers to practise court-directed mediation within consistent and standardised legislated mediation guidelines as their counterparts in private mediation. As summarised by Sir Anthony Mason who is a strong proponent of providing judges with "codified" guidance in their exercise of discretion, he said, "...In any event, there is a case for codifying the principles according to which mediations should be conducted. Codification of principles will enable review to take place attended by public scrutiny" (Mason, 1999).<sup>781</sup>

### **7.3.2 Concern 2: Lack of consistency and standardization in mediator competency and its assessment.**

The other benefit of a legislated court-directed mediation is that its provisions could govern consistency and standardization in mediator competency, and a competency-based assessment, including accreditation. It has been noted in chapter 4 and chapter 6 that judges and judicial officers may be tempted to conduct mediation in an evaluative style instead of using the facilitative approach which is expected of the mediator.<sup>782</sup>

Kovach and Love (1996) have found that "pure" mediation is always facilitative because the evaluative style is too much like traditional adversarial proceedings, and conflicts with the mediator's neutral stance, and that such evaluative practices are inconsistent with primary objectives of mediation, namely, to promote

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<sup>781</sup> Sir Anthony Mason (1999). *The Future of Adversarial Justice*. Paper presented at the 17<sup>th</sup> AIJA Annual Conference, Adelaide, Australia, August 7, 1999.

<sup>782</sup> See chapter 4 on *Court-directed Mediation in Malaysia*, and chapter 6 on *Mediation Interviews: Research Findings and Commentary*.

self-determination of parties, to help the parties examine their real interests, and to develop mutually acceptable solutions (p. 31, 32).<sup>783</sup> Any shift in the mediation style to being evaluative where the mediator becomes more directive and outcome-oriented should not be allowed to persist under “pure” mediation principles.

Judges and judicial officers must therefore be trained, taught and reminded to mediate the parties’ dispute based on mediation principles, process, procedures and governance as the mediator. Unlike adjudication, there is no guarantee of the parties reaching a settlement in mediation although the parties would reach an agreed outcome. As the judge, they should not be focused solely to push or pressure the parties to reach a settlement at all costs. As court mediators they face mounting pressure to increase the likelihood of settlements in the cases they mediate. This is driven by their KPI to reduce the backlog of cases they adjudicate where the quantifiable criterion to measure the success and effectiveness of mediation is the settlement rate.<sup>784</sup>

Hence, the researcher contends that the judge or judicial officer has to be mindful that as the mediator he or she is expected to conduct mediation and not just settlement conferences where the focus is to get the parties to reach settlement. There is the need to ensure that the mediator’s capabilities and skills to conduct court-directed mediation are constantly kept in check for purposes of consistency and standardization of mediator competency and competency-based assessment.

In this respect, it is worth noting that there are proponents who are against training mediators. There are strong views that mediation cannot be taught, and therefore, training is unnecessary for a person to be an effective mediator. Some of the said views could be seen from statements such as “Behind closed doors, skilled

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<sup>783</sup> Kovach, K. K. and Love, L. P. (1996). Evaluative” Mediation is an Oxymoron. 14 *Alternatives to the High Cost of Litigation* 31.

<sup>784</sup> *Supra* note 13, *supra* note 17, *supra* note 22, and *supra* note 26.

individuals somehow manage to extract compromise from people who disagree about intense and important matters” (Kolb, 1989, p. 60).<sup>785</sup> “Mediators are born, not made. Mediation skills are innate and cannot really be learned.” (New South Wales Law Reform Commission, 1989, p. 21)<sup>786</sup> “It is almost conventional wisdom that the art of mediation cannot be taught; that it is an art – not a science” (Maggiolo, 1985).<sup>787</sup>

Proponents who are against mediation training fear that formal training of mediators will result in the institutionalisation and professionalization of mediators where these mediators may “lose touch” with the parties, and appear to them as a remote and authoritarian figure (Zilinskas, 1995, p. 56).<sup>788</sup> Yet another argument against mediation training is that a person acting as mediator will consciously (or even subconsciously) choose techniques and qualities according to his or her personality and character according to a “mediation abacus” (Wade, 1994, p. 204).<sup>789</sup> Therefore, based on this argument, it would be futile to teach specific skills and techniques as these mediators may reject them as not being “their style.”<sup>790</sup>

However, as argued by one author, the skills which are necessary for a person to become a competent and effective mediator can be identified, described, taught and learned in a structured manner, and such skills can be improved with training.<sup>791</sup> However, such capabilities, skills and competencies may vary depending on the nature of the dispute which is to be mediated. This means that the mediator would be required to apply the necessary capabilities, skills and competencies in conducting the mediation session to assist and to guide the parties to reach an agreed outcome.

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<sup>785</sup> Kolb, D. (1989). How Existing Procedures Shape Alternatives: The Case of Grievance Mediation. *Journal of Dispute Resolution* 59.

<sup>786</sup> New South Wales Law Reform Commission (1989). *Alternative Dispute Resolution: Training and Accreditation of Mediators*, Discussion Paper 21, October.

<sup>787</sup> Maggiolo, W. (1985). *Techniques of Mediation*, Oceania Publications, USA, quoted Goldberg, A. J., a former Justice of the Supreme Court of the United States of America, who states that such a view is wrong.

<sup>788</sup> Zilinskas, A. (1995). The Training of Mediators – Is it Necessary? 6 *Australian Dispute Resolution Journal* 1, February.

<sup>789</sup> Wade, J. (1994). Mediation – The Terminological Debate. 5 *Australian Dispute Resolution Journal* 204.

<sup>790</sup> *Ibid.*

<sup>791</sup> Zilinskas, A. (1995), *op. cit.*

Be that as it may, the researcher contends that the judges and judicial officers must first change their mind-set and attitude towards mediation. It was previously noted that while it is recognised that a person's personality is difficult to change, attitude change seems to be an area which is trainable.<sup>792</sup> It was also emphasized that it is important for judicial officers as mediators to possess the basic attributes of innate passion and affinity, empathy, humility and patience.<sup>793</sup>

It is no wonder that Landerkin and Pirie (2003) stressed the need for training to neutralise potential problems with judges and judicial officers as mediators. The authors recommended that these court mediators must, of course, be trained to mediate, and more specifically, to negotiate the particular challenges of court-directed mediation.<sup>794</sup> In other words, the key is changing the judicial mind-set where the training content must address this explicitly because there is no place for an adjudicator in a mediation session.<sup>795</sup> As summarised by the Honourable Louise Otis (2006), "It is very dangerous to put a judge in the mediation room if the judge has not been trained to take off the hat of adjudication, and step into the job of mediator."<sup>796</sup>

Hence, in any training programme for mediators, the content ought to focus on the development of such skills and full understanding of the mediation process. It has been noted that effective mediators ought to demonstrate their level of competencies in three areas, namely:

1. knowledge (negotiation theory, mediation strategies, tactics, and processes in both negotiation and mediation);

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<sup>792</sup> See chapter 2 on *Review of Relevant Terms and Concepts*, and chapter 6 on *Mediation Interviews: Research Findings and Commentary*.

<sup>793</sup> See chapter 2 on *Review of Relevant Terms and Concepts*.

<sup>794</sup> Landerkin, H. F., & Pirie, A. J. (2003). Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada? 82 *Canadian Bar Review* 249.

<sup>795</sup> Otis, L. and Reiter, E. H. (2006), *op. cit.*

<sup>796</sup> Comments made by retired Justice of the Quebec Court of Appeal, leader and global authority in judicial mediation, at The Ontario Bar Association (OBA) Policy Day, December 9, 2011, as noted by Iny, J. (2011). Judicial Mediation: Transformation or Transgression? December 22, 2011. See

[http://www.louiseotis.com/index.php?option=com\\_content&view=frontpage&itemid=3&lang=en](http://www.louiseotis.com/index.php?option=com_content&view=frontpage&itemid=3&lang=en).

2. skills (analytical, communication in listening and questioning skills, organization and planning skills); and
3. attitude (ethics, values and professionalism) (Cruickshank, 1991, p. 248).<sup>797</sup>

In addition, the training content should also include a comprehensive understanding of mediation, including various mediation styles and techniques which could be applicable to various types of disputes.<sup>798</sup> Essentially, mediators require training in both “hot” skills (technical knowledge on the mediation process and principles) and “soft” skills (such as negotiation skills) to be effective mediators.

Simply put, for judges and judicial officers who act as mediators to be effective, they require professional training and accreditation in mediation. This is because the role of the mediator and the role of the judge have very different skill sets. These judicial officers also need to undergo professional training on both “hot” skills and “soft skills.” Such training content or courses should not only teach and allow court mediators to be exposed to the theories and principles of mediation, but also to enable them to practise what they have learnt in order to enhance their practical mediation skills. In fact, in an effort to enhance mediation skills of judges and judicial officers, a special training was conducted in 2011 for judges and officers in Malaysia.<sup>799</sup>

The MMC has its own rules for purposes of mediator accreditation. Its panel of accredited mediators who comprise lawyers and other professionals must have completed 40 hours of mediation skills training workshop which is conducted by the Bar Council or other recognised bodies.<sup>800</sup> Presently, as far as the judiciary is concerned, no mediator accreditation has since been formalised and implemented for judges and judicial officers who act as mediators in conducting court-directed

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<sup>797</sup> Cruickshank, D. (1991), *op. cit.*

<sup>798</sup> Zilinskas, A. (1995), *op. cit.*

<sup>799</sup> The Right Honourable Tan Sri Arifin bin Zakaria, Chief Justice of Malaya (2012), *op. cit.*

<sup>800</sup> Subramaniam, G. (2012), *op. cit.*

mediation. However, continuous but ad-hoc training sessions on mediation have been conducted for judges and judicial officers in Peninsular Malaysia, Sabah and Sarawak to enhance their skills in mediation.<sup>801</sup>

Further, in an effort by the judiciary to enhance such skills, a special training was also conducted for judges and judicial officers by a senior judge from the USA.<sup>802</sup> It is to be noted that the judiciary does seem to take a serious look about making sure that judicial training, including mediation training is provided for judges and judicial officers. According to the Chief Justice of Malaysia, the plan is to establish a centralised body under the Judicial Appointment Commission in collaboration with the Chief Registrar's Office of the Federal Court where the said body is responsible for training of judges and judicial officers.<sup>803</sup> However, since 2011 when the said statement was made by the said Chief Justice of Malaysia, the researcher notes that such a centralised body has not come into existence at the time of writing this study.

The researcher believes that in a multi-cultural society like Malaysia, the importance of culture must be embedded in the design, framework and process for mediation training and accreditation. According to one author, there is the need for intercultural mediation training to be included as a main part of the mediation accreditation training which should cover cross-cultural studies, role plays, cross-cultural communication skill development, and processes that encourage reflective and life-long learning.<sup>804</sup>

It was stressed by the said author that mediators need to be trained to be “culturally aware and sensitive mediators” where they are able to increase their self-awareness and self-development. As such, issues of culture, identity and power ought

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<sup>801</sup> *Supra* note 779.

<sup>802</sup> *Supra* note 799. It was noted that the special six-month training was conducted by Mr Justice Gordon J. Low, a Senior Federal Judge of Utah, USA in 2011.

<sup>803</sup> *Supra* note 779.

<sup>804</sup> Law, S. F. (2009). Culturally sensitive mediation: The importance of culture in mediation accreditation. 20 *Australasia Dispute Resolution Journal* 3, August, p. 162-171.

to be catered for in the mediation accreditation process. For example, International Mediation Institute (IMI) conducts certification for mediators who are involved in mediation sessions involving more than one culture, where IMI certified professional mediators are given the opportunity to obtain the intercultural mediation competency certification.<sup>805</sup>

In addition to ensuring that the mediators' competency levels are current and up-to-date, they must be encouraged to focus on their professional development as mediators on a continuous basis. As such, continuous assessments on their mediator competency levels and professional development requirements should be established for this purpose, and would serve to provide regular quality checks for the benefit of the mediators, the public, and the profession. In short, training programmes such as proper initial training, initial post-training supervision, and on-going review and continuing education are necessary to ensure that the appropriate standards are maintained amongst all judges and judicial officers who act as mediators.

In essence, such efforts should be consolidated and leveraged with existing efforts which are organised and conducted by MMC for its panel of mediators in private mediation. The researcher contends that all efforts on mediator competency, assessment of mediator competency, and accreditation of mediators ought to be standardised and regulated across all types of mediation whether court mediation or private mediation with emphasis on mediation principles such as confidentiality in mediation, party autonomy, mediator impartiality and mediator neutrality. The objective is to ensure that consistency and quality are not compromised in the interests of the parties and the profession.

It is recommended that references ought to be drawn from countries which have implemented formal training programmes including certification and

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<sup>805</sup> Law, S. F. (2009), *op. cit.*, cited IMI, *Mediator Competency Standards*, <http://www.imimediation.org> viewed on January 22, 2009.



accreditation of all mediators including judicial officers. As evident in countries like Australia and Singapore, the researcher opines that the process and content of such programmes have been comprehensively thought through for the benefit of all mediators, and to raise the standard of the mediation profession in their respective countries.

In Australia, for example, accreditation of mediators is handled by National Mediator Accreditation System (NMAS).<sup>806</sup> The “Australian National Mediator Standards” cover a variety of areas such as the creation of Recognised Mediation Accreditation Bodies (RMABs) to handle the process of accreditation, the establishment of approval process, and continuing accreditation requirements for mediators.<sup>807</sup> For example, its Section 3(1) Approval Standards for Mediators Seeking Approval under the NMAS in Australian National Mediator Standards 2007 requires mediators to comply with given pre-requisites on good character, ethical standards, and competency levels; Section 5(3) requires mediators who do not have sufficient experience in mediation to complete a 38-hour workshop, including at least nine simulated mediation sessions; and Section 1(3) requires accredited mediators to conduct at least 25 hours of mediation and attend 20 hours of continuing professional development courses every two years.<sup>808</sup>

In Singapore as there is no national system or law to regulate the accreditation, the quality of standards of mediators nor is there a law regulating the practice of mediation, the Singapore Mediation Centre (SMC) developed its own system of mediator training and accreditation, and also established its training arm in mediation, negotiation and conflict management.<sup>809</sup> Accreditation is limited to a period of one year, and is subject to renewal; its re-accreditation will be granted if the mediator

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<sup>806</sup> Bergin, P. A. (2012), *op. cit.*

<sup>807</sup> *Ibid.*

<sup>808</sup> *Ibid.*

<sup>809</sup> Loong, S. O. (2005), *op. cit.*

engages in at least four hours of annual continuing education in mediation and is available to conduct at least 5 mediations per year if requested to do so to ensure the maintenance of his or her skills.<sup>810</sup>

In other words, even judges and judicial officers who act as mediators require continuing mediation education and training in order to gain more practical experience in mediation. This should apply as early as possible in the competency and its assessment process, starting with those who are just entering into the judiciary where they would require such exposures to mediation through pre-bench orientation, guest speakers, workshops, seminars and judicial conferences which offer content on conflict management, interest-based negotiation, and conducting mediation sessions in accordance with mediation process.

In fact, the researcher opines that there should not be any distinction between judges and judicial officers who act as mediators, and private mediators who are not judicial officers. The researcher submits that there is the need to standardise such mediation competency, its competency assessments, certification and accreditation for all mediators, and for all these elements to be assimilated into the mediation profession and practice in Malaysia. Therefore, these elements ought to be regulated to ensure that the standard and quality of the mediation profession are not compromised. This is one area of concern which legislation of court-directed mediation would potentially be able to address, that is, the lack of consistency and standardization in mediation competency and its assessment for all mediators, especially judges and judicial officers when they act as mediators.

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<sup>810</sup> *Ibid.*

### 7.3.3 Concern 3: Lack of consistency and standardisation in standards and professional ethics in mediation.

It was previously discussed in chapter 4 and chapter 6 that presently there are no standards and professional ethics in mediation *per se* governing judges and judicial officers when they act as mediators although they are guided by current mediation guidelines and procedures as stipulated in the said Practice Direction and the said Rule for Court Assisted Mediation.<sup>811</sup> Further, it was noted that there are inadequate provisions governing ethical standards of mediation practice in both the said sets of guidelines and procedures.<sup>812</sup>

MMC Panel of Mediators, on the other hand, refer to the MMC Code of Conduct when they act as mediators in sessions held by the MMC.<sup>813</sup> Be that as it may, it is to be noted that standards for the conduct of mediation practice and professional ethics in mediation must apply to all mediators regardless of their background, whether they are mediators in court-directed mediation or private mediation, and therefore, should cover the majority of situations faced by mediators.

The researcher contends that mediators face ethical issues when conducting mediation throughout the mediation process.<sup>814</sup> For judges and judicial officers when they act as mediators, mediation moves them out of their familiar adjudicative role where they do not communicate directly with the parties unless the parties are unrepresented by their respective legal counsels. In mediation, however, as court mediators, they are placed into closer proximity to the parties where they are required to play the facilitative role which requires them to communicate directly and constantly with the parties throughout the mediation process.

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<sup>811</sup> See chapter 4 on *Court-directed Mediation in Malaysia*, and chapter 6 on *Mediation Interviews: Research Findings and Commentary*. See Appendix A, *supra* note 10, and Appendix B, *supra* note 16.

<sup>812</sup> *Ibid.*

<sup>813</sup> Appendix K, *supra* note 640.

<sup>814</sup> Morris, C. (1997), *op. cit.*

Simply put, they are now put in a more proactive role as the mediator in mediation as compared to their reactive role in the adjudicator role. As such, this has important ethical implications because they are now put in the delicate position of keeping, and on occasions, strategically revealing the confidences of the parties during caucuses.<sup>815</sup> Such closer contacts with the parties which take place in an informal atmosphere like mediation would start to blur the rules and boundaries, which are not clearly defined, and therefore may present ethical dilemmas for them.<sup>816</sup>

In formulating standards and professional ethics in mediation, it has been argued that effective mediation involves not confrontation or competition but cooperation.<sup>817</sup> Carrie Menkel-Meadow (1997) refers to it as “non-adversarial ethics” where effective mediation requires legal ethics to be redefined from the paradigm of competition.<sup>818</sup> In essence when considering legislation on mediation, three issues need to be looked at, namely, confidentiality, party autonomy and fair treatment, where these principles have been previously elaborated in chapter 2.<sup>819</sup>

On confidentiality, judges and judicial officers when acting as court mediators need to ensure that the right balancing act is preserved in terms of receiving sensitive and confidential information from the parties, and knowing how to use such information to guide and assist the parties to reach an agreed outcome, while at the same time, ensuring that confidentiality is not breached. It is to be noted these court mediators must always be mindful that their role as facilitators is an active and not a passive one, and that their choices of phrasing, emphasis, or timing in transmitting information have ethical implications.<sup>820</sup>

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<sup>815</sup> Otis, L. and Reiter, E. H. (2006), *op. cit.*

<sup>816</sup> Bush, R. A. B. (1994). A Study of Ethical Dilemmas and Policy Implications, *Journal of Dispute Resolution* 1.

<sup>817</sup> Adams, G. W. (2003). Mediating Justice. *Legal Dispute Negotiations*.

<sup>818</sup> Menkel-Meadow, C. (1997). Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities. 38 *S. Texas Law Review* 407.

<sup>819</sup> Otis, L. and Reiter, E. H. (2006), *op. cit.* See also chapter 2 on *Review of Relevant Terms and Concepts*.

<sup>820</sup> Otis, L. and Reiter, E. H. (2006), *op. cit.*

On party autonomy, judges and judicial officers when acting as court mediators must ensure that they remain the guardian of the fairness of the mediation process while the parties are empowered to explore and review the various options and solutions, and to reach an agreed outcome which they both can live with. Hence, the role of the mediator is limited to assisting and guiding the parties to resolve their dispute. Lastly, in order to ensure that there is fair treatment the mediator must protect the integrity of the mediation process from abuses of influence or power (Hyman, 2004, p. 22).<sup>821</sup> As such, the mediator is expected to be vigilant at all times that the parties' consent is free and clear, and that the mediation process is not conducted in such a way as to unreasonably handicap one party or the other, especially a party who is unrepresented by a legal counsel.<sup>822</sup>

However, there are also issues which challenge the creation and implementation of a code of ethics for mediators.<sup>823</sup> First, mediation is a flexible and process which is not easy to define. Such a difficulty adds to the complication in trying to determine the right ethics and standards of practice. Next, of consideration is where mediators could be bound to comply with other professional ethics due to their primary professions, that is, their training, background, education, and the like, prior to becoming mediators. The question is how a decision would be made by mediators in the event that there is a conflict of the code of ethics between that of mediation, and of their primary professions.

In this respect, references should also be drawn from how other countries have implemented such standards and professional ethics in mediation for all mediators, including those who conduct court-directed mediation.<sup>824</sup> For instance, the Model Standards of Conduct for Mediators (Model Standards) was adopted in August 2005

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<sup>821</sup> Hyman, J. M. (2004). Swimming in the Deep End: Dealing with Justice in Mediation. 6 *Cardozo J. Conflict Resolution* 19.

<sup>822</sup> Otis, L. and Reiter, E. H. (2006), *op. cit.*

<sup>823</sup> Kovach, K. K. (1994), *op. cit.*

<sup>824</sup> Ravindra, G. (2005), *op. cit.*

by the American Bar Association (ABA), the American Arbitration Association (AAA), and the Association for Conflict Resolution in the USA.<sup>825</sup> In Virginia, in order to maintain the integrity of certified mediators and mediation process, Standards of Ethics and Professional Responsibility have been adopted, and it is applicable to all certified mediators.<sup>826</sup>

Another relevant example which is closer to Malaysia can be seen in Singapore in the establishment of Model Standards of Practice for Court Mediators, and a set of code of ethics for court mediators, which covers general responsibilities of mediators, their responsibilities to the parties, where all court mediators must comply with these ethical standards (Lim and Liew, 1997, p. 204, 205).<sup>827</sup> It is undeniable that these countries are very strict and serious about ensuring that proper and appropriate standards and professional ethics are formally established and enforced appropriately for all mediators, including court mediators. It is to be noted that there is no legislation to govern court-directed mediation or private mediation. Simply put, based on the practices in these countries, legislation may not be the only solution to address the concern on the lack of consistency and standardization in standards and professional ethics in mediation.

Be that as it may, the researcher contends that given the challenges of determining the right standards and code of ethics for judges and judicial officers when they act as court mediators, legislation could be the right way to provide the “legal effect” in ensuring that there is consistency and standardization in such standards and professional ethics in mediation. Such legislation should potentially also cover the same standards and code of ethics for private mediators because there is the need for standards and ethics to be formalised and regulated to ensure

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<sup>825</sup> *Ibid.*

<sup>826</sup> *Ibid.*

<sup>827</sup> Lim, L. Y. and Liew, T. L. (1997), *op. cit.* The Model Standards of Practice for Court Mediators covers objective and role of court mediation, types of mediation conducted, the nature of mediation purposes with an emphasis on quality and training of court mediators.

consistency in mediation practice, process and conduct of mediation sessions by judges and judicial officers who act as court mediators, as with private mediations which are conducted by MMC Panel of Mediators.

#### **7.3.4 Concern 4: Current mediation guidelines on court-directed mediation are inadequate.**

The comments made in chapter 4 and chapter 6 touched on the views and thoughts of the respondents that there are shortcomings in the said Practice Direction guidelines and on the said Rules for Court Assisted Mediation, in terms of regulating the practice of court-directed mediation in Malaysia. The question is whether legislation could address the said shortcomings, and perhaps to replace the said Practice Direction and the said Rules for Court Assisted Mediation. Further, as previously highlighted in the earlier section of this chapter, the other question is whether one single source of mediation guidelines and procedures on process and governance ought to be the better option as compared to the present situation of having two separate sets of such guidelines as evidenced by the co-existence of the said Practice Direction and the said Rules for Court Assisted Mediation.

On the said Practice Direction guidelines, it was felt that the said guidelines are adequate for the current moment but may become inadequate in the long run in the absence of any legislation to govern the said practice today.<sup>828</sup> The other concern which was raised by the respondents touched on the shortcomings of the said guidelines as being relatively too general in nature where they lack depth and precision in several areas, which were extensively discussed in chapter 6.<sup>829</sup>

On the said Rules, in terms of the adequacy of the guidelines, the researcher raised several areas which have not been sufficiently covered, specifically in relation

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<sup>828</sup> *Supra* note 413, *supra* note 414, and *supra* note 415.

<sup>829</sup> *Supra* note 416, *supra* note 417, and *supra* note 721. See also chapter 6 on *Mediation Interviews: Research Findings and Commentary*.

to Section 2 (Judicial officers as mediators), Section 3 (Cases that are highly recommended for mediation), Section 4 (Basic function of a mediator), Section 5 (Introducing the process), Section 8 (Conflict of interest), and Section 9 (Confidentiality).<sup>830</sup> The other concern which was raised in chapter 4 is the fact that the said Rules may not be as widely used by judges and judicial officers of the court in Peninsular Malaysia as they are by their counterparts in Sabah and Sarawak although all judicial officers have access to the said Rules.<sup>831</sup>

It is in the researcher's opinion that legislating court-directed mediation could be one potential solution to be considered to address the two questions on the table in relation to the inadequacy of the said Practice Direction and the said Rules for Court Assisted Mediation. The said potential solution could entail the enactment of a uniform set of mediation legislation for both court-directed mediation practice and private mediation practice. It is opined that the said Mediation Act could then be used as the baseline to incorporate new provisions which relate to the role of judicial officers as mediators in court-directed mediation, and to incorporate amended provisions in the current mediation guidelines in the said Practice Direction, and the said Rules of Court Assisted Mediation into the said Mediation Act.

Essentially, the said uniform legislation ought to achieve the following objectives, namely:

1. To incorporate provisions which are relevant to court-directed mediation from the said Rules for Court Assisted Mediation as recommended in the earlier section of this chapter;<sup>832</sup>
2. To amend identified provisions in the said Practice Direction before incorporating them into the said Mediation Act;<sup>833</sup>

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<sup>830</sup> See chapter 4 on *Court-directed Mediation in Malaysia*.

<sup>831</sup> *Supra* note 434. See also chapter 6 on *Mediation Interviews: Research Findings and Commentary*.

<sup>832</sup> See earlier section in this chapter on "Areas of consideration if legislation is introduced."

<sup>833</sup> *Appendix A, supra* note 10, Annexure A (Judge-led mediation). See earlier discussion in chapter 4 on *Court-directed Mediation in Malaysia*.



3. To address the identified provisions in the said Rules for Court Assisted Mediation, which are viewed as inadequate as previously identified in chapter 4.<sup>834</sup>

### **7.3.5 Concern 5: Trial judges could mediate their own cases; mediator and trial judge are the same person.**

This area of concern in question where trial judges could mediate their own cases, and if mediation fails, the mediating judge could hear the case with consent from the parties, is one area of concern which could essentially be addressed if court-directed mediation is to be legislated. As previously elaborated in chapter 4, the researcher draws attention to Section 1 under Annexure A (Judge-led Mediation) in the said Practice Direction where it states that “*Unless agreed to by the parties [emphasis added]*, the Judge hearing the case should not be the mediating Judge. He should pass the case to another judge. If the mediation fails then it will revert to the original judge to hear and completed the case.”<sup>835</sup>

In other words, if the parties agree to have the same trial judge who heard their case to be the mediator, then the judge could act as the mediator. Further as seen in chapter 6, one of the concerns raised by the majority of the respondents was that if mediation fails, the trial judge who had acted as the mediator may be prejudiced or have pre-conceived notions of the facts or evidence which he or she is privy to during mediation which could influence his or her delivery of the judgement.<sup>836</sup>

Therefore, this section returns to the said area of concern that although consent of the parties is obtained, the trial judge could still be the mediator in the same case where the case is referred to court-directed mediation, and that the

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<sup>834</sup> See chapter 4 on *Court-directed Mediation in Malaysia*.

<sup>835</sup> See chapter 4 on *Court-directed Mediation in Malaysia*. See also *Appendix A*, *supra* note 10, Section 1, Annexure A (Judge-led mediation).

<sup>836</sup> See also chapter 6 on *Mediation Interviews: Research Findings and Commentary*.

mediator could still be the trial judge to hear and complete the case if mediation fails. The main ground for such a concern is that the impartiality and biasness of both the mediator and the trial judge could be severely compromised if left unchecked.

Outside of Malaysia, other countries have taken a clear stand to prohibit trial judges from mediating their own trial list, and for mediating judges to hear the same case if mediation fails.<sup>837</sup> For example, in the USA under the Delaware and Edmonton judicial dispute resolution programmes, sitting judges may act as mediators but these judges will not be assigned to the mediated cases should mediation fail.<sup>838</sup> Similarly, in Australia, Section 65(5) of the Supreme Court Act 1935 (SA) provides that a judge who has attempted to mediate a dispute should be excluded from adjudication.<sup>839</sup> Similar requirement can be seen in the District Court of New South Wales where the judge will not hear the case if the mediation is not successful.<sup>840</sup> Such a hard stand is also consistent with the “Guide to Judicial Conduct” which states that “The statutory obligation of confidentiality binding upon a mediator, and the withdrawal of the judge from the trial or an appeal, if the mediation fails, should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary” (Australia and New Zealand Council of Chief Justices, 2002, p. 17).<sup>841</sup>

It was held in one Malaysian case that the said Annexure on judge-led mediation in the said Practice Direction is not an automatic disqualification of the trial judge who mediated the case.<sup>842</sup> The court held that it must be satisfied that there is a real danger of bias on the part of the judge if he or she were to proceed to hear the case as each case has to be decided on its own set of facts and circumstances, and therefore cannot be a blanket disqualification (p. 295).<sup>843</sup>

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<sup>837</sup> Ravindra, G. (2005), *op. cit.* See Field, I. D. (2009), *op. cit.*, p. 464.

<sup>838</sup> *Ibid.*

<sup>839</sup> *Ibid.*

<sup>840</sup> *Ibid.*

<sup>841</sup> Australia and New Zealand Council of Chief Justices (2002). *Guide to Judicial Conduct*.

<sup>842</sup> *Dato' Dr Joseph Eravelly v Dato' Hilmi Mohd Nor & Ors* [2011] 3 CLJ 294.

<sup>843</sup> *Ibid.*

As stated by VT Singham J,

“...the litigants must have the confidence and trust in the impartiality of the presiding judge....it is for the judge himself or herself to decide whether or not he or she should still proceed to hear the case on the ground that there is a ‘real danger of bias.’ All this will depend on the facts and surrounding circumstances of the case and what had really transpired during the mediation and the ground that the judge had conducted the mediation should not hear the case should not be applied as an automatic disqualification or per se even if that was envisaged by the Practice Direction No. 5 of 2010” (p. 305).<sup>844</sup>

In other words, it is still possible for the judge who mediated the case to be the trial judge as long as the parties consent to having the same judge, and that the courts must be satisfied that there is no ‘*real danger of bias*.’

Based on the said ruling, it is even more critical to remove complete reliance on the said Practice Direction by judges and judicial officers when they act as court mediators, and to allow these court mediators to be bound by legislation insofar as court-directed mediation practice in Malaysia is concerned. It is worth recalling at this point that the said Rules for Court Assisted Mediation do not contain any provision to allow the Judge hearing the case to be the mediating Judge with consent from the parties. In fact, it is expressly prohibited in the said Rules for Court Assisted Mediation where it is stated that “...judges and judicial officers are strictly not permitted to mediate cases which are on their own trial list. This is to prevent judges from being unfairly accused of attempting to avoid hearing certain cases. Judges may only mediate cases which are on the trial list of other judges.”<sup>845</sup>

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<sup>844</sup> *Ibid.*

<sup>845</sup> *Appendix B, supra* note 16, Section 2.2.

Therefore, it is submitted that this concern of trial judges being mediators in their own cases could best be addressed by regulating court-directed mediation practice in Malaysia to ensure that there is consistency and standardisation in mediation process and governance, and in mediator competency and its assessment, as with private mediation. Simply put, judges and judicial officers when they act as court mediators would not be confused or be allowed to choose to refer to either the said Practice Direction or the said Rules of Court Assisted Mediation, where conflicting provisions on this area of concern are evident where the former allows trial judges to mediate their own cases with consent from the parties while the latter expressly prohibits such a practice.

#### **7.3.6 Concern 6: There is no guarantee that settlement rate will be increased.**

Should legislation be enacted for court-directed mediation, the question to be asked is whether this would guarantee an increased settlement rate with higher number of cases successfully mediated. Under pure mediation principles, the role of judges and judicial officers does not change when they act as mediators in court-directed mediation from the role of private mediators.<sup>846</sup> Even as court mediators, they do not compel the parties to settle by holding the law above their heads like a sword but rather guide the parties to a better understanding of their differences in order to resolve their dispute.<sup>847</sup> In addition to that, they are not to extract a settlement or to steer the mediation process towards a particular result but instead they are to guide and assist the parties come to their own resolution of their dispute.<sup>848</sup>

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<sup>846</sup> It is worth recalling at this point that the researcher refers to “pure” mediation principles under Kovach, K. K., and Love, L. P. (1996), *op. cit.*

<sup>847</sup> Otis, L., and Reiter, E. H. (2006), *op. cit.*

<sup>848</sup> Hedeon, T. (2005). Coercion and Self-Determination in Court-Connected Mediation: All mediators are voluntary, but some are more voluntary than others. 26 *Justice System Journal* 273.

In other words, party autonomy and party self-determination still apply where the parties are still in control, and they determine how things will unfold during mediation. The parties have the empowerment to prioritise and to find a resolution to their dispute under the guidance and assistance of the judicial officer as the mediator. Hence, consent of the parties which is a central pillar of the mediation process must still be obtained throughout the process, and the judges and judicial officers who act as court mediators must never use their position to manipulate this consent.<sup>849</sup>

Simply put, mediation will take its course in accordance with the process even in legislated court-directed mediation, largely determined by the parties themselves on what and how they want the resolution to unfold. Each mediation session differs from one to another, depending on what the parties' underlying interests and needs are, and how the extent to which they finalise an agreed outcome, one which they could live with. Therefore, legislation of court-directed mediation would not guarantee that more mediated cases get settled where a higher settlement rate would be recorded.

However, the researcher submits that while legislation does not guarantee that more mediated cases get settled, it must be noted that legislation could assist to ensure that judges and judicial officers play their role as the mediator within consistent and standardised mediation process and governance, and that their mediation competency and its assessment have undergone the required consistent and standardised formalisation. As discussed and elaborated in the earlier section of this chapter, with such consistency and standardization in place, the parties should be able to receive proper and professional guidance and assistance from the judicial officers when they act as mediators in the parties' effort to find and to reach an agreed outcome through regulated court-directed mediation.

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<sup>849</sup> Nolan-Haley, J. M. (1999). Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making. 74 *Notre Dame Law Review* 775.

### 7.3.7 Concern 7: Courts are still viewed as having higher authority.

As discussed in chapter 6, one of findings in this study is that the public (and the parties) still view the courts as having higher authority because people respect the bench which has traditionally been seen as the place of higher authority and wisdom. Judges and judicial officers will always remain as judges and judicial officers in the eyes of the parties even when they act as court mediators in the informal setting of the mediation room.<sup>850</sup> This is because the court mediator's position in society is such that it would be difficult for the parties to make a distinction between the judge or judicial officer, and the court mediator where the parties could misinterpret or misconstrue what the judge or judicial officer says during mediation as the court's decision on the mediated issues concerning the dispute.

As elaborated in chapter 6, the consequence of such a concern is that the parties may be pressured to accept mediation as an ADR mechanism to resolve their dispute. Further, the judge or judicial officer may be tempted to push forward his or her views using the evaluative style to pressure the parties to reach a settlement for the cases to be closed expeditiously. The Honourable Marilyn Warren (2006) has this to say in respect of this point, "in difficult cases, the gravitas of a judge would increase the likelihood of a settlement because parties do respect the bench and the mantle of the judicial office" (p. 83).<sup>851</sup>

This begs the question whether legislation of court-directed mediation where judges and judicial officers act as court mediators could address this perception which has been identified as one of the areas of concern of court-directed mediation in this study. To put things in context, the said area of concern centres on court-directed mediation presumably having the "force of the law" because it is conducted by judges

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<sup>850</sup> Otis, L. and Reiter, E. H. (2006), *op. cit.*

<sup>851</sup> Warren, M. L. (2010), *op. cit.*

and judicial officers where some parties appear to be more receptive to options or suggestions tabled by court mediators.<sup>852</sup> In the researcher's opinion, legislation alone may not be able to address the perception issue that courts have a higher authority.

The researcher submits that the parties essentially need to be educated on the role of judges and judicial officers as court mediators, and what court-directed mediation plays its intended role as an ADR mechanism in terms of how it is integrated in the litigation process and court system. At the same time, what legislation could then achieve is to ensure that judges and judicial officers "behave" and comply with the regulated consistent and standardised mediation process and procedures where these court mediators would have been subject to the mandated requirements of professional mediator competency and its standardised assessment.

#### **7.3.8 Concern 8: Judges will still remain as part-time mediators.**

This is one area of concern which legislation could seriously consider is to impose strict regulations on requirements in the appointment of full-time mediators for both court-directed mediation and private mediation. Presently, judges and judicial officers are part-time court mediators as they also adjudicate cases. Private mediators are also part-time mediators as they also practise law at the same time if they are lawyers, or they could be occupied in their other professions on a part-time basis. Suffice to state at this point that presently the only mediators who practise mediation on a full-time basis are those mediators who provide court-annexed mediation programmes at the CMCs other than judges and judicial officers.

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<sup>852</sup> See chapter 6 on *Mediation Interviews: Research Findings and Commentary*.

In chapter 4 the researcher explained that court-annexed mediation programmes are conducted by both full-time and part-time mediators at CMCKL and other CMCs. In the case of CMCKL, all registered cases for mediation which originate from the lower courts are mediated by full-time mediators from CMCKL while those from the higher courts are mediated by part-time High Court judges.<sup>853</sup> It was noted that based on the statistics provided by CMCKL judges who act as part-time mediators achieved a much lower settlement rate as compared to their full-time counterparts.<sup>854</sup> In other words, more mediated cases get settled by full-time mediators as compared to part-time mediators.

It was elaborated in chapter 4 that based on the said statistics the move to make judges full-time mediators at CMCs ought to be seriously considered by the courts.<sup>855</sup> This remains a key concern because cases which did not settle through mediation would subsequently be sent back to the courts where the same trial judges who had acted as mediators could hear and complete these cases, that is, where they may hear their own trial list although consent from the parties must first be obtained.<sup>856</sup> In short, a lower settlement rate of mediated cases could increase the likelihood of more cases to be sent back to the courts for final settlement.

The last area of contention is the time factor as discussed in chapter 6 where it was felt that owing to the dual role, both as the judge and the mediator, the perpetual challenge or obstacle faced by the mediator would be not having sufficient time on their hands to dispose of their daily load of cases and to handle mediation cases as well.<sup>857</sup> The concern is that such a situation could compromise the quality of the judgments delivered by these judges in cases which they adjudicate, and the quality and the settlement rate of the mediated cases which they mediate.

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<sup>853</sup> See chapter 4 on *Court-directed Mediation in Malaysia*.

<sup>854</sup> See Table 4.3 in chapter 4 on *Court-directed Mediation in Malaysia*.

<sup>855</sup> See chapter 4 on *Court-directed Mediation in Malaysia*.

<sup>856</sup> *Supra* note 622, *supra* note 655, and *supra* note 656.

<sup>857</sup> *Supra* note 708, and *supra* note 709.



Hence, it is submitted that there seems to be sufficient cause to regulate requirements on the appointment of mediators to be on a full-time basis. Such a cause should not be restricted or limited to only judges and judicial officers who act as mediators in court-directed mediation. The researcher contends that the same regulation ought to be applied to private mediators too in order to ensure that the mediation profession in Malaysia is to be taken seriously. By regulating such requirements through legislation what could be achieved would be a consistent and standardised set of regulations on the eligibility of mediators to be on a full-time basis before they are duly appointed.

Simply put, such a move would benefit both the parties and the mediators alike. For the parties, they would no longer need to be burdened with the notion of whether the mediator wears the “adjudicator hat” or the “mediator hat” in court-directed mediation where judges and judicial officers act as court mediators, or whether the private mediator wears the “legal counsel hat” or the “mediator hat” in private mediation. For the mediators, they would be able to completely focus and concentrate on being the full-time mediator without having to go through any ethical dilemma of being the “judge” or the “legal counsel” to the parties and to the dispute at hand.

#### **7.4 Chapter Summary**

This chapter discussed what could or could not be achieved through legislation of court-directed mediation in Malaysia with a specific view to address the current practices of judges and judicial officers when they act as mediators. Of the eight areas of concerns, *not all of them* could be addressed by enacting such legislation. Only six of the said areas of concerns could potentially form the required and necessary content in the said legislation. The question then is whether legislation

of court-directed mediation should really be enacted, and whether other potential alternatives to legislation could address *all* of the said areas of concerns.

The next chapter attempts to lay down what these potential alternatives to legislation are, including a draft set of mediation guidelines for court-directed mediation in consideration of the gaps and inadequacies of current mediation guidelines in the form of the said Practice Direction, the said Rules for Court Assisted Mediation, and general guidelines as issued by CMCKL and other CMCs in Malaysia.

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## **CHAPTER 8: CONCLUSION**

### **8.1 Introduction**

It is worth recalling at this point that the main objective of proposing such legislation is to ensure that court-directed mediation is practised in accordance with professional mediation principles by judges and judicial officers who act as competent mediators. These mediators are expected to deliver the desired results and benefits to all stakeholders, namely, the parties, the judges and judicial officers who act as mediators, the courts, and the judiciary, in a just, efficient and effective manner. This chapter attempts to cover potential alternatives to such legislation, and for purposes of this study, the researcher lays down four such potential alternatives, each of which is discussed in turn.

### **8.2 Potential Alternatives to Legislation**

#### **8.2.1 Alternative 1: Amend current mediation guidelines on court-directed mediation**

As discussed in the previous section on what legislation could and could not achieve, amending current mediation guidelines on court-directed mediation in the said Practice Direction, and the said Rules for Court Assisted Mediation is one area of concern which the enactment of legislation on court-directed mediation could address. Be that as it may, at the same time, amending the said guidelines could also be viewed as a potential alternative solution in itself which need not require the enactment of the said legislation to effect such amendments. In other words, this could be seen as a quick fix without having to go through the process of regulating the said amendments via legislation and codification.

Further, this alternative solution to legislation could well achieve the resolution of two other areas of concerns which were identified in the previous section, namely:

1. Trial judges could mediate their own cases, and the mediator and the trial judge are the same person in the same case; and
2. Judges will still remain as part-time mediators.

Simply put, current mediation guidelines could be amended to ensure that trial judges are prohibited from adjudicating their own trial lists, and that they are not allowed to hear their own cases where they are the mediating judge. Further, the said guidelines could also be amended to ensure that all mediators must be able to render their services on a full-time basis as discussed in the previous section. For purposes of this study, the researcher attempts to provide a draft set of proposed amended mediation guidelines, and a draft set of mediation standards and mediator code of conduct, having considered the identified gaps and inadequacies, or the lack thereof, of current mediation guidelines for court mediators, as critiqued by the researcher in chapter 4, and chapter 7, and as gathered from the research findings in chapter 6.<sup>858</sup>

In drawing up the said proposed amended mediation guidelines, it is to be noted that the Rules for Court Assisted Mediation is used as the base reference material. This is because as analysed in chapter 5, it is in the researcher's opinion that the said Rules for Court Assisted Mediation contains a relatively more comprehensive account and elaboration of mediation guidelines for court mediators than the said Practice Direction. Hence, with the said proposed amended mediation guidelines, the researcher attempts to provide a common set of mediation guidelines on court-directed mediation, with a view to replace the current sources of mediation

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<sup>858</sup> See chapter 4 on *Court-directed Mediation in Malaysia*, chapter 6 on *Mediation Interviews: Research Findings and Commentary*, and chapter 7 on *Implementing Court-directed Mediation in Malaysia*; Appendix K, *supra* note 640.

guidelines on court-directed mediation, namely, the said Practice Direction, and the said Rules for Court Assisted Mediation.

Further, in drawing up the proposed mediation standards and code of conduct, reference is made to the current MMC Mediation Service Code of Conduct which currently governs MMC Panel of Mediators, namely, the private mediators. As there is no similar set of standards and code of conduct governing judges and judicial officers when they act as court mediators, the researcher attempts to provide the said proposed mediation standards and code of conduct which should govern all mediators who conduct either court-directed mediation or private mediation. Details of the said draft proposed amended mediation guidelines are outlined in Appendix M while the said draft mediation standards and code of conduct for mediators are contained in Appendix N.<sup>859</sup>

### **8.2.2 Alternative 2: Centralise the mediation institution**

Presently, there does not seem to be one centralised mediation institution in Malaysia to look into the following important functions, namely:

1. Regulate and enforce consistent and standardised mediation process and governance;
2. Regulate and enforce consistent and standardised mediation standards and professional ethics;
3. Focus on delivering consistent and standardised mediation competency and its assessment;
4. Regulate and enforce mediator registration and accreditation;
5. Provide education to the public, lawyers, judges and judicial officers;

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<sup>859</sup> See *Appendix M* for Draft Proposed Amended Mediation Guidelines on Court-Directed Mediation, and *Appendix N* for Draft Proposed Mediation Standards and Mediator Code of Conduct.

6. Be the focal point for all information on mediation; and
7. Conduct independent complaints review process.

Instead, some of the above functions are separately administered and conducted by both CMCs and MMC. Each of these organizations focuses on its respective mediation practice, namely, court-directed mediation and private mediation respectively. It is the researcher's contention that in lieu of legislated court-directed mediation practice, it is recommended that the above functions be streamlined, and be housed under one roof through the establishment of a centralised mediation institution to ensure consistency, standardization and quality of mediation services, and of the profession. Such an initiative could also contribute to the elimination of duplication and wastages of efforts, time and costs.

Even if the establishment of the described centralised institution prove to be a hugely daunting task as the immediate next step, perhaps what could be considered as a baby step approach would be to first establish a centralised mediation resource organization. Such a centralised resource office could provide a centralised administrative and support function and role to oversee and to streamline the scope of responsibilities which are currently undertaken by both CMCs and MMC. This recommended approach could be drawn from the centralised ADR resource office idea which has executed in the state of Virginia, USA.<sup>860</sup>

The researcher submits that through such a centralised mediation institution whose mission is as outlined above, court-directed mediation should not be legislated with a view to provide uniform mediation legislation to include private mediation. In its place, all efforts to regulate and enforce consistent and standardised mediation

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<sup>860</sup> Ravindra, G. (2005), *op. cit.* In the state of Virginia, the Department of Dispute Resolution Services was created within the Office of the Executive Secretary of the Supreme Court of Virginia (OES), which is the Administrative Office of the Courts. The OES is the centralised ADR resource office.

process and governance, mediation standards and professional ethics, delivering consistent and standardised mediation competency and its assessment, and mediator registration and accreditation could be achieved and leveraged through such an establishment.

### **8.2.3 Alternative 3: Reach out to retired judges**

In an attempt to enhance mediator competency in addition to providing formal mediator training to active judges and judicial officers, one recommendation is to reach out to retired judges to join the mediator force. There are several advantages of using retired judges as court mediators in CMCs which are currently located in several cities and towns nationwide.<sup>861</sup>

First, they have the legal expertise which could be put to better use; they do not pose the same ethical concerns as active trial judges would, such as those which relate to coercion to pressure the parties to settle in order to clear backlog of cases, and role conflict in situations where the mediating judge and trial judge are the same person in the same case. Presumably, as retirees, they would have more time on their hands which they could spare to offer their expertise and services. However, the researcher is of the view that caution must be exercised in considering this potential alternative solution in that these retired judges would still need to undergo formal mediator training as their active counterparts who are still in judicial service.

A relevant example which could be cited is in the USA where Norfolk Circuit Court brought in retired Circuit Court judges to conduct settlement conferences in complex cases.<sup>862</sup> As with the successful implementation of the Norfolk programme,

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<sup>861</sup> *Supra* note 26.

<sup>862</sup> Ravindra, G. (2005), *op. cit.* In order to ensure that the programme works, comprehensive training in mediation and settlement conference techniques of 16 hours were conducted to a pre-selected group of retired Circuit Court judges.

the researcher's suggestion is to formulate a set of standard requirements to ensure an effective implementation of the said programme using retired judges in Malaysia.

First, retired judges will join the panel of trained mediators from CMCs. They would be recommended to be assigned to the most proximate CMCs depending on their residential locations. They would be on an "on demand" basis where they would be duly compensated by the courts whenever they conduct court-directed mediation sessions. They do not have trial authority in all the cases which they mediate. They would be equally bound by the same set of mediator standards and professional ethics in mediation, which is also applicable to all mediators from MMC Panel of Mediators, judges and judicial officers who act as part-time mediators.

Under this arrangement, suffice to note that there would be no change in the current CMC model where the parties would be assigned a mediating judge from the panel of trained mediators to handle their matter by the relevant CMC. Such court-annexed mediation services would still be provided free of charge to the parties, and would still be open to any civil case which is filed in the courts. It is in the researcher's humble opinion that such an arrangement would only pose minimal changes so as not to disrupt the current CMC model. Instead, such an arrangement would help to enhance the value of CMCs to the current court-directed mediation practice in Malaysia.

#### **8.2.4 Alternative 4: Enhance and expand the scope of CMCs**

As previously discussed in chapter 4, since its inception in Kuala Lumpur in 2010, CMCs have mushroomed in major locations nationwide such as in Kuantan and Johor Bahru in 2011, and Shah Alam in 2013.<sup>863</sup> The results so far have been

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<sup>863</sup> *Supra* note 26.



encouraging with reasonable settlement rates achieved in CMCKL since the pilot programme was launched in 2010.<sup>864</sup> Barring all circumstances, similar achievements would be forthcoming from the other CMCs in the near future.

Be that as it may, it is worth noting that in order for higher settlement rates to be achieved and sustained from all CMCs, there must be continued efforts to promote and enhance public awareness of, and education on court-annexed mediation programmes which are provided free of charge to the parties. It is most important for the public to be educated on how CMCs can help and guide the parties to reach an agreed outcome in mediation, and to correct the perception that the courts are viewed as having higher authority. This is particularly important as more and more CMCs would be established nationwide in the coming years. Further, in order to cater for increasing demand of court-annexed mediation services, the scope of CMCs ought to be progressively enhanced and expanded.

Presently, CMCs cover cases which are referred by the referring courts for mediation, and also “running down” cases which are automatically referred to CMCs for mediation under the said Practice Direction No. 2 of 2013.<sup>865</sup> The type of cases should also be expanded to include family/divorce matters, and building and construction disputes. However, this would very much depend on whether such cases could be automatically referred to CMCs as in the “running down” accident cases.

### **8.3 Chapter Summary**

This chapter attempts to provide reasons why it may not be justifiable for court-directed mediation to be legislated in Malaysia given the extent that such legislation could and could not achieve in addressing *all* of the areas of concerns on

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<sup>864</sup> See Table 4.3 in chapter 4 on *Court-directed Mediation in Malaysia*.

<sup>865</sup> *Appendix E, supra* note 394.

the practice of court-directed mediation. Such a perspective is contrary to the views and thoughts of the respondents in this study. The researcher recommends that much more could be achieved by focusing on the potential alternative solutions to legislation. In the researcher's humble view, the said solutions could be viewed as quick and hassle-free fixes to ensure that judges and judicial officers act as competent mediators to deliver the desired results to the parties in accordance with the required standards and professionalism in mediation in a just, efficient and effective manner.

In other words, based on the findings in this study on court-directed mediation in Malaysia, it is submitted that as court-directed mediation is still new in Malaysia, and what is required is a cultural change on the current public perception of judges and judicial officers when they act as court mediators. Undoubtedly, a lot of proactive education and awareness programmes need to be implemented across the nation to reach the public at large, the lawyers and even the judges and judicial officers on the role of CMCs and how court-annexed mediation services are administered and integrated into the court process.

Next, it is recommended that amending the current guidelines on court-directed mediation practice could provide clarity and consistency in standardised mediation process and governance, mediator competency, its assessment and accreditation, and standards and professional ethics in mediation. Fears of trial judges mediating their own trial lists, and mediating judges hear their own cases if mediation fails would be allayed. Concerns about judges and judicial officers not performing their mediator role on a full-time basis in order to deliver higher settlement rates, could be addressed although there is no guarantee that more mediated cases get settled.

Worries about judges and judicial officers when acting as court mediators are actually incompetent and do not possess the required capabilities and skills to the

extent that they do not practise court-directed mediation in accordance with “pure” mediation principles could no longer hold water. Thoughts that the parties may be pressured or coerced by judges and judicial officers to accept mediation as an ADR mechanism, or even to accept settlement terms which are passed down to the parties would be a thing of the past.

Be that as it may, it cannot be under-emphasized that all the recommended positive changes and amendments to the current guidelines on court-directed mediation would come to nought if there is lack of focus, regulation and enforcement on a sustainable basis. To this end, it is the researcher’s recommendation that there must be a centralised mediation institution to hold all these together in order to achieve the desired results albeit that baby steps may need to be progressively implemented with a view to materialise this vision.

Further, due consideration has also been given on how other countries have considered and implemented codified guidelines for their judicial officers who act as mediators.<sup>866</sup> Suffice to state at this point that judicial mediation in Australia does not have the prescribed process, and no principles are formally codified on how mediations ought to be conducted by judges acting as mediators in several courts and jurisdictions.<sup>867</sup> Similarly, in Singapore, there is no law regulating the practice of mediation.<sup>868</sup>

In the final analysis, having considered the findings in this study, in the larger scheme of things, all of the above described and identified steps and actions offered by the researcher to address the said areas of concern do not demand any attempt to

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<sup>866</sup> For example, in Australia in some jurisdictions, judges act as mediators in what is termed as “judicial mediation.” See also Practice Note 2 of 2012, “Judicial Mediator Guidelines Supreme Court of Victoria,” March 30, 2012; Nickless, R. (2012). Victoria allows Judge Mediators. Australian Financial Review, April 13, 2012, in The Honourable Justice P. A. Bergin (2012). Chief Judge in Equity, Supreme Court of New South Wales, Australia. The Objectives, Scope and Focus of Mediation Legislation in Australia. Paper presented at the ‘Mediate First’ Conference, Hong Kong International Arbitration Centre and The Hong Kong Mediation Council, Hong Kong Convention and Exhibition Centre, Hong Kong, May 11, 2012.

<sup>867</sup> Mediation by judges has not been a popular process with judges, and is rarely used in the Federal Court. Please see The Honourable Justice Bergin, P. A. (2008). Mediation in Hong Kong: The Way Forward - Perspectives from Australia. 82 *Australian Law Journal* 196, p. 198-199. There is no formal process nor specific principles on judicial mediation which have been codified in South Australia on how mediation should be conducted. Please also see Field, I. D. (2009), *op. cit.*

<sup>868</sup> Loong, S. O. (2005), *op. cit.*

legislate or codify such court-directed mediation practices in Malaysia. As such, it is submitted that it may not be justifiable for court-direction to be legislated in Malaysia at the present moment because the said potential alternative solutions to legislation seem to command a relatively more practical implementation with more ease and candour.

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## LIST OF PUBLICATIONS AND PAPERS PRESENTED

### Articles under review by publication

- Ooi, C. S. S., Choong, Y. C. & Tie, F. H. (2017). Training Judges to Mediate: A Case of *piscem natore doces*? 3<sup>rd</sup> Issue, The Law Review, Thomson Reuters.

### Published Publications

- Ooi, C. S. S., Choong, Y. C. & Tie, F. H. (2016). Court-Annexed Mediation Practice in Malaysia: What the Future Holds. *University of Bologna Law Review*, Vol. 1:2.
- Ooi, C. S. S. (2009). *Surviving the War for Talent in Asia: How Innovation Can Help*. New Jersey: IBM Press-Pearson Education, August.
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## **APPENDIX I**

Sample of mediation interview invitation by letter

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## **APPENDIX J**

Sample of Consent Form for participation in mediation interview

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## **APPENDIX K**

Malaysia Mediation Centre (MMC) Mediation Service Code of Conduct

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## **APPENDIX L**

### **Malaysia Mediation Centre (MMC) Mediation Rules**

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## **APPENDIX M**

Proposed Draft Amended Mediation Guidelines on Court-Directed Mediation

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## **APPENDIX N**

### **Proposed Draft Mediation Standards and Mediator Code of Conduct**

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