Enhancing the JDR process through planning, management, implementation, facilities, budgeting, and technology

Presentation by Justice Barbara Conway
Superior Court of Justice (Ontario)

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Thank you very much. Thank you to our JDRN co-chairs, to my colleagues around the world, both in-person and virtually. My name is Justice Barbara Conway from the Ontario Superior Court of Justice. I sit on our Commercial List in Toronto that specializes in commercial and insolvency matters. I met many of you in May of 2023 in New York City at the second meeting of the JDRN. I look forward to meeting many more of you over the next few days at this third meeting in Kuala Lumpur. Before I begin, I just want to say a hearty thank you to the co-chairs and to the organizers of this third meeting. I know how much work has gone into it and it shows.

I am going to just speak for just a few minutes on enhancing the JDR process through planning, management, implementation, facilities, budgeting, and technology at the Ontario Superior Court of Justice.

JDR is an essential function of the Ontario Superior Court of Justice. Our court system recognizes that JDR helps parties achieve resolution more quickly and at less expense. It also assists the court in managing its trial resources and ensuring that they go to the matters that truly need them.

Logistically, JDR is very similar to other hearings in our court. Most JDR hearing types are fully integrated into the court's regular planning, scheduling, facilities, and budgeting processes.

Most JDR hearings take place under statute or rules of court enacted by the appropriate law-making body. For more details about the legal background and the features of specific JDR processes in our country, I encourage you to consult the Ontario Superior Court of Justice country report that was recently uploaded to the JDRN website.

Administrative support for JDR hearings and attendances is provided by the provincial Ministry of the Attorney General, as it is for all hearings in our court.

In terms of hearing methods and guidelines, JDR hearings are conducted in-person, virtually and/or through hybrid means. In 2022, the Superior Court of Justice released presumptive guidelines indicating to parties what the default method of hearing would be. In all civil JDR hearings, the presumptive mode is virtual. In all family conferences, the presumptive mode is in-person. In commercial matters (which we have our own practices), the default mode for any hearings over one hour is in-person. The selection of default hearing methods was guided by overarching principles such as access to justice, the needs of self-represented litigants and the court's discretion.

The guidelines are available on the court's website.

Technology is a critical component of our JDR hearings. We need to be able to offer JDR processes through a range of hearing types, including virtual and hybrid, so that they are easily accessible to parties.

Virtual and hybrid hearings are not just about the hardware and computer applications, but also about training and change management. In this vein, judiciary and staff have been trained on using Zoom (now second nature to us) and the document sharing platform Case Center. The court and the provincial Ministry of the Attorney General make instructional materials and technical support available to counsel and parties.

I will now talk about the court's JDR initiatives in civil, commercial, and family matters.

The court's civil JDR processes include pre-trial conferences and case conferences, as well as settlement conferences in the Small Claims Court. They are well-established parts of the litigation process and set out in rules of court.

In commercial matters, where I sit, most cases are case managed by the same judge, either formally or informally, to the extent possible. This ensures continuity and enhances the prospects of narrowing issues or resolving the case through actively case managed hearings, including case conferences, scheduling appointments, and pre-trials. In addition, counsel may request that the case management judge conduct a judicial mediation – those typically are scheduled for a half or a full day. The judge conducting the judicial mediation will not be the trial judge, most of the time. For cases that do not settle, the trial judge will meet with counsel at a trial management conference several weeks before trial to address procedural issues so that the trial gets off to a good start and runs smoothly.

For family matters, I wish to briefly highlight three aspects of JDR at our court. The first is the case conferencing model. Case conferencing is key to our family litigation process. The province's Family Law Rules require the court to hold at least one conference in each family case. These conferences allow early judicial intervention and support attempts at resolution. They also help the court discharge its duty under the Rules to manage cases expeditiously and fairly.

I will turn now to the court's Dispute Resolution Officer Program, often referred to as the "DRO Program" for family matters. It operates in 12 of our court's 52 locations. Senior lawyers under this program conduct the first conference on all motions to change a final order in a family case. The hearings facilitate settlement and help judges by preparing the files that do not settle.

While DROs cannot make orders, they play important roles. These include facilitating settlement and disclosure, setting timelines for next steps, and narrowing issues.

All DROs must be approved by our Regional Senior Judge and they receive a modest stipend from the provincial government for their assistance.

Finally, for family matters, our Binding Judicial Dispute Resolution, or Binding JDR pilot program, launched in May 2021. It is a flexible process initiated by the parties on consent. A judge actively helps them explore settlement options. If the case does not settle, the judge makes orders addressing both agreed-upon issues and contested issues. It is less formal than a trial. It has relaxed rules of evidence, no presumptive right to call witnesses, no cross-examination, and a more proactive role for the judge.

Binding JDR hearings can be scheduled more quickly than trials. They take only one or two days of court time. And this process is appropriate for simpler cases where credibility is not an issue and where no party is particularly vulnerable.

The project is authorized under a court practice advisory, and it operates in all but one of the court's regions. It has been very well received by the judiciary and the bar and our Legal Aid of Ontario offers support for financially eligible parties to cover the cost of legal representation at these hearings.

I will just speak briefly about advance preparation for virtual JDR hearings. A lot of thought goes into that. Some of the following recommendations may seem obvious, but you may be surprised at how many times these issues arise.

- We tell all participants to ensure that their devices are properly functioning and are fully charged or plugged in. They need to log in early enough to allow unexpected software updates to be installed.

- They need to test their internet connection ahead of time.

- Where possible, the judge and participants are encouraged to use two screens (I always do that): one for the hearing and one for documents.

- Participants need to stand or sit to reduce movement, consider how they are going to take notes.

- It is strongly recommended that each person who appears before the court have their own device.

- Counsel are to consider a way to communicate confidentially with clients and co-counsel during the hearing in a manner that preserves a record of client instructions.

- Participants are told to minimize background noise, use headsets and close all unnecessary applications on their computers and mute notifications.

The judge should advise counsel and parties (and we always do this) on how the JDR conference is to proceed, whether in-person, virtual or hybrid. In the latter two cases, the judge or court registrar will give directions about how to interact with the virtual platform to ensure a smooth hearing. For example, the direction might address how names are to be displayed, how participants indicate whether and when they want to speak, whether breakout rooms are available, and so on.

In commercial cases, our default procedure for judicial mediations is in-person, subject to the discretion of the judge conducting the mediation. I should note that we will only schedule a judicial mediation if we know that the parties are serious about resolving the case – we want to ensure that judicial resources are used appropriately and not wasted. Parties are required to attend judicial mediations and must have the authority to make decisions and settle the case. The judge is clear with the parties about the lines of communication and what can and cannot be conveyed to the other side. We have separate breakout facilities for counsel to be able to discuss matters with their clients. If the parties reach a resolution, we require

that it be put in writing in minutes of settlement before we vacate the scheduled hearing date.

And finally, to conclude, as a judge who conducts judicial mediations, I just wanted to offer some words from my personal experience.

I read the briefs carefully in advance and I let the parties know that I have done that and I show them that I have done that.

I let the parties speak to me – present their side of the story. I want them to know they have been heard. I find that that facilitates settlement and lets them know that a judge has heard their side before any settlement is reached. They have had their "day in court".

I am firm with the parties. I will often suggest a number that I think is the appropriate settlement number, for them to then discuss with their counsel.

I speak to parties and their lawyers through a combination of means. With their lawyers present, I sometimes speak to the lawyers alone, and I have plenary sessions with all of the parties and their lawyers present.

I talk to parties about the costs of a trial. I talk to them about the emotional costs, the time, and the exposure in our jurisdiction to adverse costs awards. And I tell them – do not underestimate the cost and the toll that going through a trial will have on you.

I tell them about the benefits of a settlement. Immediate certainty – it avoids the delay of going through a trial, the time of waiting to get decisions, and the time and years of going through the appeal process. It gives them certainty as to the result when they leave that courtroom.

I acknowledge that they may not be happy with a settlement but that it is the better way.

I consider creative ways of settling – and sometimes the lawyers are very helpful with this. We consider matters such as payment of settlement payments over time, structuring things with favourable tax treatments, if available, and so on.

And finally, I congratulate parties if they settle. I tell them not to have buyer's remorse, that they can get on with their lives, put it behind them, and look forward to new matters.

So with that, I thank you very much and I look forward to speaking with all of you over the next few days. Thank you.