

Court-Annexed Mediation Practice in Malaysia: What the Future Holds

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ABSTRACT: It is an indubitable fact that the use of mediation as a form of dispute resolution has gained traction across the globe. More importantly, the practice of mediation has also been transformed through the establishment of several techniques for formalized mediation. This article will provide insights into one of these avenues for formalised mediation, namely, court-annexed mediation practice in Malaysia. It will first discuss the motivations that led to the introduction of such a programme. This will be followed by an analysis of the operational aspects of the practice. A matter of utmost importance concerns the role of the courts and the judiciary in court-annexed mediation and will be considered in great detail. This article will then offer suggestions on how some of the challenges that exist and are inherent in this particular method of formalised mediation could be overcome. These views are expressed with the hope that court-annexed mediation can function as an effective alternative dispute resolution mechanism under the umbrella of the Malaysian courts. Last but not least, it is also hoped that the above deliberations will be a catalyst for further comparative research and debates concerning this increasingly imperative form of formalised mediation process across all jurisdictions.

KEYWORDS: *Court-Annexed; Mediation; Judges; Mediators.*

1. INTRODUCTION

Mediation practice in Malaysia has come a long way since its embryonic days in the mid-1990s.¹ Today, mediation forms a core component in the Malaysian judicial system where it provides an alternative to disputing parties to resolve their dispute without going through the trial process.² The focal point of this article is on this form of formalised mediation, namely court-assisted or court-referred mediation. It will provide insights into this method of formalised mediation.

This article will begin by discussing the motivations that led to the introduction of such a programme by the Malaysian judiciary. This will be followed by an analysis of the operational aspects of the practice. It will then proceed to offer suggestions on how some of the challenges that exist and are inherent in this particular method of formalised mediation could be overcome.

These views are expressed with the hope that court-annexed mediation can function as an effective alternative dispute resolution mechanism under the umbrella of the Malaysian courts. Last but not least, it is also hoped that the above-mentioned deliberations will be a catalyst for further comparative research and debates concerning this increasingly imperative form of formalised mediation process across all jurisdictions.

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¹ See Cecil Abraham, *Alternative Dispute Resolution*, 20 *Asian Bus. L. Rev.* (1998).

² See YAA Tan Sri Arifin Bin Zakaria, Chief Justice, Malay., Speech at the Opening of the Legal Year 2012 (Jan. 14, 2012) (transcript available in <http://www.kehakiman.gov.my/sites/default/files/document3/Penerbitan%20Kehakiman/KetuaHakim.pdf>).

2. COURT-ANNEXED MEDIATION – THE MOTIVATIONS AND THE MECHANISM OF THE PROGRAMME

Court-annexed mediation refers to mediation where active judges and judicial officers act as mediators to litigating parties after they have filed their action in the courts. The Malaysian judiciary is the prime mover for introducing this form of mediation in the legal system in Malaysia. As far back as in 2005, mediation was viewed by the Malaysian 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]”.³ In fact, one author suggested that mediation would be more popular if it is placed on a statutory footing.⁴ As summarised by U.S. Senior Judge and Chief Judge Emeritus J. Clifford Wallace of the United States Court of Appeals (Ninth Circuit) that “what we are dealing with in Malaysia is court-annexed mediation, that is, what do you do to mediate after you have filed in court...”⁵ Hence, severe backlog of cases in this country has somewhat provided the catalyst for mediation to be taken seriously by the courts.⁶ In fact, it has been stated that court-assisted or court-referred mediation would be an opportunity to introduce measures to alleviate the problem of backlog of cases in the lower and High Courts.⁷

On the 14th February 2010, it was reported in a local newspaper that the Chief Justice was quoted to have said that the judiciary was in discussion with the Malaysian Bar to draft a Practice Direction to encourage litigating parties to mediate instead of going to trial to resolve their disputes in Malaysian courts.⁸ The Practice Direction No. 5 of 2010 (Practice Direction on Mediation) came into effect on the 16th August 2010. It can be said that the 2010 Practice

³ Aniza Damis, *Go Mediate! Mediation may be ordered to clear cases*, NEW STRAITS TIMES MALAYSIA (Jun. 18, 2007), http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/go_mediate_mediation_may_be_ordered_to_clear_cases.html.

⁴ See Swee Seng Lee, *Mediation in Construction Contracts: Mediation, Adjudication, Litigation and Arbitration in Construction Contracts*, CURRENT L.J. (2006).

⁵ Shaila Koshy, *The case for mediation*, THE STAR ONLINE (Feb. 14, 2010), <http://www.thestar.com.my/story/?file=%2F2010%2F2%2F14%2Ffocus%2F5645878>

⁶ Damis, *supra* note 3.

⁷ See Aida Othman, *Introducing Alternative Dispute Resolution in Malaysia: Prospects and Challenges*, 2 MALAYAN L. REV. 230 (2002). The author made a comparison with Singapore which already has an established Court Mediation Centre.

⁸ See Shaila Koshy, *Opt for mediation, people told*, THE STAR MALAYSIA, (Feb. 14, 2010), <http://www.thestar.com.my/news/nation/2010/02/14/opt-for-mediation-people-told/>.

Direction has formalised the ad hoc practice of some judges asking litigating parties in certain cases whether they would like to opt for mediation.⁹

Seen as a call for disputing parties who have filed their action in the courts to find a solution to resolve their disputes via mediation, the Malaysian judiciary introduced a free court-annexed mediation programme using judges as mediators in August 2011.¹⁰ In conjunction with the said introduction, it has also launched the Kuala Lumpur Court Mediation Centre (hereinafter K.L.C.M.C.) as its official premises, and opened its doors to all litigating parties. In essence, the free-of-charge service, which is alternative to trials, is aimed at encouraging litigating parties to mediate a solution to resolve their disputes.

Launched as a pilot project, the said programme was planned to be integrated into the court process as part of civil litigation. This is to ensure that the right message is sent to all litigating parties and their lawyers: that the mediation process is now under the umbrella of the courts. It was revealed at the said launch that twenty-eight civil cases from the High Court had already been referred to the K.L.C.M.C. pending mediation to commence, with a mediation success rate of 52% at all trial courts, and 15% at the Court of Appeal.¹¹

With the set-up of the K.L.C.M.C., litigants and their lawyers have been encouraged to take advantage of the benefits of the said mediation programme. Litigating parties could optimize the allocated time, to try their best to communicate with each other, and to break down barriers between them during mediation. Even if litigating parties do not reach a settlement via mediation, they would not have wasted their time. In fact, they would have received assistance from the mediator to find a solution or agreement to reduce the number of issues before proceeding to trial.

Yet another benefit is the opportunity for litigating parties to re-think about the dispute at hand, and to reassess their risks of not agreeing to come

⁹ See Shaila Koshy, *CJ pushes mediation option*, THE STAR ONLINE, (Oct. 29, 2010), <http://www.thestar.com.my/story/?file=%2F2010%2F10%2F29%2Fnation%2F7311125&sec=nation>.

¹⁰ See *Court Annexed Mediation a Free Programme – Chief Justice*, BERNAMA, (Aug. 25, 2011). The said press release was subsequently reported in *Chief Justice says court annexed mediation a free programme*, BORNEO POST ONLINE (Aug. 26, 2011), <http://www.theborneopost.com/2011/08/26/chief-justice-says-court-annexed-mediation-a-free-programme/>.

¹¹ *Id.*

to a settlement in the first instance. Under the said mediation programme, they would have the opportunity to experience the mediation process which is mediated by a judge or a judicial officer, and to hear directly from the judge or judicial officer who may provide alternative options for litigating parties to consider. As such, litigating parties may be even more convinced to reach a settlement.

Since its inception, the K.L.C.M.C. has issued an eight-page document entitled 'Kuala Lumpur Court Mediation Centre, Pioneer Court-Annexed Mediation in Malaysia' which is given out to all litigating parties who have filed their cases in court. It describes the idea of the court-annexed mediation programme as a pilot project where mediation is conducted by judges or judicial officers as mediators at the K.L.C.M.C., at no cost to all litigating parties to help them find a solution. The main content of the said brochure focuses on mediation procedures on order of referral, mediation agreement, scheduling and attendance, conduct of mediation sessions, duration, settlement agreement, adjournment; and if no agreement is reached, rules on confidentiality, and withdrawal of mediation by litigating parties. It also features the organization structure of the K.L.C.M.C., where its panel of mediators comprises ten judges from the High Court, and three Sessions Court judges and magistrates.

The said brochure is aimed primarily to provide general information about court-annexed mediation in Malaysia. It also covers general rules and procedures which govern how such mediation process works, including the names of judges and judicial officers who have been appointed as the panel of mediators at the K.L.C.M.C. However, the said brochure does not cover any rules and procedures on how judges or judicial officers who act as mediators should conduct such mediation sessions. In essence, it does not provide guidelines to mediators on the process, practice and procedures of conducting court-annexed mediation at the K.L.C.M.C.

The K.L.C.M.C., which has since changed its name to the Court-Annexed Mediation Centre Kuala Lumpur (hereinafter C.M.C.K.L.), is situated inside the Kuala Lumpur Court Complex where facilities such as mediation rooms, caucus

rooms, and telecommunications are provided for use by litigants.¹² At the C.M.C.K.L., there are part-time mediators who are current sitting High Court judges and Sessions Court judges, and full-time mediators.¹³

With the set-up of its own facilities and infrastructure, mediation sessions are no longer conducted in judges' chambers but on its own C.M.C.K.L. premises. 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 Centre Kuala Lumpur – a positive solution' to replace the previous eight-page document. Compared to the previous K.L.C.M.C. document, the said brochure contains seven sections on general information and guidelines on the said court-annexed mediation programme, including 'Agreement to Mediate' form for litigating parties to execute. As a move to encourage litigating parties to opt for court-annexed mediation to resolve their disputes, more court-annexed mediation centres (hereinafter C.M.Cs.) have since been established in several other locations nation-wide.¹⁴

Under the court-annexed mediation programme, all cases must first be filed in the courts before they can be registered for mediation. The only exception is '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 on 'Mediation Process for Road Accident Cases in Magistrate's Courts and Sessions Courts' prior to the case being fixed for hearing.

At the C.M.C.K.L., all registered cases for mediation which originate from the lower courts are mediated by full-time mediators while those from the higher courts are mediated by current sitting High Court judges who act as

¹² C.M.C.K.L. is located on Level 2, Kuala Lumpur Court Complex, Kuala Lumpur, Malaysia.

¹³ As of 24 March 2014.

¹⁴ Court-annexed mediation centres have been set up in a number of cities in Peninsular Malaysia. See *Mediation can help court reduce case backlog*, BUSINESS TIMES (Feb. 28, 2014); *Use mediation to resolve disputes, urges CJ*, NEW STRAITS TIMES (Mar. 1, 2014); See YAA Tan Sri Arifin Bin Zakaria, supra 2; YAA Tan Sri Arifin Bin Zakaria, Chief Justice, Malay., Speech at the Opening of the Legal Year 2013 (Jan. 12, 2013) (transcript available in <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>); YAA Tan Sri Arifin Bin Zakaria, Chief Justice, Malay., Speech at the Opening of the Legal Year 2014 (Jan. 11, 2014) (transcript available in http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/UcapanTUN2014_15JAN.pdf).

part-time mediators. Over a period of three years from 2011 to 2013, a total of 2,036 cases were registered at the C.M.C.K.L., where it increased by almost three-fold from 2011 to 2012, followed by an increase of almost two and a half times the number of registered cases between 2012 and 2013.¹⁵ It must also be noted that following the implementation of the said 2013 Practice Direction, the number of cases registered at the C.M.C.K.L. 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.¹⁶

Based on the report issued by the C.M.C.K.L. in December 2013, 816 cases were successfully mediated over the said three-year period with a settlement rate of 40%. It is interesting to note that full-time mediators recorded a 35% settlement rate (707 cases), while current sitting 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 2013 Practice Direction. From the 779 'running down' accident cases which were registered for mediation at the C.M.C.K.L., 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. The said accident cases constituted 38.3% of the total number of cases registered at the C.M.C.K.L. for automatic mediation across the three years in accordance with the 2013 Practice Direction.

In terms of total number of cases mediated by all C.M.Cs., up until December 2013, a total of 3,134 cases were referred to the C.M.Cs. in three cities with a collective settlement rate close to 50% at 47%.¹⁷ The C.M.C. in the city of Shah Alam was reported to have successfully mediated and settled 168 cases out of 539 cases which were registered between early 2013 and January 2014, recording a 31.2% settlement rate.¹⁸ From the C.M.C. in the city of Johor Bahru,

¹⁵ As of 24 March 2014.

¹⁶ *Id.*

¹⁷ See YAA Tan Sri Arifin Bin Zakaria, Chief Justice, Malay., Speech at the Opening of the Legal Year 2014 (Jan. 11, 2014) (transcript available in http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/UcapanTUN2014_15JAN.pdf).

¹⁸ See BUSINESS TIMES, *supra* note 14; NEW STRAITS TIMES, *supra* note 14.

a total of 251 cases were registered for mediation between September 2011 and December 2012 with a settlement rate of 47.6%, while the C.M.C. in the Kuantan city recorded a 25% settlement rate where it successfully mediated twenty out of eighty cases which were registered for mediation between November 2011 and December 2012.¹⁹

It could be surmised that, since the formal inception of the C.M.C.K.L. and subsequent establishment of C.M.Cs. in the said cities nationwide, a steady rise of cases has been registered at these C.M.Cs. over the last three years, with a slow increase of settlement rates recorded where the highest rates are evident in the C.M.C.K.L., being the first C.M.C. which was established. Such a positive trend should encourage C.M.Cs. to be set up in more locations nationwide including those in the states of Sabah and Sarawak in East Malaysia.

3. PROVISIONS ON COURT-ANNEXED MEDIATION

There is no primary statutory provision in Malaysia which expressly provides for litigating parties to resolve their dispute through court-annexed mediation, or for courts to resolve disputes via mediation as an alternative dispute resolution (A.D.R.) mechanism. However, reference must be made to Order 34 rule 2(2)(a) of the recently revamped Rules of Court 2012.²⁰ This Order relates to pre-trial case management.²¹ 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.”

¹⁹ *Supra* note 14.

²⁰ See 205 P.U. (A) 2012), http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=3766.

²¹ Similar provision can be seen in FED. R. CIV. P 16 (amended 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”. See Owen M Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

Reference to mediation in the 2012 Rules can also be traced to O 59 r 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.

In addition, there is a provision which requires claims for personal injuries and other damages due to road accidents to be automatically referred to court-annexed mediation prior to the cases being fixed for hearing. The said provision can be found in the 2013 Practice Direction where 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-annexed mediation within ten weeks from the date of filing before pleadings are closed. However, litigating parties could request for a court hearing date prior to the said referral to court-annexed mediation in their effort for early preparation in the event that mediation does not succeed in resolving their dispute.

In essence, in the absence of any comprehensive statutory provisions governing court-annexed mediation in Malaysia, current sitting judges and judicial officers who act as mediators rely solely on two main sources of mediation rules, guidelines and procedures when conducting mediation. The said sources are the 2010 Practice Direction, and the Rules for Court Assisted Mediation. The latter is used by all current sitting judicial officers who as act mediators in the courts in East Malaysia.

4. PRACTICE DIRECTION NO. 5 OF 2010 (PRACTICE DIRECTION ON MEDIATION)

The Practice Direction No. 5 of 2010, which is the Practice Direction on Mediation that came into effect on 16 August 2010, governs mediation for civil and commercial cases which are pending in the High Court and Subordinate Courts. Under the 2010 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, give such directions that litigating parties facilitate the settlement of the matter before the court by way of mediation.²²

In fact, judges may encourage litigating parties 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.²³ This is the power to direct bestowed on judges as part of their responsibility.²⁴ It is to be noted that the 2010 Practice Direction is intended only as a guideline for settlement, and that judges and litigating parties may suggest alternative modes of settlement other than through mediation.²⁵

In fact, lawyers representing litigating parties are required to cooperate and assist their clients in resolving their disputes in the most amicable manner.²⁶ Essentially, the key objective of the 2010 Practice Direction is to encourage litigating parties to come to an amicable settlement without having to go through or to complete a trial or appeal for the simple benefits of litigating parties arriving at a settlement which is agreed by both parties, that it is expeditious, and that it is a final settlement.²⁷ The 2010 Practice Direction contains six key areas which cover general guidelines on responsibilities of judges, including the “without prejudice” rule on confidentiality, which which judges are required to adhere to when they act as mediators.²⁸

Under the judge-led mediation mode, the general rule is not to have the judge hearing the case to be the mediating judge unless litigating parties agree to that.²⁹ If litigating parties do not agree to that, the hearing judge should then pass the case to another judge for mediation. In the judge-led mediation process, litigating parties must have their lawyers present during the

²² See 5 PRACTICE DIRECTION (hereinafter PRACTICE DIRECTION ON MEDIATION) §. 1.1 (2010) (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).

²³ *Id.*, §. 3.1.

²⁴ See YAA Tan Sri Arifin Bin Zakaria, Chief Justice, Malay., Responsibility of Judges Under Practise Direction no. 5 of 2010 (Oct. 10, 2010).

²⁵ See PRACTICE DIRECTION ON MEDIATION *supra* note 22, §. 2.2; §. 5.1(a) and (b). (2010) (Stipulates that mediation may be conducted in two modes, namely, “Judge-led Mediation,” and “Mediation by any other mediator”).

²⁶ PRACTICE DIRECTION ON MEDIATION *supra* note 22,, §. 2.3.

²⁷ PRACTICE DIRECTION ON MEDIATION *supra* note 22,, §. 2.1.

²⁸ PRACTICE DIRECTION ON MEDIATION *supra* note 22,, §. 6.2(a).

²⁹ PRACTICE DIRECTION ON MEDIATION *supra* note 22,, Annexure A (Judge-led mediation).

mediation session unless litigating parties are not represented by any legal counsel. In cases where the mediation is successful, the mediating judge will record a consent judgment on the agreed terms by litigating parties. However, if the mediation is not successful, the case is then reverted to the hearing judge to continue to hear the case for disposal.

It is submitted that the phrase “unless agreed to by the parties” gives litigating parties the option to decide whether if they want the judge or the judicial officer who is hearing their case to be the judge or the judicial officer to mediate their matter.³⁰ 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 current sitting 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, we argue 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 judges or judicial officers who conduct court-annexed mediation would be compromised. This would also raise other questions as to whether the judges or judicial officers could compromise their mediator impartiality, mediator neutrality, and mediator biasness wherein as mediators, the judges or judicial officers have 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 judges or the judicial officers, 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 or the judicial officer conducts the mediation, and the dispute does not settle. The said phrase “unless agreed to by the parties” which exists in the mediation rule under Annexure A allows the

³⁰ PRACTICE DIRECTION ON MEDIATION *supra* note 22,

judge or the judicial officer 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 or the judicial officer hears the matter during the trial. In other words, the said phrase allows for the same person to act as both the mediator and the hearing judge in the same case if agreed by the parties.

Aside from the potential negative perception on current sitting judges and judicial officers when they act as mediators, the said phrase, if allowed to be retained in the said Annexure A, could also provide the opportunity to litigating parties and/or their lawyers to undermine the mediation process. There is the potential risk of litigating parties and/or their lawyers to use 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 or the judicial officer, and the mediator to be the same person, we submit that litigating parties and/or their lawyers may be familiar with the mediator who hears the matter as the trial judge, and this could provide litigating 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, all these could lead to increasing dissatisfaction with judicial conduct of court-annexed mediation which would not be healthy. In fact, it may reflect negatively upon the judiciary as a whole. Consequently, it is suggested that the said phrase ought to be removed from Section 1 in the said Annexure and should be amended accordingly to read as follows – “The Judge hearing the case should not be the mediating Judge.”

It is to be noted that the 2010 Practice Direction does not cover mediation for Court of Appeal cases which could then be conducted on a voluntary basis with the consent of litigating parties.³¹ 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 9 April 2010.³² To illustrate by way of statistics, since the introduction of

³¹ See Datuk Wira Low Hop Bing, Retired Court of Appeal Judge, Malay., *Alternative Dispute Resolution in Civil and Commercial Cases* (Jul. 18, 2011).

³² See *Court of Appeal sits for first time to clear cases through mediation*, THE MALAYSIAN INSIDER (Apr. 9, 2010).

mediation in the Court of Appeal in April 2010 until November 2010, forty-five cases had been set down for mediation, of which seventeen cases were settled and consent judgments were recorded, two cases were withdrawn by way of Notices of Discontinuance, and mediation was not successful in nineteen cases.³³ At the Federal Court, two cases were mediated in 2011 while a total thirteen cases were settled at the Court of Appeal through mediation; 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.³⁴

In the courts of Sabah and Sarawak, court-annexed mediation programme is equally popular with settlement rate of 44% achieved over 746 mediations conducted in the courts from the period 2007 through 2009.³⁵ A further illustration on statistics gathered from 2007 through 2010 also indicated that the Sabah and Sarawak Courts had saved 1,368 sitting days or three and three-quarter years of judicial time, where 456 cases were mediated, assuming each case took three sitting (trial) days.³⁶

5. RULES FOR COURT ASSISTED MEDIATION

The second source of guidelines which is available to all current sitting judges and judicial officers who act as mediators is the Rules for Court Assisted Mediation which were introduced in 2011.³⁷ Although the 2011 Rules are posted in the official website of The High Court in Sabah and Sarawak, they can be referred to by all current sitting judges and judicial officers who act as mediators, including those in Peninsular Malaysia. It is to be noted that there are a number of inconsistencies in the use of terminologies to describe

³³ See Datuk Wira Low Hop Bing, Retired Court of Appeal Judge, Malay., *Mediation: The Way Forward, Challenges & Solutions*, (Jul. 3, 2012).

³⁴ *Supra* note 2.

³⁵ See EUGUSRA ALI and EDWARD PAUL, *Mediation*, OFFICIAL WEBSITE OF THE HIGH COURT IN SABAH AND SARAWAK, (Feb. 17, 2010), http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/ (last visited Jan. 6, 2013) (Eugusra Ali, Sessions Court Judge, Sessions Court Tawau, Sabah, and Edward Paul, Magistrate, Magistrate's Court, Tawau, Sabah, Malaysia).

³⁶ See THE HONOURABLE MR JUSTICE DATUK DAVID WONG DAK WAH (High Court Judge, Kota Kinabalu High Court, Sabah, Malaysia), *Court-Annexed Mediation*, (2011), http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/ (last visited Jan. 6, 2013).

³⁷ See THE HONOURABLE JUSTICE RAVINTHRAN N. PARAMAGURU, *Rules for Court Assisted Mediation*, OFFICIAL WEBSITE OF THE HIGH COURT IN SABAH AND SARAWAK, (Mar. 18, 2011), http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/mediation.php (last visited Jan. 6, 2013).

mediation which is conducted by judges and judicial officers. The 2011 Rules refer to it as “court assisted mediation” while the 2010 Practice Direction describes it as ‘Judge-led mediation,’ and the C.M.Cs. refer to it as ‘court-annexed mediation.’ It is unclear why such inconsistencies existed in the first place.

In the absence of primary statutory provisions on current sitting judges and judicial officers who act as mediators in court assisted mediation, the 2011 Rules have been written with the sole objective of using them to operate as guidelines to assist these judges and judicial officers.³⁸ Contained in sixteen sections, the 2011 Rules cover roles and responsibilities of judicial officers sitting as mediators, do’s and don’ts of the mediation process, the mediation process itself, and the effect of a successful mediation, including guidelines governing termination of a mediation session.

On the role of judges and judicial officers as mediators, the principle of mediator impartiality touches on the importance of not allowing current sitting judges and judicial officers to mediate their own trial cases.³⁹ Further, guidance is given on the basic function of a mediator as a facilitator at the first stage of the mediation process, and as an evaluator at the second stage. This is a manifestation of the principle of mediator impartiality and mediator neutrality which needs to be maintained throughout the process, including the duty to discharge with caution, tact and diplomacy.⁴⁰ The 2011 Rules also cover guidelines on how to conduct the mediation session from the first meeting with litigating parties, to the actual mediation session itself, and the conclusion of the session, whether or not settlement is reached. These guidelines are governed by mediation principles on confidentiality, party autonomy, fair treatment, impartiality and neutrality.⁴¹

We are of the view that the 2011 Rules are adequate to provide general guidelines for current sitting judges and judicial officers who act as mediators in court assisted mediation in the absence of any primary statutory legislation or provisions. It is understood that the 2011 Rules have been widely practised by the Sabah and Sarawak courts since its inception in March 2011. However,

³⁸ See RULES FOR COURT ASSISTED MEDIATION §. 1.

³⁹ *Id.*, §. 2.

⁴⁰ *Id.*, §. 4.

⁴¹ *Id.*, §§ 5-16.

the same could not be said about the extent of the 2011 Rules being practiced by current sitting judges and judicial officers in the courts in Peninsular Malaysia. It is conceded that the 2011 Rules are by far the most comprehensive on court assisted mediation to guide all current sitting judges and judicial officers when acting as mediators. One can safely conclude that the 2011 Rules constitute the official procedural set of guidelines on court assisted mediation currently recognized by the courts both in Peninsular Malaysia and East Malaysia as compared to the 2010 Practice Direction. Be that as it may, there are statutory provisions which govern non-court-annexed mediation where mediators are not current sitting judges or judicial officers. These provisions are governed in the Mediation Act 2012 (Act 749).

6. THE MEDIATION ACT 2012

The Mediation Act 2012 (Act 749) came into operation on the 1st August 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.” The enactment of the 2012 Act indicates that the Malaysian Government is desirous of having a mediation statute to promote mediation as an A.D.R., and is also indicative that the Government is moving along the international trend.⁴²

Be that as it may, the 2012 Act is not applicable to any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in court.⁴³ However, all judges and judicial officers who act as mediators do take guidance from the 2010 Practice Direction, and the 2011 Rules, which provide the required guidelines on court-annexed mediation practice during the pre-trial case management stage. In any case, mediation as an A.D.R. mechanism encourages consensus, mutuality and voluntariness where parties are not compelled to use mediation to resolve their dispute, whether before or after they have commenced any civil action in court.

⁴² See Lay Choo Lee, Deputy Comm’r, Law Revision & Reform Div. in the Attorney Gen.’s Chambers, Overview of Malaysian Mediation Act 2012 (Jul. 3, 2012).

⁴³ Mediation Act, 749 L.O.M., § 2(b), (2012).

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 2012 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.”⁴⁴ It is to be noted that the 2012 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 alternative dispute resolution mechanism.

7. ROLE OF THE COURTS AND JUDICIARY IN COURT-ANNEXED MEDIATION

The conventional view of the role of the judiciary in the administration of justice is to judge (not mediate), to apply the law (not interests), to evaluate the evidence (not facilitate), to make relevant order(s) (not accommodate), and to decide (not settle).⁴⁵ However, in the context of court-annexed mediation, this view is now considered an oxymoron because current sitting judges also play the role to mediate, to apply interests, to facilitate, to accommodate, and to settle “as part of his Key Performance Indicators (hereinafter K.P.Is.) in Malaysian judiciary,”⁴⁶ which is based on the assumption that the functions of judging and mediation are mutually exclusive.⁴⁷ However, this observation may no longer be true in the light of an increasingly more active role played by the courts and the judiciary in court-annexed mediation.

The role of current sitting judges and judicial officers in court-annexed mediation is evident in the mediation process. First, the hearing judge may encourage litigating parties to settle their disputes at the pre-trial case management or at any stage, whether prior to, or even after a trial has

⁴⁴ *Id.*, S.55 4(1), 4(2).

⁴⁵ See Hiram E. Chodosh, *Judicial Mediation and Legal Culture*, ISSUES OF DEMOCRACY, Dec. 1999, at 6-12.

⁴⁶ Our own emphasis.

⁴⁷ Chodosh, *supra* note 45.

commenced. It can even be suggested at the appeal stage.⁴⁸ Further, if litigating 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 decision of which is made by litigating parties.⁴⁹

In the event that the litigating 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 litigating parties, the hearing judge should not be the mediating judge, where he should pass the case to another judge.⁵⁰ Finally, if the matter is successfully mediated and settled, the hearing judge shall record a consent judgement on the terms as agreed to by litigating parties.⁵¹ If the matter is not settled through mediation, the court shall, on application of either one of the litigating parties or on the court's own motion, give such directions as the court deems fit.⁵²

Presumably, there has been substantial focus in articulating the distinction between the role of the judge, and the role of the mediator insofar as court-annexed mediation is concerned. The issues at hand relate to whether the mediating judge could mediate his or her own trial list, what should litigants 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 A.D.R. mechanism. At the end of the day, as with private mediation, court-annexed mediation is no different in the courts' efforts to ensure fairness in the mediation process. It is the duty and responsibilities of current sitting judges and judicial officers when they act as mediators to guide and provide assistance to litigating parties to enable them to reach their agreed outcome, one which they can live with.

⁴⁸ See PRACTICE DIRECTION ON MEDIATION *supra* note 22, §. 3.1 ; PIONEER COURT-ANNEXED MEDIATION IN MALAYSIA §. 1.

⁴⁹ See PRACTICE DIRECTION ON MEDIATION *supra* note 22, §§ 5.1 5.3 .

⁵⁰ *Supra* note 29; See RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 2.2; See also PIONEER COURT-ANNEXED MEDIATION IN MALAYSIA, *supra* note 48, §. 5(d) (as issued by the Kuala Lumpur Court Mediation Centre).

⁵¹ See 5 PRACTICE DIRECTION, *supra* note 22, Annexure A (Judge-led Mediation) §. 4; RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 15.1; See also PIONEER COURT-ANNEXED MEDIATION IN MALAYSIA, *supra* note 48, §. 7.

⁵² See 5 PRACTICE DIRECTION, *supra* note 22, §. 6.3(b); RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 16.1; See also PIONEER COURT-ANNEXED MEDIATION IN MALAYSIA, *supra* note 48, §. 9.

Be that as it may, there are different schools of thought on whether these judges and judicial officers 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.”⁵³ In further support of these judges and judicial officers playing the role as mediators, it is believed that they are able to address the fear of impartiality at post-mediation trials (where mediation did not succeed) by recusing himself or herself; they are resolvers of disputes through other mechanisms besides litigation; they have been trained in and are highly skilled at identifying issues; and they do understand that mediation is not the same as adjudication.⁵⁴

In fact, newly-appointed judges are reminded that the proper judicial role is to include functions as mediator, and as judicial administrator, where 95% of their cases should be settled with the judge’s active intervention.⁵⁵ It has been said that mediation has become an accepted part of the litigation process where judges and judicial officers are currently being encouraged to engage in A.D.R. mechanisms such as judicial case management–mediation, just to name a couple.⁵⁶ This statement also holds water in the context of court-annexed mediation in Malaysia where current sitting judges and judicial officers participate actively as mediators on a part-time basis with the formalization of several C.M.Cs. nationwide.

Yet another reason in support of the idea for these judges and judicial officers to mediate disputes centers on the notion that having judges or judicial officers as mediators could increase the likelihood of a settlement because litigating parties respect the bench and the mantle of the judge or the judicial officer. However, there is also the other side of the coin to consider. When judges or judicial officers take on the role as mediators, they become mediators, and are no longer adjudicators. This crucial point needs proper explanation to litigating parties, including these judges or judicial officers who act as mediators.⁵⁷ Once they step into the role as the mediator, that notion of a

⁵³ Louise Otis & Eric H Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L. J., 351 (2006).

⁵⁴ See Bruce Debelle, Justice, Should Judges Act as Mediators? (Jun. 1–3, 2007).

⁵⁵ See Frederick B. Lacey, Judge, The Judge’s Role in the Settlement of Civil Suits (Sep. 26, 1977), as cited in Marc Galanter, *A Settlement Judge, not a Trial Judge: Judicial Mediation in the United States*, 12 J. OF L. & SOC’Y 1 (1985).

⁵⁶ See Marilyn Louise Warren, *Should judges be mediators?* 21 AUSTRALASIA DISP. RESOL. J. 77 (2010).

⁵⁷ *Id.*

mediator must be crystalized in the perception, understanding and acceptance by litigating parties, and the judges or judicial officers themselves. In other words, there cannot be any unfair advantage of having judges or judicial officers as mediators when compared to other mediators who are not judges nor judicial officers.

While litigating parties and the public at large do respect judges and judicial officers as persons of higher authority, they must understand that in mediation, the judge or the judicial officer as the mediator does not make any decision for litigating parties. Neither would any award or judgement be handed down by the mediator to litigating parties, just as how mediation is conducted by mediators who are not judges or judicial officers. The final outcome of the dispute still lies in the hands of litigating parties who have full autonomy.

The second reason in support of judges and judicial officers as mediators is related to the notion that if judges and judicial officers do not start getting engaged in A.D.R. mechanisms such as mediation, the courts will risk being marginalised, and eventually become appellate and supervisory institutions, and could no longer be involved in civil litigation matters.⁵⁸ 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...”⁵⁹ It is granted that the above is a valid concern. As noted, such a concern was the catalyst for the induction of the mediation process into the Malaysian litigation landscape.

Another reason in support of current sitting judges and judicial officers as mediators is to give them the opportunity to develop variety in their judicial life, and to expand their judicial role for mutual benefits of judges and the community at large when they adopt A.D.R. skills.⁶⁰ It is contended here that, relative to the other reasons, this reason is not compelling because A.D.R. processes, or specifically, mediation, is not every judge’s cup of tea. In other

⁵⁸ *Id.*

⁵⁹ Abraham, *supra* note 1.

⁶⁰ Warren, *supra* note 56.

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, the Australian National Alternative Dispute Resolution Advisory Council (hereinafter N.A.D.R.A.C.) comes down hard on judges playing the role as mediators because there is uncertainty in what actually constitutes judge-led mediation.⁶¹ In total support of N.A.D.R.A.C.'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.⁶² However, judges could mediate under exceptional circumstances in which case the judge should not hear the case, and must be an accredited mediator.⁶³

There are also other reasons which do not support the idea of having judges take on the role of mediators.⁶⁴ 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.⁶⁵ However, in recent years, with changing times, judges and judicial officers have been trained to have wider and practical perspectives on how to resolve disputes other than through the litigation process.⁶⁶ Having judges and judicial officers mediate is not new news in developed countries such as Canada, the United States, and

⁶¹ See MURRAY KELLAM AO ET AL., 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* 111 (2009). The main concern was on the incompatibility with the constitutional role of judges exercising federal jurisdiction (sec. 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 (sec. 7.42), being an inappropriate application of judicial authority (sec. 7.43), and the negative implication on the judiciary as a whole from dissatisfaction with judicial conduct of mediation by the judge (sec. 7.45).

⁶² N.A.D.R.A.C., sec. 7.52.

⁶³ *Id.*, sec. 7.59.

⁶⁴ *Cf.* Warren, *supra* note 56.

⁶⁵ Warren, *supra* note 56.

⁶⁶ Warren, *supra* note 56.

South Australia, just to name a few.⁶⁷ A developing country such as Malaysia has already made efforts to promote free court-annexed mediation programmes by having current sitting judges and judicial officers mediate cases through several C.M.Cs. which have been set up nation-wide.

The second reason is that judges and judicial officers would be frowned upon when they are engaged in private sessions, such as mediation, because their roles must be conducted transparently, and in public.⁶⁸ Lastly, where judges and judicial officers play the mediator role, judicial resource is seen to be taken away from trials and appeals.⁶⁹ We are of the view that this reason is relevant to the court-annexed mediation programme in Malaysia where current sitting judges and judicial officers who act as mediators on a part-time basis still have their adjudication role, which requires their undivided attention and focus on trials and appeals. Until they become full-time mediators, this reason will be the most compelling reason why judges and judicial officers should not be mediators.

Further, it has been seen that full-time mediators recorded a higher settlement rate (at 35%) than judges and judicial officers who act 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 the C.M.C.K.L.⁷⁰ Hence, it is argued 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-annexed mediation practice in Malaysia as an A.D.R. mechanism to facilitate settlement of disputes.

⁶⁷ 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 Geetha Ravindra, *Virginia's Judicial Settlement Conference Program*, 26 THE JUST. SYS. J. 293 (2005). In the United States, the Del. Code Ann., tit.10, §§ 346-347 were 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 generally Maureen Milford, *Jurisdiction, judges' power expanded*, WILMINGTON NEWS J., Jun. 8, 2003, at.1. . In South Australia, *Supreme Court Act 1935* (SA) s 65 (Austl.) provides judges with the capacity to engage in mediation. See Iain D Field, *Judicial Mediation and Ch III of the Commonwealth Constitution* (2009) (unpublished Ph.D. thesis, Bond University, Faculty of Law).

⁶⁸ Warren, *supra* note 56.

⁶⁹ Warren, *supra* note 56.

⁷⁰ As of 24 March 2014.

Judges and judicial officers who act as mediators must be guided by ethical standards when conducting mediation. In Singapore, judges are guided by the Model Standards of Practice for Court Mediators of the Subordinate Courts under clause 4 according to which mediators are required to comply with the Code of Ethics for Court Mediators of the Subordinate Courts of Singapore, which covers key areas on impartiality, neutrality, confidentiality, conflict of interests and the like.⁷¹ However, in Malaysia, there are no similar standards of practice for court mediators although current sitting judges and judicial officers who act as mediators are guided by the 2010 Practice Direction and the 2011 Rules.

8. OVERCOMING THE CHALLENGES

As seen in the preceding sections, court-annexed mediation practice in Malaysia has since evolved within the Malaysian legal system, relying on current mediation guidelines in the absence of primary statutory provisions governing such practice. What we have seen is a number of aspects which could severely hamper or restrict the growth and future of such practice in Malaysia, which can be summed up as follows, namely:

1. There is lack of consistency and standardization in mediation practice across court-annexed mediation and private mediation in Malaysia, from three perspectives – the mediation process, procedure and governance; mediator competency and assessment; and mediation standards and ethics.
2. The current mediation guidelines, the 2010 Practice Direction, and the 2011 Rules are relatively inadequate and general in nature.
3. Current sitting judges and judicial officers in Malaysia could mediate their own trial cases under the 2010 Practice Direction where the trial judge and the mediator could be the same person in the same case.
4. Current sitting judges and judicial officers who act as mediators are still viewed as having higher authority because they are viewed as having higher authority as sitting judges and judicial officers.
5. Current sitting judges and judicial officers are only part-time mediators.

⁷¹ See Seng Oon Loong, *Mediation*. LAWS OF SINGAPORE, SINGAPORE ACADEMY OF LAW (2009), <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-3>.

If mediation is to be promoted and encouraged as an A.D.R. mechanism to disputing parties and litigating parties, then the name of the game is to ensure that there is consistency and standardization in mediation practice across the board regardless of who the mediators are, whether they are current sitting judges or judicial officers, practising lawyers, or other professionals. This is especially critical at a time when court-annexed mediation practice in Malaysia is not legislated while private mediation has already been legislated through the 2012 Act.⁷²

Presently, all private mediators practise mediation in accordance with the 2012 Act which contains provisions on regulatory, beneficial and procedural elements on mediation agreement, settlement agreement, issue of enforceability of these agreements, mediation process, confidentiality and privileges, and mediator's liability.⁷³ On the other hand, current sitting judges and judicial officers who act as mediators take guidance from the 2010 Practice Direction, and the 2011 Rules, which provide the required guidelines on court-annexed mediation practice during the pre-trial case management stage.

Hence, it is evident that there is more than one single source of reference on mediation practice for all mediators in Malaysia. By having different sources of reference, there is a risk of allowing inconsistent mediation practices to prevail without check. In the effort to consider implementing consistency and standardization in mediation practice where court-annexed mediation is new in Malaysia, we argue whether it is fair to impose the same standards of mediation practice to judges and judicial officers as with private mediators who are bound by the Malaysia Mediation Centre (hereinafter M.M.C.) Mediation Service Code of Conduct, and M.M.C. Mediation Rules as issued by the Malaysian Bar (also known as the Bar Council).⁷⁴

It is to be noted that the panel of mediators from M.M.C. are accredited mediators, comprising lawyers and other professionals, who have completed 40 hours of mediation skills training workshop which is conducted by the Bar

⁷² *Supra* note 43.

⁷³ *Supra* note 43.

⁷⁴ See official website of MALAYSIAN BAR (also known as the BAR COUNCIL), www.malaysianbar.org.my.

Council or other recognised bodies.⁷⁵ In contrast, no mediator accreditation has since been formalised for current sitting judges and judicial officers who act as mediators, although continuous but ad-hoc training sessions have been conducted for these judges and judicial officers to enhance their skills in mediation.⁷⁶ We submit that the same standard of mediation practice should apply to these judges and judicial officers as do their private mediator counterparts.

In terms of ensuring consistency in mediator competency and its assessment, current sitting judges and judicial officers must, therefore, be trained, taught and reminded to mediate litigating parties' dispute based on mediation principles, process, procedures and governance as mediators. These judges and judicial officers may be tempted to conduct mediation in an evaluative style, which they practise in their adjudication role, instead of using the facilitative approach which is expected of mediators. They should not focus solely to push or pressure litigating parties to reach a settlement at all costs although they face mounting pressure to increase the likelihood of settlements in the cases they mediate. As an example, these judges and judicial officers in Malaysia are driven by their K.P.Is. to reduce the volume of backlog of cases they adjudicate.⁷⁷

Hence, we are of the view that judges and judicial officers have to be mindful that mediation sessions are not the same as settlement conferences where the focus is to get litigating parties to reach settlement. There is the need to ensure that their capabilities and skills to conduct court-annexed mediation are constantly kept in check for purposes of consistency and standardization of mediator competency and competency-based assessment.

Simply put, in any training programme for mediators, including accreditation, the content ought to focus on 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,

⁷⁵ See Gunavathi Subramaniam, Mediator, Malay. Mediation Ctr., *The Practice of Mediation in Malaysia* (Jul. 3, 2012).

⁷⁶ See Tan Sri Bin Zakaria, Chief Justice, Malay., Appointment Speech as the 13th Chief Justice of Malaysia (Sep.14, 2011). <http://www.kehakiman.gov.my/sites/default/files/document3/Penerbitan%20Kehakiman/UcapanKHNBI.pdf>. See also *Mediation and the Courts – The Right Approach* (Jul. 30, 2010).

⁷⁷ *Supra* note 10, *supra* note 14, and *supra* note 19.

namely, knowledge (negotiation theory, mediation strategies, tactics, and processes in both negotiation and mediation), skills (analytical, communication in listening and questioning skills, organization and planning skills), and attitude (ethics, values and professionalism).⁷⁸ According to one author, there is the need for intercultural mediation training to be included on cross-cultural studies, role plays, cross-cultural communication skill development, and processes that encourage reflective and life-long learning.⁷⁹ We share the same view given the fact that Malaysia is a multi-cultural society. For current sitting judges and judicial officers who act as mediators, they require professional training and accreditation in mediation. This is because the role of the mediator and the role of the adjudicator have very different skill sets where they would be exposed to theories and principles of mediation, including the opportunity to enhance their practical mediation skills.

As an example, in an effort to enhance mediation skills of judges and judicial officers in Malaysia, a special training was conducted in 2011 for these judges and officers.⁸⁰ Further, in an effort by the Malaysian judiciary to enhance such skills, a special training was also conducted for judges and judicial officers by a senior judge from the United States.⁸¹ We submit that in order to ensure 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 these 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 current sitting judges and judicial officers who act as mediators.

⁷⁸ See David A Cruickshank, *Training mediators: moving towards competency-based training*, in A HANDBOOK OF DISPUTE RESOLUTION (Karl Mackie, ed., 1991).

⁷⁹ See Siew Fang Law, *Culturally-sensitive mediation: The importance of culture in mediation accreditation*, 20 AUSTRALASIA DISP. RESOL. J. 3 (2009).

⁸⁰ *Supra* note 2.

⁸¹ The special six-month training was conducted by Mr Justice Gordon J. Low, a Senior Federal Judge of Utah, U.S. in 2011.

In essence, such efforts should be consolidated and leveraged with existing efforts, which are organised and conducted by M.M.C. for its panel of mediators in private mediation. We contend 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, including court-annexed mediation, with emphasis on mediation principles such as confidentiality, party autonomy, mediator impartiality, mediator neutrality, and fair treatment. The objective is to ensure that consistency and quality in mediation practice 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 accreditation of all mediators, including judges and judicial officers. As evident in countries like Australia and Singapore, we are of the view 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, accreditation of mediators is handled by National Mediator Accreditation System (N.M.A.S.).⁸² The Australian National Mediator Standards cover a variety of areas such as the creation of Recognised Mediation Accreditation Bodies (R.M.A.Bs.) to handle the process of accreditation, the establishment of the approval process, and continuing accreditation requirements for mediators.⁸³ Singapore, on the other hand, has a different challenge. In the absence of a national system or law to regulate the accreditation and the quality of standards of mediators, and to regulate mediation practice, the Singapore Mediation Centre (S.M.C.) developed its own system of mediator training and accreditation, and also established its training arm in mediation, negotiation and conflict management.⁸⁴

⁸² See Rachel Nickless, *Victoria allows Judge Mediators*, AUSTL. FIN. REV., Apr. 13, 2012 in Patricia Anne Bergin, Chief Justice in Equity, Supreme Court of N.S.W., *The Objectives, Scope and Focus of Mediation Legislation in Australia* (May 11, 2012).

⁸³ *Id.*

⁸⁴ Loong, *supra* note 71. Accreditation is limited to one year, and is subject to renewal. Re-accreditation is 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 if requested to do so to ensure the maintenance of his or her skills.

In other words, 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 the mediation process.

In fact, we opine that there must be any distinction between current sitting judges and judicial officers as mediators, and private mediators who are not current sitting judges and judicial officers. It is submitted that the need to standardize such mediation competency, its competency assessments, certification and accreditation for all mediators, and for all the above mentioned elements to be assimilated into the mediation profession and practice in Malaysia, cannot be overemphasized. Our view is that these elements ought to be regulated to ensure that the standard and quality of the mediation profession are not compromised.

Such efforts would ensure consistency and standardization in mediation standards and ethics. This is because presently, there are no such standards and professional ethics in mediation *per se* governing current sitting judges and judicial officers in Malaysia when they act as mediators although they are guided by the 2010 Practice Direction, and the 2011 Rules. It was seen from earlier discussions in this article that there are inadequate provisions governing ethical standards of mediation practice in both sets of the guidelines and procedures. The panel of mediators from M.M.C., on the other hand, refer to the M.M.C. Code of Conduct when they act as mediators in sessions held by the M.M.C.⁸⁵ The need for a standardized code of conduct on mediation practice and professional ethics in mediation cannot be overemphasized as it must apply to all mediators regardless of their background, whether they are mediators in court-directed mediation or private mediation.

It is contended that mediators face ethical issues when conducting mediation throughout the mediation process. When judges and judicial officers

⁸⁵ *Supra* note 74.

act as mediators, mediation moves them out of their familiar adjudicative role where they do not communicate directly with litigating parties unless litigating parties are unrepresented by their respective legal counsels. In mediation, however, 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. Further, they may be required to conduct caucuses during mediation. This has important ethical implications because they are now put in the delicate position of keeping, and on occasions, strategically revealing the confidences of each of the parties.⁸⁶ 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 judges and judicial officers.⁸⁷

However, there are also issues which challenge the creation and implementation of a code of ethics for mediators.⁸⁸ First, mediation is a flexible 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 do mediators handle this challenge in the event 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 other countries which have implemented such standards and professional ethics in mediation for all mediators, including those who conduct court-annexed mediation, for strict compliance by all mediators. For instance, the Model Standards of Conduct for Mediators (Model Standards) was adopted in August 2005 by the American Bar Association (A.B.A.), the American Arbitration Association (A.A.A.), and the Association for Conflict Resolution, the Standards of Ethics

⁸⁶ See Otis and Reiter, *supra* note 53.

⁸⁷ See Robert A Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, J. DISP. RESOL. 1 (1994).

⁸⁸ See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (1994).

and Professional Responsibility in Virginia, U.S.,⁸⁹ and a set of code of ethics under the Model Standards of Practice for Court Mediators in Singapore.⁹⁰

One of the key challenges facing court-annexed mediation in Malaysia is the inadequacy and inconsistency of current mediation guidelines. As we saw in the earlier section of this article, the said guidelines in the 2010 Practice Direction are general in nature, and lack the depth and precision in several areas, namely, scope of the mediation process and its procedures; the role, responsibilities, duties, “dos and don’ts” of the mediator; the fundamental ethics on the conduct of mediators on impartiality, neutrality, and conflict of interest. In short, they are not as comprehensive as those in the 2011 Rules.

Be that as it may, we are of the view that the 2011 Rules could be further enhanced and improved, specifically in a number of areas. On ‘other cases which can be referred to mediation,’ further clarity and direction could be included.⁹¹ Under the basic function of the mediator, no guidelines are provided on the different mediation styles to be adopted.⁹² In terms of the mediation process per se, there are no details on the step-by-step process of the end-to-end mediation session included to guide mediators.⁹³ The section on conflict of interest does not include principles of mediator impartiality and mediator neutrality.⁹⁴ Last but not least, the provision on confidentiality does not touch on limitations and exceptions to this rule.⁹⁵

In addition, we also saw the inconsistent provision in the 2010 Practice Direction with that in the 2011 Rules, which allows litigating parties to decide if they choose to have the same judge or judicial officer who is hearing their case to be the mediator.⁹⁶ Simply put, the said provision also allows trial judges to mediate their own cases, and if mediation fails, the mediator could hear the case as the trial judge with consent from litigating parties. In contrast, the 2011

⁸⁹ See Ravindra, *supra* note 67.

⁹⁰ See LAN YUAN LIM & THIAM LENG LIEW, COURT MEDIATION IN SINGAPORE (1997). 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, including general responsibilities of mediators, and their responsibilities to parties.

⁹¹ See RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 3.3.

⁹² RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 4.

⁹³ RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 5.

⁹⁴ RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 8.

⁹⁵ RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 9.

⁹⁶ *Supra* note 29.

Rules expressly prohibit the mediator from trying his own cases.⁹⁷ In other words, such inconsistent provisions in the said two sources of mediation guidelines allow judges and judicial officers when acting as mediators to choose either provision, whichever they decide to make reference to or to rely on. Trial judges who had acted as mediators may be prejudiced or have pre-conceived notions of the facts or evidence which they were privy to during mediation which could influence their delivery of the judgment.

This opens up inconsistent practices in mediation which would gravely undermine fundamental mediation principles of ethics, fair treatment, impartiality and neutrality of judges and judicial officers who act as mediators. We are of the view that the said phrase in the 2010 Practice Direction ought to be removed, and that the two sources of mediation guidelines should be streamlined into one single source of mediation guidelines for all mediators nation-wide, whether it is for court-annexed mediation or private mediation, whether they are in Peninsular Malaysia, or in East 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.⁹⁸ For example, in the United States 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.⁹⁹ A similar prohibition can be seen in Australia.¹⁰⁰

However, it was held in one Malaysian case that the said Annexure A on judge-led mediation in the 2010 Practice Direction is not an automatic disqualification of the trial judge who mediated the case.¹⁰¹ 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.¹⁰² In other words, the present Malaysian position holds that it

⁹⁷ See RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 14.

⁹⁸ See Ravindra, *supra* note 67; see also Field, *supra* note 67.

⁹⁹ See Ravindra, *supra* note 67.

¹⁰⁰ Ravindra, *supra* note 67. See *Supreme Court Act 1935* (SA) s 65(5) (Austl.) provides that a judge who has attempted to mediate a dispute should be excluded from adjudication; AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION INCORPORATED, *GUIDE TO JUDICIAL CONDUCT* (2002).

¹⁰¹ See *Dato' Dr Joseph Eravelly v Dato' Hilmi Mohd Nor & Ors*, 3 CLJ 294 (2011).

¹⁰² *Id.*, at 295. See also judgment of VT Singham, J, 305.

is still possible for the judge who mediated the case to be the trial judge as long as litigating parties consent to having the same judge, and that the courts must be satisfied that there is no “real danger of bias.”

One of the areas which could hamper the growth of court-annexed mediation practice in Malaysia is the notion that judges and judicial officers will always remain as judges and judicial officers in the eyes of litigating parties even when they act as mediators in the informal setting of the mediation room.¹⁰³ This is because mediators' position in society is such that it would be difficult for the parties to make a distinction between current sitting judges and judicial officers, and mediators. The parties could misinterpret or misconstrue what judges and judicial officers say during mediation as the court's decision on the mediated issues concerning the dispute. In our view, people respect the bench which has traditionally been seen as the place of higher authority and wisdom. Presumably, court-annexed mediation has the “force of the law” because it is conducted by judges and judicial officers where the parties may appear to be more receptive to options or suggestions tabled by these mediators. Judges and judicial officers may be tempted to push forward their views using the evaluative style of mediation to pressure the parties to reach a settlement in order for cases to be closed expeditiously. The Honorable Marilyn Warren 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.”¹⁰⁴

It is submitted that litigating parties need to be educated on the role of judges and judicial officers as mediators, and the role court-annexed mediation plays as an A.D.R. mechanism, including how it is integrated in the litigation process and court system. As emphasized in the earlier, we are of the view that having a common and standardised set of mediation guidelines for both court-annexed mediation and private mediation could ensure the right behavior and compliance amongst judges and judicial officers when they act as mediators. Only then would they be subject to the mandated requirements of professional mediator competency and its standardised assessment as do their counterparts in private mediation.

¹⁰³ See Otis and Reiter, *supra* note 53.

¹⁰⁴ Warren, *supra* note 56.

Last but not least, the current practice of court-annexed mediation is for current sitting judges and judicial officers to act as mediators on a part-time basis. Suffice to state at this point that presently the only mediators who practise court-annexed mediation on a full-time basis are those mediators who conduct court-annexed mediation programmes at the C.M.Cs. other than judges and judicial officers who are on a part-time basis. At the C.M.C.K.L., for example, all registered cases for mediation which originate from the lower courts are mediated by full-time mediators while those from the higher courts are mediated by part-time High Court judges.

We are of the view that the area of contention is the time factor. Owing to the dual role by current sitting judges and judicial officers who act as mediators, the perpetual challenge or obstacle faced by mediators is insufficient time on their hands to dispose of their daily load of trial cases, and to handle mediation cases as well. Presumably, such time constraints could compromise the quality of the judgments delivered by judges and judicial officers in cases which they adjudicate, and the quality and the settlement rate of cases which they mediate.

Hence, it is submitted that there seems to be a sufficient cause to regulate requirements on the appointment of mediators to be on a full-time basis, which should not be applicable to all mediators, for the mediation profession in Malaysia is to be taken seriously. We are of the view that formalizing such requirements through a common set of regulations on mediator eligibility to be on a full-time basis before they are duly appointed could ensure consistency and standardisation of the said regulations.

Simply put, such a move would benefit both litigating parties and mediators alike. For the parties, they would no longer need to be burdened with the notion of whether mediators wear the “adjudicator hat” or the “mediator hat” where current sitting judges and judicial officers act as mediators. For mediators, they would be able to completely focus and concentrate on being full-time mediators without having to go through any ethical dilemmas of being the “judge” to the litigating parties to resolve the dispute at hand.

9. WHAT THE FUTURE HOLDS

The question is this: Given the challenges faced by current sitting judges and judicial officers who act as mediators, is there a future for court-annexed mediation practice in Malaysia? What would the future hold? How can these challenges be addressed and overcome? It is our contention that much could still be done by the Malaysian courts and judiciary to tackle these challenges little by little because they are not insurmountable. In our view, there are five solutions to manage the future of court-annexed mediation practice in Malaysia, which are to be adopted cohesively in an integrated manner when being implemented.

The first solution is to amend the 2010 Practice Direction and the 2011 Rules, given their shortcomings and inadequacies, as elaborated earlier. This could be seen as a quick fix without having to go through the process of regulating the said amendments via legislation and codification. We are of the opinion that the situation deserves immediate attention in the light of the Malaysian position to allow current sitting judges and judicial officers to try cases which they did not succeed in mediation, provided the courts must be satisfied that there is no “real danger of bias.”¹⁰⁵ Hence, our submission is that the current sources of mediation guidelines on court-directed mediation are to be replaced with an amended version which should be premised on the 2011 Rules as the base reference material. This is because the 2011 Rules contain a relatively more comprehensive account and elaboration of mediation guidelines for court mediators than the 2010 Practice Direction, as discussed earlier.

The next suggested solution is to draw up a common set of mediation standards and code of conduct which governs all mediators, whether they conduct court-annexed mediation or private mediation. As seen in the earlier section of this article, presently, there are no standards and code of conduct governing judges and judicial officers when they act as mediators, unlike their counterparts in private mediation practice, where they are bound by the said M.M.C. Mediation Service Code of Conduct, and the M.M.C. Mediation Rules as

¹⁰⁵ *Supra* note 101.

issued by the Malaysian Bar.¹⁰⁶ As a step forward, the immediate approach would be to use the said information as issued by the Malaysian Bar as the base reference materials when drawing up one common set of mediation standards and code of conduct, which is applicable to all mediators in Malaysia.

In addition, there is a need to look into forming 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;
6. Be the focal point for all information on mediation; and
7. Conduct independent complaints review process.

Presently, some of the above functions are separately administered and conducted by different organizations, namely, the C.M.Cs. and the M.M.C., which focus on court-annexed mediation practice, and private mediation practice respectively. We are of the view 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 of effort, time and cost leading to wastage and inefficiencies.

Taking a baby step forward, our suggestion is to form a mediation resource organization first.¹⁰⁷ Such a centralised resource office could provide administrative support and function with a view to oversee, and to could

¹⁰⁶ *Supra* note 74.

¹⁰⁷ *See* Ravindra, *supra* note 67. As an example, in the state of Virginia, U.S., 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.

streamline the scope of responsibilities, which are currently undertaken by both the C.M.Cs. and the M.M.C. Through such a centralised mediation institution, all efforts to regulate and enforce consistent and standardised mediation process and governance, mediation standards and professional ethics, to deliver consistent and standardised mediation competency and its assessment, and mediator registration and accreditation, could be achieved and leveraged through such an establishment.

The next solution is to reach out to retired judges to join the mediator workforce.¹⁰⁸ This is an attempt to enhance mediator competency in addition to providing formal mediator training to current sitting judges and judicial officers who act as mediators. There are several advantages of using retired judges as court mediators in the C.M.Cs. which are currently located in several cities and towns nationwide.¹⁰⁹ First, they have the legal expertise which could be put to better use; they do not pose the same ethical concerns as current sitting judges and judicial officers would, such as those which relate to coercion to pressure litigating parties to settle in order to clear backlog of cases, and role conflict in situations where the current sitting judge or judicial officer who act as the mediator, and the trial judge could be 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, we are of the view that retired judges would still need to undergo formal mediator training, just like every mediator needs to.

First, these retired judges will join the panel of trained mediators from the C.M.Cs. They would be recommended to be assigned to the most proximate C.M.Cs. 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-annexed 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 the panel of mediators from the M.M.C., and current sitting judges and judicial officers who act as part-time mediators.

¹⁰⁸ Ravindra, *supra* note 67. As an example, the Norfolk Circuit Court in the United States brought in retired Circuit Court judges to conduct settlement conferences in complex cases. 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 these retired judges.

¹⁰⁹ *Supra* note 14.

Under this arrangement, suffice to note that there would be no change in the current C.M.C. model where litigating parties would be assigned a mediating judge from the panel of trained mediators to handle their matter by the relevant C.M.C. Such court-annexed mediation services would still be provided free of charge to litigating parties, and would still be open to any civil case which is filed in the courts. It is in our humble opinion that such an arrangement would only pose minimal changes so as not to disrupt the current C.M.C. model. Instead, such an arrangement would help to enhance the value of the C.M.Cs. to the current court-annexed mediation practice in Malaysia.

Last but not least, our suggested solution to address the current challenges in court-annexed mediation practice is to enhance and expand the scope of the C.M.Cs. Since its inception in Kuala Lumpur in 2010, C.M.Cs. have mushroomed in major cities nationwide.¹¹⁰ The results so far have been encouraging with reasonable settlement rates achieved in C.M.C.K.L. since the pilot programme.¹¹¹ Barring all circumstances, similar achievements would be forthcoming from the other C.M.Cs. 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 C.M.Cs., 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 litigating parties. It is most important for the public to be educated about how C.M.Cs. can help and guide litigating parties to reach an agreed outcome in mediation which needs to be promoted as an A.D.R. mechanism, and to correct the perception that litigation in the courts is the only way to resolve disputes. This is particularly important as more and more C.M.Cs. could be established nationwide in the coming years. Further, in order to cater for increasing demand of court-annexed mediation services, the scope of C.M.Cs. ought to be progressively enhanced and expanded.

Presently, C.M.Cs. cover cases which are referred by the courts for mediation, and also 'running down' cases which are automatically referred to C.M.Cs. for mediation under the 2013 Practice Direction. Potentially, the type of cases should also be expanded to include family/divorce matters, and building

¹¹⁰ *Supra* note 17.

¹¹¹ *Supra* note 17.

and construction disputes. However, this would very much depend on whether such cases could be automatically referred to C.M.Cs. as in the “running down” accident cases through Practice Directions as issued by the judiciary.

10. CONCLUSION

As court-directed mediation practice is still new in Malaysia, 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 C.M.Cs. and how court-annexed mediation services are administered and integrated into the court process.

Next, amending the current guidelines on court-directed mediation practice would 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 hearing 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 would be addressed, although there is no guarantee that more mediated cases will get settled by full-time mediators.

Worries that judges and judicial officers, when acting as court mediators lack mediator, competency, and lack the required capabilities and skills to the extent that they do not practise court-directed mediation in accordance with ‘pure’ mediation principles would no longer hold water. Thoughts that litigating parties may be pressured or coerced by judges and judicial officers to accept mediation as an A.D.R. mechanism, or even to accept settlement terms which are passed down to litigating parties would be a thing of the past.

Be that as it may, it cannot be over-emphasized that all the recommended positive changes and amendments to the current guidelines on court-directed mediation would come to naught if there is lack of focus,

regulation and enforcement on a sustainable basis. To this end, it is our recommendation that a centralised mediation institution is to be established 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 by the Malaysian judiciary.