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Judicial Mediation and Competition for Clients and Government Funding among Dispute Resolution Providers.

Professor John Wade¹

The aim of this paper is to:

- Describe “judicial mediation”—what is it?
- Describe the general competition for clients and government funding between dispute resolution services—including to some extent, judicial mediation
- Set out the possible advantages and disadvantages of judicial mediation for both disputants and society—either as a diagnostic or competitive guide.
- Despite lurking or actual competition, tentatively confirm, a role for judicial mediation.

Judicial Mediation: What is it?

Judges have always engaged in a wide range of formal and informal practices in attempts to pressure disputants towards settlement.² One survey identified 71 methods used by judges to encourage settlement.³ However only one of these 71 methods will be considered in this paper—that is the method(s) known as “judicial mediation” (referred to in this paper as “JM”). For the purposes of this paper, judicial mediation is a formal meeting of disputants late in the litigation process under the leadership of a judge, other than the proposed trial judge, which explores the range of settlement possibilities in the light of the perceived uncertainty, risks and ranges attached to ongoing litigation. Within the single phrase “judicial mediation”, there are many categories of process, goals and skills which are described in general mediation literature by labels such as settlement, facilitative, evaluative, therapeutic and narrative (and many more emerging labels) mediation. Moreover, the labels attached to the many different forms of meetings which judges have with litigants, such as judicial settlement conferences, moderations, appraisals, case management, mediation⁴, usually have incidental “legal” importance as different legal consequences follow (especially in relation to degrees of confidentiality).⁵

Judicial mediation in this narrow sense described above, has existed for centuries in some legal systems⁶; in other places it is a relative newcomer, or still to be adopted. Controversies about judicial mediation appear to be inversely proportional to duration of adoption.⁷

What is the normal scope of business of judicial mediators?

JMs deal with a tiny formalized and escalated slice of the vast array of types of social conflict.

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² M. Galanter and M. Cahill, “Most Cases Settle: Judicial Promotion and Regulation of Settlements” (1994) 46 *Stanford L. Rev.* 1339; C. Menkel-Meadow “Judges and Settlement” (1985) 21 *Trial* 24; L.F. Schiller and J.A. Wall, “Judicial Settlement Techniques” (1981) 5 *Am J Trial Advocacy* 39; J.A. Wall and L.F. Schiller, “Judicial Improvements in Pre-Trial Settlement: A Judge is not a Bump on a Log” (1982) 6 *Am J Trial Advocacy* 27; J. Resnik, “Managerial Judges” (1982) 96 *Harvard L. Rev.* 374

³ J.A. Wall, L.F. Schiller, R.J. Ebert, “Should Judges Grease the Slow Wheels of Justice? A Survey on the effectiveness of Judicial Mediation Techniques” (1984) 8 *Am J of Trial Advocacy* 83 at 103.

⁴ There are many attempts to create some consistency of terminology in the DR field—see for example, National Alternative Dispute Resolution Advisory Council (NADRAC), *Alternative Dispute Resolution Definitions* (1997).

⁵ Eg see P. Robinson, “Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to them for Trial” (2006) 2 *J of DR* 335.

⁶ See N. Alexander, *International and Comparative Mediation: Legal Perspectives*, 2009, pp 26-27; 127-147; L. Boulle and M. Nestic, *Mediator Skills and Techniques: Triangle of Influence* 2010, pp 353-361.

⁷ Eg see the contrasting enthusiasm and nervousness about JM in different courts and parts of Australia—eg CJ T.F. Bathurst, “The Role of the Courts in the Changing Dispute Resolution Landscape” (2012) 18 *Uni of NSWLJ* 4 at 11-12; CJ M. Warren, “Should Judges be Mediators?” (2012) 21 *Aust DRJ* 77; Judge M. Sidis, “A Successful Experiment in Judicial Mediation” (2006) 18(9) *Judicial Officers’ Bulletin* 74. Compare similar comments in parts of Canada—L. Otis and E. Reiter, “Mediation by Judges: A New Phenomenon in the Transformation of Justice” (2006) 6 *Pepperdine Dispute Resolution LJ* 351; L. Otis, “A Quiet Revolution Part II: Important Considerations for a Successful Judicial Mediation Program” (2008) 4 *Asian J on Mediation* 8; J. Epp, “The Role of the Judiciary in the Settlement of Civil Actions. A Survey of Vancouver Lawyers” (1996) 15 *Windsor Year Book of Access to Justice* 82; CJ W.K. Winkler, “Some Reflections on Judicial Mediation: Reality or Fantasy?” (2012) Winter, *The Advocates’ Journal* 3; CJ JD Rooke, “The Multi-Door Courthouse is Open in Alberta” (2011) Winter *Journal of the Association of Canadian Court Administrators* 7.

That is, judges mediate only in those statistically few conflicts which have been transformed into legal claims, and survived many abandonment and settlement pressures, to finally reach the prelude to a formal and “final” hearing.⁸ Unlike other mediators, judicial mediators do not “reach down” the vast pyramid of social conflicts, looking for business. Instead, they wait for disappointments and grievances to be transformed by “naming, blaming and claiming”⁹; then for claims to be denied, abandoned or settled; then for the diminishing survivors to consult skilled helpers, or lawyers; then for even fewer ongoing formal disputants to receive legal advice whether to file in court; then for the shrinking still-determined, time rich and solvent to file in court; and for less than 10% of these formal claimants to endure multiple settlement pressures¹⁰ and reach the door of the court, where multi-skilled judges wearing their mediator hats, lie waiting for the statistically few survivors.

Competition for clients and funding between dispute resolution services—including judicial mediators.

The preceding paragraph describes a dramatically small and residual client base for judicial mediators in comparison to other mediators and negotiators who can reach into the oceans of unresolved conflicts whether connected to courts or not. So why is there actual or lurking competition for the clients and funding attached to such a small market?¹¹

In the dispute resolution industry, there is competition in at least two senses, both of which are relevant to judicial mediation:

1. Between DR services for the limited and fluctuating tax dollars available for DR; and
2. Between DR services for the limited number of paying DR clients available.

Limited DR tax dollars available between competitors

All government services are being asked to do more with less particularly since the global financial crisis of 2008. Moreover, in contrast to government expenditure on roads, schools, healthcare, pensions and police, there are no votes in expenditure on civil courts. Accordingly, civil courts grudgingly experience steady reduction in expenditure, and pressure to produce more efficient outcomes for less money and fewer staff. Courts and law societies tend to ineffectually resist this trend to “commodify justice”. However, governments respond by reducing civil court budgets and staff even further.

Moreover, government DR budgets are being redirected to multiple schemes which allegedly provide more “outcomes per dollar” than traditional courts. These schemes include websites, telephone advisory services, “legal” information centres, refuges, counseling and mediation centres, and summary tribunals. There are helpful analogies in the redirection of stressed health budgets with the goal of producing more preventive and responsive health “outcomes” per dollar spent.

“Politically active” traditional courts then compete for their shrinking budgets by demonstrating “efficiency”, particularly by vigorous case management, and by offering DR services which are allegedly fast, cheap, and informal—for example, judicial mediation. These politically active courts attempt to develop yearly statistics about taxpayer cost per resolution achieved, in order to keep ubiquitous cost-cutting government auditors at bay.

Ironically, newly funded government DR services tend to be more expert than courts at the ongoing competitive game of chasing government funding, by providing monthly statistical evidence of the number of resolutions per tax dollar provided, and of “satisfied” clients/voters.

⁸ See M. Galanter, “A World Without Trials?” (2006) 1 *J.Disp.Resol.* 7; M. Galanter, “Justice in Many Rooms” (1981) 19 *J. of Legal Pluralism* 1; M. Galanter, “Planet of the APs: Reflections on the Scale of Law and its Users” (2006) 54 *Buffalo L. Rev.* 1369.

⁹ R.E. Miller and A. Sarat, “Grievances, Claims and Disputes: Assessing the Adversary Culture” (1980-81) 15 *Law & Society Rev.* 524; W. Felstiner, R. Abel and A. Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming and Claiming” (1980-81) 15 *Law and Society Rev.* 631; M. Galanter, “Reading the Landscape of Disputes: What We Know and Don’t Know (And think we know) About our allegedly Contentious and Litigious Society” (1983) 31 *UCLA L. Rev.* 4.

¹⁰ Justice R. Sackville, “The Future of Case Management in Litigation” (2009) 18 *J of Judicial Administration* 211; ALRC, *Managing Justice Report no 89* (Canberra: AGPS, 2000); Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, (HMSO, 1996).

¹¹ Compare the competition between DR teachers—see J.H. Wade, “Teaching Conflict Management and Dispute Resolution Courses in Australia” in F. Shonewille, ed, *Mastering Mediation Education* (Antwerp: Maklu Publishers, 2013).

Judicial mediation in some courts, faces this competitive challenge of “proving” each year that annual expenditure on JM is more “cost effective” than delegating to privately paid mediators; than settlement conferences conducted by court registrars; than pre-filing mandatory private mediation; than abbreviated trials and judgments; than simplifying legal language and court documentation; than more rigorous case management, and the other variety of fad or competitive DR services.

Of course, there are many private and government funded lobby groups, and some judges, who have personal interests in the tax funding for judicial mediation being reduced and re-directed elsewhere, preferably to their own DR services.

A further challenge is that government funded DR services, including courts, spend the majority of their budgets and time on the expanding number of “difficult” clients—particularly self represented, mentally ill, violent, personality disordered, alcoholic and/or drug addicted clients.¹² Without a screening mechanism, these clients are particularly attracted to the “help”, “hope” and listening ears provided at judicial mediation, when en route and close to a court hearing. Of course, beleaguered DR services refer these “difficult” clients back and forth to one another or into the wilderness; and plead for more government funds to provide special services for this growing proportion of litigants. Statistically isolating this very expensive and labour intensive class of disputants is essential in order to maintain healthy settlement figures to attract future government funding.

Competition for Litigating disputants who can Pay for DR Services

There is a potential second and overlapping form of “competition” between dispute resolution services apart from competing for government DR funding discussed above. This is the competition for the limited number of disputants who are “deeply” involved in litigation, and have sufficient money themselves to pay for DR services.

This tiny statistical corner of the world of conflicts has many “fix-it” competitors. “Bring your door-of-the-court problems to us” say the bands and lists of arbitrators, hearing judges, negotiation lawyers, collaborative lawyers, litigating lawyers, therapists, accountants, judicial mediators, and a variety of other kinds of private mediators.

Why is there a glut of dispute resolution suppliers for this limited number of “late-litigation” and paying conflicted clients?

The variety of dispute resolution suppliers mentioned above are eager sellers at this late stage because:

1. Apart from trial judges and JMs, they usually do not have enough work or income. Or if they do, they know that the phone may stop ringing if they do not continually and visibly compete in the marketplace.
2. “Legalized” conflicts have been transformed into legal categories, culture and language with which some DR providers, such as lawyer-mediators are comfortable (eg tort, breach of contract, damages etc). And any referring person or agency at this late stage (such as a lawyer or judge) is also comfortable with the transformed language and legal categories of the conflict.
3. These “late” suppliers of DR services know that further procrastination by disputants, their tribes and lawyers is no longer possible at the door of the court. “Nothing focuses the mind like a hanging”.
4. Some degree of factual clarification, summary and reconstruction, plus some evidentiary support for the competing histories (or predictions about the future) have occurred by this late stage under the process which lawyers label “discovery”; or which historians might label as “reconstruction”. The noise, posturing and skirmishes attached to the initial conflicts may also have subsided with the passage of time and expense.
5. There is a tendency for the standard rhetoric and threats attached to negotiation to modify in inverse proportion to the proximity of a final hearing. Some hawks on the team backslide into moderates or even doves as the once-distant risks approach. Disputants, tribes and lawyers become more focused, divided and fearful as expense, uncertainty and loss of control multiply near to or inside the door of the court.¹³

¹² B. Eddy, *High Conflict People in Legal Disputes* 2005; J.H. Wade, “Negotiating with Difficult People” (2011) 2 *Faulkner Law Rev.* 221; *Responding to the Needs of the Self-Represented Divorce Litigant* (ABA, 1994); Family Law Council of Australia, *Litigants in Person* (2000). “Difficulty” cuts many ways—see C. Curtis and R. Zisman, “Dealing with Difficult Judges”, National Family Law Conference, Victoria, BC, July 2012.

¹³ See elaboration of changes in team dynamics in D.G. Pruitt and S.H. Kim, *Social Conflict: Escalation, Stalemate, and Settlement* 3rd ed (2004) ch 9.

6. Lawyers know, by research and by anecdote, that once a final hearing actually begins, their reputations with their own clients plunge.¹⁴In negotiation terminology, the interests in the once unified teams, begin to split.
7. Due to market habits and to impending crises, the disputants and their tribes usually pay well and in advance for “late” dispute resolution services (perhaps with analogies to payment for brain surgery)
8. If a DR supplier can break into this tiny door-of-the-court market, and do some skilled work, or be lucky, or both, then gossip and repeat players will ensure some return business, at least for awhile.

The above reasons intensify the competition between JMs and other legal dispute resolvers, especially the oversupply of awaiting private mediators.

The writer has worked with a number of very experienced lawyer-mediators in Australia and USA. They enjoy high status and income. However, anecdotally they express gradations of disapproval of judges who also act as mediators; and of retired judges who attempt to enter the mediation industry. Why?

Here are some of the typical anonymised comments from private mediators in Australia and USA:.

“These interlopers:

- “Do not know how to mediate”;
- “Should stick to their knitting” (ie should write more timely judgments?);
- “Confuse the public with their double roles as judge and diplomatic deal-maker”;
- “Prematurely isolate disputants in different rooms, express opinions, and carry inflammatory offers from one room to another;”¹⁵
- “Discredit mediation as a brand with their clumsy attempts at mediation”;
- “Are deluded into thinking that because they are respected as judges, they will also be respected as mediators”;
- “Are overpaid”;
- “After judicial retirement, only a few survive as respected mediators in the marketplace”;
- “Are paid by the taxpayer to take away interesting work from us! This work could be done (better?) by highly competent private mediators (ie us or me!) on a user-pays basis”;
- “Have unfair economic advantages over private mediators, as judges offer “free” services, “free” premises, and “free” support staff (again, all such government services being paid for by the taxpayers)”;
- “May be acting unconstitutionally”¹⁶

Such anecdotal criticisms of judicial mediators may not be heard in polite or “indirect” cultures such as China or even Canada¹⁷; nevertheless may be whispered or momentarily pondered in private. However in more direct cultures, such as USA or Australia, these critical comments are loud, repetitive and apparently ignored.

In other places where judicial mediation in various forms has been long-standing¹⁸, such criticisms seem to be replaced by habit, normalcy and perceived “efficiency”. However, as Attorneys General eternally dabble with methods to reduce expenditure on courts, they will be inevitably tempted to experiment cyclically with reducing

¹⁴ P. Mc Donald (ed) *Settling Up: Property and Income Distribution in Australia* (1986).

¹⁵ This stereotype is no doubt sometimes true of all mediators, but often there are complex dynamics occurring in shuttle models: see especially W. Brazil, “Professionalism and Misguided Negotiation” in A.K. Schneider and C. Honeyman, (eds) *The Negotiator’s Fieldbook* (2006) ch.78; J. Levy, “Fly on the Wall” in *Texas Alternative Dispute Resolution* (looseleaf) Appendix A.

¹⁶ See the constitutional debates summarized in L. Boulle *Mediation-Process, Principles and Practice* 3rd ed, 2011, pp604-605. The “unconstitutional” arguments appear to be too little too late in all jurisdictions. Compare the discussion in Alexander, note 6 at pp140-147.

¹⁷ For a helpful overview of cultural typologies and cross-cultural negotiation, see R.J. Lewicki et al, *Negotiation*, 6th ed, 2010, ch 16.

¹⁸ Eg China; New Zealand; many parts of Europe; Quebec—see L. Boulle, *Mediation Principles, Process, Practice*, 3rd ed, 2011, pp 49-62; N. Alexander, *International and Comparative Mediation: Legal Perspectives*, 2009, ch 1, pp127-148; see Boulle and Nesic note 4; J. Bonafe-Schmitt, “Global Trends in Mediation Training and Accreditation – the Case of France” (2009) 11(3) *ADR Bulletin* 47.

allegedly “expensive” judicial time spent on mediations, and delegating such work routinely to the waiting for-service queues of private mediators.¹⁹

Judges who enjoy the challenges of mediation predictably oppose such delegation to outside mediators by quoting statistics about high settlement rates at judicial mediations; and horror stories about public expense attached to long trials. Such dueling statistics are essential for proponents of both in-house and out-house mediation, but are rarely persuasive either way once analysed.²⁰

Standard Market Responses to Increasing Competition

As competition for a diminishing but partially attractive group of “late” litigation clients occurs, then these usual market responses may be observed.

1. **Exit** from the field by some providers. Anecdotally, many would-be or has-been mediators leave the field of door-of-the-court mediations to a specialized group of judicial mediators or experienced lawyer-mediators. The departers sometimes enter new fields of work or specialize in one area of dispute resolution at an earlier stage than an imminent hearing (eg succession, workplace, native title, family disputes).
2. **Cut and fixed prices.** It is already standard for lawyers and disputants to obtain several lump sum quotes from different mediators. Price is one factor in mediator choice. Once disputants have filed in court and expended skirmish and discovery costs, then judicial mediators have a clear price advantage—usually zero for the mediator and his/her supporting infrastructure. Of course, diminishing court budgets are paying the substantial costs behind “zero”.
3. **Expand client base.** Many mediators expand the disputes they work on beyond the relative few cases filed in courts; and fewer still which reach the door of the court. Particular targets include the epidemic of pre-litigation conflicts in employment and building areas, and cross-border trading disputes, particularly in the mega-economies of China, Indonesia, Brazil and India. This leads to the common comment that even if judicial mediators sometimes appear to monopolise a tiny area of late litigated conflict resolution, “there is lots of conflict to go around” for other mediators (and arbitrators).
4. **Advertising.** As competition increases between DR providers, mediators go online to advertise “success rates”; fixed fees; diverse processes; conference and publication records, comfortable and private premises, willingness to travel, and popularity in an attempt to draw clients away from other service providers.²¹ Judicial mediators are more likely to rely on more subtle advertising in the form of court statistics on settlement rates, and upon ubiquitous gossip.
5. **Create “Accreditation Lists”**
Worldwide, there are many competing local or national “lists” of mediators. Prerequisites for entry to some of these lists range from easy in parts of North America, to very onerous in parts of Europe.²² Members on each list have allegedly acquired basic to advanced levels of skills, process, attitudes and knowledge in one or more of the schools of mediation. Being on a list may assist with

¹⁹ See in Australia, the recent reforms which attempt to reduce early traffic *into* the court system. All disputants must attempt some kind of settlement conference BEFORE filing a claim in a Federal Court. *Civil Dispute Resolution Act 2011* (Cth); M. Legg and D. Boniface, “Pre-Action

Protocols in Australia” (2010) *J of Judicial Administration* 39. A good example of the see saw of expenditure cuts can be found in Alberta. On February 12, 2013, the Court of QB in Alberta announced that it would not enforce the mandatory DR rules” until such time as the judicial complement of the Court and other resources permit reinstatement”. Presumably when the court queues lengthen, mandatory DR will again be reinstated?

²⁰ See the lengthy competitive debates between different mediation schools and trainers, especially between facilitative and evaluative stereotypes. See also the challenging interpretation of deceit and marketing in R.J. Condlin, “Every Day and Every Way we are All Becoming Meta and Meta, or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)” (2008) 23 *Ohio State J. on Dispute Res.* 231; Wade note 11.

²¹ For example, in the USA, see the advertising through the popular website mediate.com; and the clever (and culturally appropriate for California?) combination of newsletters and advertising by mediators such as Jeff Kichaven --- jeffkichaven.com; youtube.com/jeffkichaven

²² N. Alexander, *International and Comparative Mediation: Legal Perspectives*, (2009), pp 115-127.

advertising (or not), and may give the listed mediators exclusive access to certain conflicts which legislatively require assurance of minimum levels of mediator competence.²³

Occasionally, a Chief Justice of a court may require all registrars and judges to be accredited in order to improve court mediation standards, and increase confidence of the legal profession and public in JM²⁴.

6. Add value and diversify services offered.

Private mediators attempt to out-perform the competition by offering privacy; willingness to travel; late night meetings; diagnostic planning meetings; flexible calendars; meals; multi-lingual facilities; familiarity with certain other cultures; post mediation written reports; use of med-arb or arb-med. Similarly, judicial mediators add value by having substantive expertise in certain areas of law; long experience of predicting a range of monetary outcomes; air of solemnity important to some people; perhaps vast experience in many mediations; protection for middle managers who want some “official” sanction for the settlement; ability to convert agreements into consent orders instantly before post settlement regrets blossom.

7. Change Rules to Confirm or Weaken a Monopoly, or Market Dominance.

Competition or monopolistic patterns for late mediation of litigated cases can obviously be altered by new rules enacted due to lobbying of different competing interest groups. For example:

- Make JM *mandatory* for *all* cases (or make DR mandatory for all cases with JM a no-charge and available version); or for all cases unless one party can prove in a satellite court application that mediation is inappropriate²⁵ or make JM mandatory for certain “types” of cases; or mandatory for only those disputes diagnosed by a judge or court official as suitable; or for every alternatively numbered case.
- *Exclude* certain types of disputants or disputes from JM (eg self represented clients?)
- Require *all* judges to act as JMs; or only appoint certain skilled and willing judges to mediate either all of, the bulk of, specialized, or labour intensive disputes.
- Make JM mandatory only if *requested* by one disputant; or by the majority of disputants; or by all disputants in any case.
- *Abolish or suspend* pre-hearing mandatory mediation²⁶; or institute mandatory pre-filing mediation²⁷
- Charge a *daily fee* for JM; or a fee for JMs which last for more than x hours.
- Excuse the requirement for mandatory JM if the disputants have been to a *private mediation* already and have a certificate from that mediator that they all made a “genuine attempt to resolve”, or “good faith effort” or some other analogous concept.
- *Restrict the diverse mediation practices* available to JMs by imposing short time limits; forbidding preparation meetings or separate meetings; reducing confidentiality; purporting to forbid mediator “legal opinions”²⁸; requiring court room venues; circumscribing creative mediator practices etc.²⁹ Such restrictions may also be chosen by JMs or others in order to coexist peacefully with other competitive private DR providers. Famously, “facilitative” non-lawyer mediators have been able to enter the field of mediating disputes on a litigotiation path, previously dominated by lawyers, by the fiction that they do not give “opinions”, “advice” or “legal advice”---whatever those phrases may mean.³⁰

²³ For example, in Australia, people disputing over children must obtain a certificate from a mediator that they have made genuine attempts to resolve their dispute before they can file an application in court. Only a nationally accredited family mediator can sign such a certificate. *Family Law Act 1975* (Cth), s.60I.

²⁴ eg The registrars of the Federal Court of Australia are currently required to be nationally accredited as mediators, if they are assigned to mediate/conciliate the traffic of filed cases.

²⁵ Eg J.H. Wade, “Don’t Waste My Time on Negotiation or Mediation: This Case Needs a Judge. When is litigation the Right Solution?” (2001) 18 *Mediation Q.* 259.

²⁶ As suspended in Alberta by judicial announcement on February 12, 2013. See <http://www.moss.com/law/publications?Email+Alerts?contentId=2489>

²⁷ eg the Federal Court in Australia—see note 19.

²⁸ Prohibitions on “legal advice” hide more than they reveal. For the many versions of “advice”, “legal advice” and “opinions”, see J.H. Wade, “Forever Bargaining in the Shadow of the Law—Who sells Solid Shadows” (1998) 12 *Aust DRJ* 59.

²⁹ Eg See H. Landerkin and A.J. Pirie, “Judges as Mediators: what’s the Problem with Judicial Dispute Resolution in Canada” (2003) 82(2) *Canadian Bar Rev.* 249

³⁰ Wade note 26; JH Wade, “Directive and Evaluative Mediation: All mediators give advice” in epublications@bond.edu.au; and mediate.com October, 2011.

- Give disputants the opportunity to *choose*, rather than be assigned, their favourite JM ---that is, endorse JM “shopping”.³¹ Ironically, increased waiting times for a favourite JM may open opportunities for more available private mediators.

The above standard features of competitive behaviour can be observed in the competitions between DR providers—between judges and arbitrators; arbitrators and arbitrators, particularly in relation to international disputes; underemployed arbitrators attempting to enter the mediation field, or vice versa; and between various brands of mediators, including JMs, vying for certain sections of the “conflict market.”

Diagnostically and competitively, what value can judicial mediators “add” for both society and for individual disputants? And what are the alleged disadvantages of judicial mediators?

In judicial mediations, judges can potentially “add value” for both the disputants and for society in several ways. However predictably, each advantage of JM usually has a balancing potential disadvantage for the disputants or for society.³² The simplified chart below attempts to assist *diagnostically* when deciding which kind of mediator to choose, if a choice is available; and *competitively*, when attempting to predict which type of mediator may dominate a corner of the market (or not) for a time.

<i>Potential Advantages of Judicial Mediation for either Disputants or for Society</i>	<i>Potential Disadvantages of Judicial Mediation for either Disputants or for Society</i>
1. “Free” service from the JM paid for by taxpayers.	1. Perceived “free” service provides an incentive to file in court to gain access to JM; uses limited judicial resources; and also takes work away from competent private mediators whom some disputants can afford.
2. “Free” premises and support staff (again paid for by taxpayers).	2. Ditto
3. Judges have daily experience of the costs, risks, outcomes and settlements of disputes	3. Judges may emphasise conflicts as “legal” disputes and miss what is really occurring ³³ (“a conflict is never about what is on the pleadings”).
4. May enable a “mini-trial” without the full expense and due process of a longer trial. This process provides a fast insight into possible outcomes of a longer trial (sometimes called “early neutral evaluation” ³⁴ or a hybrid thereof)	4. Ditto
5. Judicial status as a “repeat player” modifies lying and “misbehaviour” by clients and lawyers.	5. Judges’ perception of “misbehaviour” may reduce exploration of goals, and alternative creative procedures.
6. Wild guesstimates and insult offers based on alleged litigation ranges are less likely to be proposed, or to be influential before an experienced JM.	6. NA
7. Arriving unprepared to “see what happens” is far less likely on the part of lawyers who are being observed by a JM.	7. NA

³¹ JM selection has been available in Alberta since 2010. See Judge R. Graesser, “Judicial Dispute Resolution Advocacy” CLEBC, Dispute Resolution Conference, 11 May 2012, Vancouver.

³² L. Boule, *Mediation: Principles, Process, Practice*, 3rd ed, 2011 at pp 601-602.

³³ S. Burns, “The Name of the Game is Movement: Concession Seeking in Judicial Mediation of Large Money Cases” (1998) 15 *Mediation Q.* 359

³⁴ W. D. Brazil, *Early Neutral Evaluation: A Guide for Neutrals, Advocates, and ADR Program Designers* (ABA, 2012)

8. Premature or theatrical walkouts are unlikely where lawyers and disputants are in the presence of a JM.	8. NA
9. Judicial authority assists to “sell” a proposed settlement to a reluctant disputant, middle manager, tribal member or person from an hierarchical culture.	9. Disputants may fear that they must comply with the JM’s preliminary expressed or implied opinions; thereby losing the choice of a “fully” considered hearing; and potential avenue of appeal.
10. Strong incentive for disputants to settle before a JM occurs in order to avoid airing illegal or immoral behaviour, and other skeletons in their closets. (“Settlement at the door of the mediation”).	10. This is a potential advantage and disadvantage of all settlements. Society sometimes has an interest in discovering patterns of pollution, tax evasion, violence, worker exploitation etc
11. Procedurally, every settlement can be converted instantly into consent orders, thereby reducing the risks of post-settlement regrets and renegeing.	11.NA
12. Alleged or actual “high” JM settlement rates reduce waiting times for litigation lists; and reduce the onerous work of writing judgments; and make more judicial time available for case management, JMs and occasional full-blown hearings.	12. Judges may exert undue pressure to effect settlements in order to meet targets; and to reduce personal and court trial workloads. (What is “undue pressure” is unclear, as all settlement involve some pressure). And additionally, the long waiting lists for JM, may lead to further delays to trials. This may promote a cyclical reassignment of judges between roles in an ongoing attempt to balance waiting times for trials and JMs.
13. Provides JMs with stimulating and diverse work, and insight into bargaining so that they can adjudicate (or not) in the shadow of the bargains. ³⁵	13. Some judges do not like the mediation role; or are not skilled in that role; resist change; or say they were hired to do traditional judging roles and are protected against new roles by judicial independence.
14. Some lawyers may like the predictability of a “standard” JM process.	14. Conversely, some JMs may be reluctant to use (m)any of the creative tools in a private mediator’s toolbox such as excluding lawyers, using sub-committees, auctions, insisting on the presence of certain tribal members, coaching clients etc. ³⁶
15. Some DIY unrepresented disputants, or disputants from hierarchical cultures, are impressed by the official status, time, skills and patience of skilled JMs.	15. JMs are usually reluctant to mediate with disorganized and emotional DIY disputants, especially in family, employment and succession disputes. Alternatively, they want a lawyer or witness present in case the DIY client makes satellite allegations of “misbehaviour” by the JM. This is an administrative challenge as the majority of JMs probably involve a DIY client. Additionally, judges may overlook that some cultural groups are deferring habitually to an authority figure.
16. When JMs are assigned, as compared to chosen by the disputants, there is less waiting time for JM, and all judges gain in JM experience.	16. In many JM systems, the disputants cannot choose a particular judge as their JM. Rather the JM is assigned according to availability. The assigned JM may not have the desired skills, expertise or personality.
17. Court administrators will come under pressure	17. A popular JM will have a long waiting list and will

³⁵ M. Galanter, “A World Without Trials” (2006) 1 *J. Disp. Resol.* 7

³⁶ For creative practices see, E.R. Galton & L.P.Love, *Stories Mediators Tell* (ABA, 2012); J.H. Wade “The Edges of Orthodoxy in Mediation” (2009) in epublications@bond.edu.au; E.R. Galton, *Ripples from Peace Lake*, (2005).

from lawyers to use the most skilled JMs more often (or in alleged “difficult cases”), and thereby create efficient trial and mediation specialization amongst the judges.	need to reduce time on trials and judgment writing. Such specialization may create collegial animosity.
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Conclusion

Should JM be *diagnostically* promoted for all the advantages set out above in the left column? Or should JM be competitively restricted or phased out due to its disadvantages listed in the right column above, and especially due to available user-pays and competent *competition*?

Predictably, the writer speculates that JM is probably diagnostically helpful, both to disputants and to society, in many (not all) “late” litigated disputes. However, in a changing DR world, JM is in actual or potential competition for taxpayer funding, and with other hungry DR services. In some parts of Canada, the competition anecdotally appears to be rather quiet at the moment. Nevertheless, supporters of JM are strategically wise to adopt some standard competitive behaviours,³⁷ including indirect advertising, quality control of JMs, training and mentoring of JMs, selective use of the most competent mediator judges, constant and careful collection and summary of statistics of court and JM business,³⁸ creation of separate statistics for high conflict and self-represented disputants, pro-active education of successive Attorneys-General and their fluctuating managerial departments; building bridges and ideas with other DR providers; and being alert to the standard range of lurking rule changes³⁹ which reduce the diagnostic benefits of JM—such as short time frames; no separate meetings; only voluntary mediation⁴⁰; alleged use of only one model of mediation; and payment of JM fees.

³⁷ See some of these marketing behaviours at pp 6-8 of this paper.

³⁸ Note research suggesting the persuasive effect of one page coloured charts!; see J.S. Hammond, R.L. Keeney, H. Raiffa, *Smart Choices-A Practical Guide to Making Better Decisions* (1999), Ch 10, “Psychological Traps”; and R.J. Lewicki, B. Barry and D.M. Saunders, *Negotiation* (6th ed) 2010 pp. 154-155.

³⁹ See lurking rule changes at p.8.

⁴⁰ See notes 19 and 26 for the 2013 reversal by suspending mandatory pre- hearing mediation in Alberta.