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ARTICLES

Judicial mediators: Is the time right? – Part II – *David Spencer*

The issue of the appointment of judicial mediators has once again been raised – this time by the Victorian Attorney-General. But is the appointment of judicial mediators necessary at a time when managerial judging through active case management and lawyer led settlements are leading to the efficient disposition of cases in the civil courts? Part I of this article appeared in the previous edition of this Journal and dealt with defining judicial mediation, after which it discussed why the judicial promotion of settlement is vital to the functioning of the judicial system. It then detailed the first phase of the argument about the constitutional validity of the appointment of judicial mediators and the legal and philosophical arguments that stem from that discussion. In Part II, the discussion on the Constitutional validity of the appointment of judicial mediators is concluded together with a discussion of the positives and negatives of the appointment of judicial mediators. Finally, the conclusion will raise the issue of whether we need judicial mediators? 189

Party, mediator and lawyer-driven problems and ways of avoiding them – *Micheline Dewdney*

This article covers party, mediator and lawyer-driven problems which become evident in mediation and suggests ways of avoiding them. The success of mediation cannot be attributed solely to the mediator, just as failure to reach a mediated agreement cannot be attributed solely to the parties and/or their legal representatives. The article identifies problems related to the performance of parties, mediators and lawyers involved in the mediation. Common party-driven problems include hidden agendas and bad-faith participation; requests to the mediator for advice; accusing the mediator of bias; demands for private sessions; directive, angry or threatening parties; destructive communication; and threats to abandon the mediation. Mediator-driven problems include the mediator acting as an advocate or advisor or acting on his or her private agenda. The mediator may also be responsible for procedural problems, eg using jargon or technical terms which may be difficult for the parties to understand, or being inadequately prepared for the mediation session. Lawyer-driven problems include lawyers predominantly adopting an adversarial approach and not encouraging their clients to participate actively in the mediation process. 200

Mediation as a post-modern practice: A challenge to the cornerstones of mediation's legitimacy – *Bronwen Gray*

In the last 20 years, mediation as an alternative form of dispute resolution in Australia has grown extensively. So much so that the term "alternative" is rapidly falling into decline. Historically, the legitimising cornerstones of mediation have been identified as consensuality and neutrality. Identifying mediation as a post-modern construct throws into question these concepts and allows for alternative interpretations to be identified. Deconstructing mediation allows us to reveal how power, neutrality and consensuality are interrelated and what, in turn, they can tell us about justice and power in a wider political process. 208

E-negotiations: Rapport building, anonymity and attribution – *Benedict Sheehy and Norbert Palanovics*

The growing quantity of negotiation conducted by email calls for an increased effort to understand the processes involved in and effects of the medium on negotiation. Previous studies indicate that negotiations by email tend to be more difficult and more susceptible to impasse. This study produced statistically significant data indicating that rapport building, anonymity and attribution of intention are the three critical factors that impact significantly on email negotiations. It was hypothesised that these critical factors help overcome the weaknesses of email and assist in achieving better actual outcomes in negotiated agreements. While many negotiations are cross-media, this study examined exclusively email negotiations in order to focus and address the issues raised by this unique form of communication. 221

Mandatory victim offender mediation – valuable fruit or rotten tomato? – *Marco Piazza*

Victim offender mediation is an offshoot of alternative dispute resolution (ADR) that seeks to address dissatisfaction with traditional criminal justice processes. There are increasing demands for our legal systems, to be more responsive and to involve the victims. Many successes have been claimed for ADR. The result has been an increasing number of mandatory ADR programs in civil jurisdictions Australia-wide. This article will examine whether victim offender mediation within the criminal justice system should also be mandatory; does victim offender mediation lend itself to the benefits claimed for mandatory referral in civil jurisdictions; or is mandatory referral the antithesis of victim offender mediation? 233

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