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Renting your judge

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'Einstein J observed that the focus in a dispute resolution clause should be on the process provided by the dispute resolution procedure … it is the *process* in which the parties must participate that must be sufficiently certain to be enforceable.'

New ADR services

Renting your judge

Geoff Wilson

The concept of a retired judge providing services to family law clientele and their lawyers via a variety of ADR techniques remains relatively untried in Australia.

However, the concept of 'rent a judge' has been a feature of the legal landscape in the United States for many years. Firms such as Action Dispute Resolution Services (over 80 retired judges and 20 attorneys), and JAMS (200 full time 'neutrals' — justices, judges and lawyers) provide all forms of ADR to clients. JAMS report that they resolve more than 10,000 disputes annually.

In Australia, we are on the cusp of a new beginning in dispute resolution of family law matters. Retired Family Court judges are starting to offer their services to clients as a cost effective and efficient alternative to traditional Family Court hearings.

This is not surprising, considering:

(1) the wider acceptance of ADR techniques by lawyers and the public;
(2) the increasing number of retirements of judges from the Family Court; and
(3) lawyers' and the public's concern about the current delays in proceedings ➢

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➢ before the Family Court and its associated costs to clients.

The Honourable Eric Baker, who retired from the Family Court in 1999, is now offering his services to family law clientele. Similarly, retired Family Court judges Tony Graham QC and John Fogarty have joined forces with three other judges in Victoria to establish a business venture called Private Judging.

A pioneer of the 'rent a judge' concept for family law matters in Australia is the Honourable R J (Bob) Bulley. Bob was a judge of the Family Court of Australia for 18 years. Since his retirement in 1995, Bob has offered a range of specialist and innovative dispute resolution services to family law and other clientele. Bob is highly respected among his peers for his knowledge of the law and court processes, his listening ability and his ability to produce quick and clear judgments.

Bob was recently appointed Special Counsel to the firm Hopgood Ganim Lawyers. Bob is offering four specialist services which are summarised below.

'The primary goal of voluntary early neutral evaluation (ENE) is to provide an early, frank and respected evaluation on essential matters, together with assistance to the parties in devising a sensible case development plan.'

Quick advice

This process involves:

(1) a lawyer presenting a brief outline of the relevant facts by letter, fax or personal interview with Bob; and

(2) within seven days, or earlier by arrangement, the lawyer receiving Bob's opinion by fax.

After briefly presenting Bob with the facts in writing, the lawyer receives a short letter which reflects the former Family Court judge's view on the strengths and weaknesses of the case and the range of possible outcomes based on the facts and documents presented. This enables the lawyer and client both to better prepare his or her case and to know the 'scope of the legal process' to enable more realistic negotiations.

Quick look

This service involves two or more lawyers or accountants presenting to Bob:

(1) a joint letter;

(2) a joint summary of facts; or

(3) a separate summary of facts, arguments and desired outcomes.

After receipt of the short preliminary facts, Bob meets confidentially with the lawyers and the parties together to ask questions and give orally his first quick impressions of the strengths and weaknesses of the case and the possible range of court outcomes.

Bob's preliminary opinion is not binding in any sense, but it provides:

(1) a framework for settlement negotiations;

(2) a way of avoiding, initially, the drafting of inflammatory and expensive documentation; and

(3) both clients with the confidence or necessary doubt of a second opinion.

Mediation — early neutral evaluation

The primary goal of voluntary early neutral evaluation (ENE) is to provide an early, frank and respected evaluation on essential matters, together with assistance to the parties in devising a sensible case development plan. A further goal is to reduce parties' posturing on court procedures and thereby reduce delays in court.

This service is a lengthier and more multi-layered process than the 'quick look'. The parties are required to go through the following stages.

1. Sign an agreement setting out the 'med-ENE' process individually or jointly.

2. Meet individually or jointly with Bob for an intake meeting to discuss:

(a) concerns;

(b) information needed;

(c) summaries of facts to exchange.

3. Bob will meet jointly with lawyers and clients for a three hour structured mediation/negotiation. If agreement is reached, it is immediately put into writing. If agreement does not eventuate within the designated time period, Bob will take a one hour break and return with his non-binding opinion on the strengths and weaknesses in the parties' cases and likely court outcomes. This is the 'early neutral evaluation' component of the service. The parties, lawyers and Bob can discuss the likely outcomes at this time.

4. The parties are invited to continue negotiations immediately in light of what they have discussed.

The process provides a non-binding decision and is confidential. It is informal but structured,

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ADR on the web

Useful websites

The Australian Dispute Resolution Directory is now available on the web. The website provides information on:

- providers of dispute resolution services in Australia;
- dispute resolution employment opportunities;
- education and training opportunities;
- new local and international ADR developments; and
- discussion pages for academics, students and practitioners.

Practitioners and organisations can register on the website for a fee. The directory is also available in hard copy.

<http://www.ausdispute.unisa.edu.au>.

The National Alternative Dispute Resolution Advisory Council (NADRAC) has a website which contains information on the following matters:

- the Charter of the Council and its composition;
- the current work programme of the Council;
- the annual reports of the Council;
- the Council's published reports, for example *ADR Definitions* and *A Fair Say*; and
- some of the Council's advice to the federal Attorney-General, for example, its recommendations on the use of ADR in the new Federal Magistracy.

<http://www.ag.gov.au/aghome/advisory/nadrac>.

The Lord Chancellor's Department in the United Kingdom has a website which includes, inter alia, a discussion paper on ADR (November 1999). The paper deals with the nature and forms of ADR, choosing ADR, provision of ADR services, ADR in the process of litigation, and quality control in ADR. It also provides information on the principal court-based ADR schemes in the UK. While there is not much new here for Australian readers, the final report based on the discussion paper could provide interesting new initiatives in the area.

New ADR services

Renting your judge

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and does not require a formal tender of evidence.

ENE is used where people in dispute want the help of someone who:

- is skilled in the classical process of mediation; and
- has the substantive expertise to give a persuasive opinion on strengths, weaknesses and likely outcomes.

Arbitration

Bob continues to offer arbitration services while family lawyers and their clients await the passage and assent of arbitration Regulations through the Commonwealth Parliament which will provide a formal framework for arbitration in Family Court proceedings.

After the parties enter the necessary arbitration agreement, Bob conducts a hearing akin to a court trial. He delivers a decision which is then registered in the Court and becomes as binding as if it were a decree of the Court.

The advantages of arbitration include an earlier hearing date, a quicker decision, a saving in costs and a less inhibiting atmosphere for the client.

The above services can be tailor-made to the needs of the clients. Clients can define the costs of the services and apportionment between themselves. ●

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