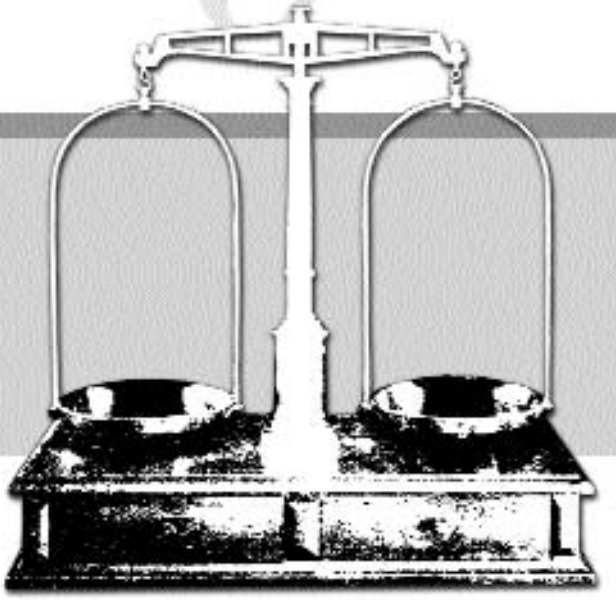
COURT EFFICIENCY AND ALTERNATIVE DISPUTE RESOLUTION



Program to Support
Independence and Impartiality
of the Judiciary Serbia and Montenegro

INTERNATIONAL COMMISSION OF JURISTS

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Professor **Ed Ratushy**
President of the International Commission of Jurists - Canadian Section

Indissoluble Bond between Canadian and Serbian Judges

The Canadian Section of the International Commission of Jurists (ICJ-Canada) is a non governmental organization with more than 600 members of which more than half are judges from all jurisdictions. Established in 1958, the Canadian Section of the ICJ is dedicated to the promotion of the Rule of Law and Human Rights.

The Canadian section of ICJ is an affiliate of the International Commission of Jurists in Geneva. This non-governmental organization is based on the conviction that justice and the law are two indispensable pillars of democracy. The Rule of Law in a free society is their main objective and it undertakes to build bridges between East and West, South and North in order to promote the legal protection of human rights throughout the world. Its experienced and prestigious membership puts it in an excellent position to help transition countries reform their judicial systems. ICJ-Canada is very proud to have two of its members, Justice Ian Binnie from the Supreme Court of Canada and Michèle Rivet, President of the Quebec Human Rights Tribunal, acting as Commissioners of the International Jurists in Geneva.

From December 1998 until now, ICJ-Canada has implemented three projects on Judicial Independence and Impartiality in the Southeast Adriatic countries. Those projects[1] have contributed to a better professionalism of judges from these countries as individual and to a stronger, independent and more efficient judiciary and have tackled important issues dealing with Human Rights.

In order to meet its objectives, ICJ-Canada has started in 2002, with the financial support of the Canadian International Development Agency (ClDA), this project aimed at strengthening the overall efficiency of the Judiciary. The Canadian experience in this field has been largely developed over the past 20 years in a way that has brought important changes into the Canadian judicial system and in the country's society.

This project is extremely important for ICJ-Canada; it permits Canadian and Serbian colleagues to deepen their understanding of the problems, facilitate exchanges between them and allow them to present to the proper authority reform strategies.

The work started is far from over, but this two-year project has created an indissoluble bond between Canadian and Serbian judges that will be sustained in the years to come with a next Phase of the Project.

ICJ-Canada wish to pursue its activities for the upcoming years and continue to support work to better achieve Independence and Impartiality of the Judiciary in the South-East Adriatic countries.

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1 Project in Serbia-Montenegro, 1998-1999 (Suspended in March 1999), Project in Croatia, 2000-2002, Regional project in Serbia & Montenegro and in Croatia, 2002-2004

Lawyer **Natasa Vučković**
Center for Democracy Foundation Program Director

Struggle for the Independent Judiciary and Professional Dignity

The Center for Democracy Foundation (CDF) is a non-governmental organization, which has been focussing for ten years now on the development of civil society and democratic institutions and the establishment of democratic political culture in Serbia and Montenegro. The CDF programs focus on support to reforms in Parliament, the judiciary and state administration and the development of human resources for reforms. CDF's mission is based on the principles of the rule of law and human and civil rights.

The Project to Support the Independence and Impartiality of Judges in Serbia and Montenegro, then called the Federal Republic of Yugoslavia (FRY) was initiated in 1997. In addition to its focus on civil society development, CDF conceived the project with the intent of contributing to the development of institutions and programs that would pave the way to reforms in institutions which would play a crucial role in establishing a democratic order in the country and its embrace of European standards. At the margins of the International Human Rights Training Program in Montreal in 1996 and 1997, CDF had the first opportunity to exchange opinions with judges - members of the Canadian Section of the International Commission of Jurists, particularly with judge Anne Marie Trahan. These meetings were an opportunity to initiate structured cooperation between the two organizations. Our friends in the Canadian Section of ICJ understood that the assistance to the development of an impartial and independent judiciary in the country was crucial to its democratic and modern prospects. The idea of an expert program to support Yugoslav judiciary was supported by the Canadian International Development Agency (CIDA); without its support, the project would not have been implemented.

The project was launched in 1998, when the country's reality and prospects of development totally differed from those today. The project faced staunch opposition of the then FRY and Serbian Justice Ministries, the courts were literally forbidden to participate in the project. The judges most committed to the struggle for the independent judiciary and the dignity of their profession decided to take part in the program nevertheless and to sign up for the first expert study visit organized for Yugoslav colleagues in Montreal. The delegation included Vida Petrović Škero, Zoran Ivošević, Slobodan Vučetić, Gordana Mihajlović, Sonja Brkić, Radmila Dičić and other judges who played the key role in the judiciary after the October 2000 changes. Unfortunately, their departure for Montreal in 1999 was prevented by the air strikes on Yugoslavia and the whole program was put off for a more opportune time.

The program continued in 2002, thanks to the democratic changes in Serbia, the persistence of CDF and the ICJ Canadian Section, as well as CIDA's resolve to continue assisting the development of institutions, especially the judiciary. The program was expanded both in terms of the number of judges taking part in it, and in terms of topics and problems it covered. It covered two areas.

The first project segment was devoted to enhancing court efficiency and introducing alternative dispute resolution methods. Two Serbian courts took part in this segment: the Second Belgrade Municipal Court and the Zrenjanin District and Municipal Courts.

The second project segment focused on human rights in local courts. A group of 30 Serbia and Montenegro judges took part in it. Two groups of judges from Serbia and Montenegro went on study trips to Canada. The first group of judges paid a visit to their Canadian colleagues in 2002; during the two-week seminar, they had the opportunity to learn how the Canadian judiciary operates. The second group went on a study visit in 2003 and had the opportunity to see how mediation is applied in the Canadian judiciary system.

This brochure is the result of the work and exchange of opinions of the judges of the Belgrade Second Municipal Court and the Zrenjanin District and Municipal Courts, the judges who took part in the study trips devoted to mediation, and the Canadian judges. The brochure and future publications that we hope will be published in result of this project are to contribute to the dissemination of new expertise amongst judges in Serbia and Montenegro. They aim to present to the broader expert public the cooperation established between the judiciary in Serbia and Montenegro and Canada in hope that this project will encourage similar cooperation with other countries as well.

We would especially like to thank Judge Leposava Karamarković and judge Sonja Brkić, former presidents of the Supreme Court of Serbia, as well as Supreme Court of Serbia Judge Vida Petrović Škero for their assistance and support to this project. Cooperation with the Belgrade Second Municipal Court and the Zrenjanin District and Municipal Courts would not have been so fruitful if it had not been for the President of the Belgrade Second Municipal Court Gordana Mihajlović, the former president of Zrenjanin District Court Vera Šupica and the President of the Zrenjanin Municipal Court Aleksandra Odavić Mak.

We would especially like to extend our appreciation to the former director of the Judicial Training Center Nataša Rašić, whose support had crucially contributed to the success of the project. The Association of Judges of Serbia, chaired by Managerial Board Chairman Judge Zoran Marković and Judge Radmila Dičić, was a precious CDF partner in different project stages. We would also like to express our gratitude to our partners in the Canadian Section of the ICJ for their cooperation and understanding, as well as to the whole expert and logistic team that worked on the implementation of this project with the utmost commitment and precision.

Belgrade, May 2004

Michèle Rivet
President of the Quebec Human Rights Tribunal
Director of the International Project Committee of the Canadian Section of the International Commission of Jurists

Summary of the Project Efficiency of the Courts in Serbia: 2002-2004

In Serbia, the judiciary has faced many phases of reforms since 1999. Serbia and Montenegro have adopted a new Constitution in February 2003 and recently became member of the Council of Europe. The European Convention was ratified in December 2003 and since March 2004 Serbia and Montenegro have to apply the European standards prescribed by this Convention. In this regard, the judiciary in Serbia and Montenegro is at the core of the complete integration of European and international standards and needs to fulfill its obligation towards an efficient court system respecting and promoting the Rule of Law.

It is now well acknowledged that concrete alternatives have to be taken to solve the long lasting backlog of cases and the difficulties that all judiciaries are facing in the South-East Adriatic countries. Moreover, new mechanisms and tools have to be introduced uniformly in the Justice system to improve its efficiency in order to permit Serbia to be in line with European and international standards.

Canadian experience in the field of court settlement and mediation is well recognized. Judicial Dispute Resolution (ADR), conference settlement, mediation and other models are now rooted in the Canadian system and training program for judges and lawyers are common in every jurisdiction.

All those Judicial Dispute Resolution mechanisms were introduced into Canadian system some years ago, at first as experience or pilot project before leading the Government and the Legislative power to reform its legislation or it's Code of Civil Procedure. This Canadian capacity of implementation achieved trough the years is of the outmost relevance for the Judicial system of the South-east Adriatic countries.

Part of the ICJ-Canada project is aimed at tackling exact problems of restraining the efficiency of the courts and to implement different mechanisms to enhance celerity and efficiency, namely through mediation. Moreover, the ongoing reform in many Courts of Serbia has convinced ICJ-Canada that the Courts require increased support to solve the long lasting backlog of cases.

Practical implementation of this reform has to be promoted and supported. Introduction of modern court management techniques and case management tools have to be re-enforced. In order to achieve these objectives in Serbia, two pilot courts have been selected: the Municipal and District Courts of Zrenjanin and the Second Municipal Court of Belgrade. This Pilot Courts Project is designed to provide exchanges between Canadian and Serbian judges in order to tackle the exact problems restraining the efficiency of their courts and to implement different mechanisms to enhance celerity and efficiency.

In these two Courts, the Project has put in place a program of collaboration with 20 judges assigned to these courts in order to improve court efficiency. With the involvement of their Presidents, Judge Vera Supica from Zrenjanin and Judge Gordana Mihajlovic from Belgrade, the Pilot Courts Project have built two main training sessions for each court. More specifically, the Project organized a series of two seminars addressing mediation within the court, caseload management, court administration, pre-trial conference and skills development. After having addressed the problems during the first seminar, for the next six months period judges worked trying to put in place technics, methods, to start to solve problems identified at the beginning. After the second seminar, they shared the results and the difficulties that they were facing.

During these seminars, Canadian judges were directly involved and we worked in a "judge to judge" approach, focusing to create the proper forum for exchanges of means and ideas. Having the opportunity to learn from the Canadian experiences and models, the Serbian judges appropriated mechanisms developed over the years by different Canadian jurisdictions that most suit their courts. Also, a group of Serbian judges attended a mediation week seminar in Canada in October 2003.

Judges from the two pilot courts in Serbia, in the line of the Project are now discussing with their colleagues of other courts in the country to involve them in such a task, as well as with judges from the region. Possibilities for regional cooperation will be fully implemented at the Regional conference on Court Efficiency - "Modernizing Judiciary in South-East Europe: Needs, Results and Prospects", which will be held in Palić from June 17th to June 20th 2004.

A similar Project took also place in Croatia with the Courts of Pula and Varaždin although exchanges with colleagues from abroad were not institutionalized.

Throughout that endeavor, not only Serbian judges have broadened their knowledge and their capacity of organizing an efficient court, but Canadian judges also learned how important it is to have mediation and Alternative Dispute Resolution embedded in the judicial activities.

Results achieved during the last initiatives have shown that with the collaboration of judges and presidents of pilot courts, recommendations to improve the court efficiency can successfully be implemented. ICJ-Canada's Project is convinced that complete devotion and enthusiasm of the Serbian judges were a key element to the achievement of this Project.

The achievement of an efficient and independent Judiciary based on international standards is one of the outmost importance and this essential goal is addressed through ICJ-Canada's Project to support the Independence and Impartiality of the Judiciary in the South-East Adriatic countries. The Project is also aiming to improve the life of citizens and to increase public, political and economic confidence in the legal system and the administration of Justice in doing so, ICJ-Canada contributes to help the Judiciary to distinguish itself as the third pillar of the democratic society.

Michel Robert
Chief Justice, Quebec Court of Appeal
Mel Rothman
Justice, Quebec Court of Appeal

Mediation[2] within the Court System[3]

Although various forms of Alternative Dispute Resolution have been around for some time, in recent years, there has been tremendous interest and growth in these techniques for resolving legal disputes and putting an end to litigation. The reasons are not difficult to understand: the unacceptable delays involved in bringing cases to judgment in the formal judicial system; the very serious costs involved in formal litigation; the emotional stress involved in formal court procedures, particularly in family matters; the heavy and formal nature of court proceedings, particularly in the context of the adversary system.

In recent years, many jurisdictions in Canada, the U.S. and elsewhere, have been turning to simpler, quicker, less costly and less cumbersome solutions for settling legal disputes.

Arbitration is, of course, one alternative to court litigation, but I know there is no need to discuss this with you. You are all familiar with the arbitration process. Mediation outside of the court structure is another alternative.

In general terms, mediation or conciliation within the court structure is a process by which a mediator will try to bring the parties to a legal dispute together so that they can come to an agreement to put an end to their dispute on terms they themselves consider acceptable.

In 1998, the Quebec Court of Appeal adopted a system of conciliation (a mediation within the court structure), permitting the parties to an appeal to use a less formal mechanism than the formal court process to arrive at a solution to their problem. Certain kinds of cases are excluded from the conciliation process - generally cases involving issues of public law.

Apart from the obvious benefits of saving the time, the cost and stress of long and costly litigation in the formal court process, the theory behind the conciliation procedure is that, if the parties themselves can agree upon their own solution to the problem, this solution will be preferable to a solution imposed by court judgment. Parties are more likely to accept and respect what they themselves have agreed upon.

The conciliation program adopted by the Quebec Court of Appeal in 1998 was the first program of its kind adopted by a Court of Appeal in Canada or, for that matter, by any other Court of Appeal elsewhere.

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[2] Mediation within the Court System and conciliation have the same meaning.

[3] Notes of a conference given by Michel Robert in Pula in May 2003 and by Mel Rothman in Belgrade and Zrenjanin in June 2003.

Prior to the commencement of the conciliation program in 1998, some observers felt that conciliation at the appeal level would be difficult and awkward, at best. After all, at this stage, one of the parties had won in the court below and the other had lost. The incentives to settle seemed less than they would have been prior to judgment in the lower court. But delays, costs and other practical advantages of a judge-mediated settlement outweigh, in many cases, the possible advantages of a favourable judgment in first instance.

Quite apart from the obvious benefit of a satisfactory settlement to the parties, the conciliation procedure has had a real benefit for the Court. It has eliminated a significant number of cases, which would otherwise be waiting to be heard by the Court.

Think of examples: the conditions for visiting rights with children; boundary disputes between neighbours; disputes involving estates or successions; commercial disputes about money between companies; shareholders' disputes in private family companies etc.

How the system works?

First: The system is a voluntary system so that all of the parties must sign a joint request for conciliation. This is the first step, and the parties will generally file the request shortly after the case has been inscribed in appeal. The conciliation proceedings are presided over by a judge of the Court of Appeal. Normally, the conciliation session is scheduled to take place within 30 days from the joint request. However, once the parties have agreed to go to conciliation, any of them are free to withdraw at any time and return to the regular court process. There is no additional cost payable by the parties to the Court for the conciliation procedure.

Second: By consenting to go to conciliation, the parties do not waive their rights to return to the court process if they are unable to reach agreement.

Third: The conciliation proceedings are confidential. We assure the parties that the judge presiding over the conciliation proceedings will have nothing to do with the appeal if no agreement is concluded in the conciliation. Nor can any of the parties or their attorneys mention in the appeal any statements made during the conciliation discussions. There is no transcript or record kept of the conciliation proceedings unless or until an agreement is concluded by the parties.

Fourth: The parties can extend their conciliation agreement to cover not only the proceedings involved in the appeal before the court but any other matters or disputes related to the appeal or arising out of the issues involved in the appeal.

Fifth: Once the parties, with the aid of the conciliator, arrive at a settlement of their dispute, the conciliator will immediately have them, with the assistance of their attorneys, put the agreement in writing. This agreement will then be put before 3 judges of the Court of Appeal (not including the conciliator judge) for ratification. If the 3 judges consider the agreement reasonable, they will ratify it and order the parties to abide by it. This judgment of ratification will then be enforceable like any other judgment of the Court.

The conciliating judge has many roles to play during the course of the conciliation, and he must be flexible in how he guides the parties during the proceedings. He is, in

part, director of the discussions, as well as explorer, guide, advisor and, above all, negotiator and facilitator to assure that the parties want to come to an agreement; to help the parties feel at ease in discussing their problem and exploring possible solutions; to have the parties agree upon the procedures in the conciliation; to have the parties define the issue or issues in dispute; to explore with them the possible solutions; to have the parties focus on the possible compromises most likely to lead to a common solution and finally; to prevent any of the parties from prolonging the proceedings or using the procedure simply for the purpose of gaining information or advantage in the appeal.

In a way, the conciliating judge is something like an orchestra conductor - leading the parties towards a common agreement and away from unrealistic expectations or bitterness or intransigence. At the beginning, the music may be discordant. Hopefully, the conciliator may be able to bring the players together towards more concordant music leading to a fair compromise and a positive result.

§

Michèle Rivet

Improving the Court Efficiency: Case management, pre-trial and settlement conferences[4]

Court rules, court practices, Bench Book, National and International laws are factors that influence dispute resolution in and out of the courtroom. However, judges themselves are ultimately responsible for making informed, independent and impartial decisions concerning their individual and institutional roles on and within the dispute resolution continuum.

The courts have to operate on a set of rules, that is, before all, consistent in its administration, and in its application. This means that similar cases are treated similarly, according to recognised and accepted principles and norms. A number of writers have referred to this as 'formal justice', or 'obedience to the system', but it is much more fundamental than that. It is the absolute priority which must be at all given times to the idea of liberty, and democratic liberty combined.

Secondly, liberty is not liberty except as defined in the system of laws and institutions, showing no preferences, except those required in order to repair and tolerate, rather than act in retribution. That means that Justice which is arbitrary or capricious is not Justice at all. Or is it Justice, to have a system crippled by delays that impoverish and engender cynicism?

The court system must reflect, in addition to its concepts of formal justice, those of fundamental or natural justice. This means that no rule will unfairly deny the litigant, whether it be the plaintiff or the defendant, the full opportunity to be heard and to test the merits of the case before a competent and independent tribunal, as prescribed in Constitution and Human Rights Convenants.

Few years ago in Quebec, we had a horrendous backlog. Cases, when they were ready for trial, had to wait for many years. We found that too many cases were postponed the morning of the trial, and came back and came back and came back; too many cases were badly prepared, badly presented, badly argued; too many cases were tried according to by trial by error; too many parties went to court, and didn't know what the other side had and they were taken by surprise; too many cases took too long, much of it was irrelevant and unnecessary. They took at least as much time as the court was ready to give them - you went before the judge and you had a week to present your case, when the judge should have given them a day.

Over the years, we had two specifically developed techniques to speed up the process. First, we did it with Rules of practice only. Since January 2003, we have amendments to the Code of Civil Procedure dealing with case management, pre-trial and court settlement conferences.

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[4] This conference was given in Zrenjanin and Belgrade, in June 2003 and in Pula and Varazdin, in September 2003.

Case management

Case management means simply that the parties come before the Court as soon as the proceeding is issued and that they must negotiate an agreement as to the conduct of the proceeding and specify the arrangements between them. It also means that they have to determine the timetable with which they are to comply. In fact it is an agreement on the proceeding itself.

The Code of Civil Procedure regarding case management reads as follow:

> 151.1. Before the date indicated in the notice to the defendant for presentation of the action or application, the parties, except impleaded parties, must negotiate an agreement as to the conduct of the proceeding, specifying the arrangements between them and the timetable with which they are to comply within the 180-day peremptory time limit. Any person impleaded in the motion to institute proceedings who wishes to take part in the negotiation of the agreement determining the proceeding timetable must notify the parties within five days of service of the motion. Otherwise, the person is presumed not to wish to do so. The agreement must cover, among other things, the preliminary exceptions and safeguard measures, the procedure and time limit for the communication of exhibits, written statements in lieu of testimony and detailed affidavits, the number and length of and other conditions relating to examinations on discovery before the filing of the defence, expert appraisals, any planned or foreseeable incidental proceedings, the oral or written form of the defence and, in the case of a written defence, the time limit for its filing as well as the time limit for filing an answer, if one is to be filed. The agreement must be filed without delay at the office of the court, no later than the date fixed for presentation of the action or application. 2002, c. 7, s. 19.
>
> 151.2. The agreement is binding on the parties as to the conduct of the proceeding. The parties may modify the agreement, insofar as the modification does not contravene the 180-day peremptory time limit. If there is a disagreement between the parties, the court may, on request, authorize any modification it considers appropriate. 2002, c. 7, s. 19.
>
> 151.3. The parties must comply with the timetable they have set under pain of the penalty prescribed by this Code or, in the absence thereof, of dismissal of the action or application, striking of the allegations involved or foreclosure, as appropriate. However, the judge may, on request, relieve a defaulting party from default if required in the interest of justice; the costs resulting from the default are borne by the party concerned, unless the judge decides otherwise. 2002, c. 7, s. 19.

Case management is, in fact, aimed at better preparing the trial. It also has the main characteristic of an active intervention by the judicial Authority the sooner as possible. This kind of management is a way to oversee the entire process and to avoid surprises along the way.

The advantages of such management are beneficial to everyone - judges, parties, lawyers, Presidents. Very often the parties will agree on the necessary scheduling, but in the absence of agreement, a judge is available to intervene to make appropriate determinations. That is clearly the wave of the future. This has the advantage of creating some element of certainty in the way in which litigation is conducted.

This procedure helps avoiding disputes over insignificant issues that can be easily resolved by the mere requirement that the parties have to appear before a judge to justify how and on what basis they want to prosecute their case. The imposition of strict scheduling of pre-trial matters, such as the presentation of interlocutory motions, the conduct of discoveries, and the delivery of responsive pleadings facilitates an orderly process that is to the advantage of everyone.

Of course, tied to this we need strong and efficient sanctions for the defaulted parties. When both parties have agreed on the forthcoming scheduled, the judge has the responsibilities to enforce any sanctions available. We, as judges, need to be firm and make it clear that court order cannot be defied. The judge must be firm enough to refuse all request for postponement when a date of hearing is fixed, and must advise the parties that time now is for the file and decision, not for postponement.

Pre-trial and Court settlement conferences

Pre-trial conferences have been in place for years, and on these occasions, a judge can seize the opportunity to give his or her impression of a case without actually rendering a judgment.

At the pre-trial conference, the judge can intervene more deeply into the merits of the case. He can also propose mediation, and explain the practical and economic advantages to reaching a settlement.

The aim of such a pre-trial conference is to discuss with the parties or their attorneys appropriate means to simplify the proceedings and to shorten the hearing; to define the questions of law and facts in controversy; to admit some facts and/or documents in evidence or exhibit; and to provide each parties with lists of authorities they intend to submit to the tribunal.

The judge who presides a pre-trial conference will not generally hear the case on its merit. This way, the presiding judge is not influenced by previous discussion.

Pre-trial conference again is to focus the debate and avoid getting lost in peculiar details, redundant testimony and irrelevant questions. The difference between case management and pre-trial conference lies in the fact that during a pre-trial conference, admission will be made on facts to ease the burden of proof of everyone.

So after the "Calendar of proceeding have been completed" meaning that after a case has been scheduled for hearing on merits, the judge assigned to hear it, or any other judge designated by the chief justice, if he believes it useful or if he is so requested, invites the attorneys to discuss appropriate means to simplify the suit and to shorten the hearing. It can include the advisability of amendments to the pleadings; defining the ques-

tions of law and fact really in controversy; admitting some fact or document; providing the list of authorities they intend to submit.

The agreements and decisions made at such conference are recorded in minutes signed by the attorneys and countersigned by the person who presided over the pre-trial and, as far as they go, govern the hearing part before the trial judge, unless he permits a derogation there from to prevent an injustice.

One of the most important skills needed in conducting pre-trial conference and case management meeting is to know how to conduct an effective meeting. If we want to speed up the process, such meetings cannot overburden our daily job. It has to reduce it.

Again, the modifications in the Code of Civil Procedure are in that sense very important:

> 151.11. Where required by the nature or complexity of the proceeding or in cases where the 180-day peremptory time limit is extended, the chief judge or chief justice may, at any stage of the proceeding, on his or her own initiative or on request, order special case management. In that case, the chief judge or chief justice designates a judge to see to the orderly conduct of the proceeding. 2002, c. 7, s. 19.
>
> 151.12. The judge so designated convenes the parties and their attorneys to a case management conference so that they may negotiate an agreement as to the conduct of the proceeding, specifying the arrangements between them and determining the timetable with which they are to comply. If the parties fail to agree, the judge shall determine a timetable for the proceeding. 2002, c. 7, s. 19.
>
> 151.13. The judge disposes of all incidental proceedings and other applications during the course of the proceeding. The judge holds a pre-trial conference, where applicable, and issues any appropriate orders. The judge presides the hearing and renders judgment on the merits. 2002, c. 7, s. 19.

Moreover, the Code of Civil Procedure now prescribes settlement conferences in a very detailed way. At any stage of the proceedings, either at the request of the parties or at the Chief judge initiative, a settlement conference could take place to facilitate dialogue between the parties, help to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions.

The new provisions regarding settlement conference reads as follow:

> 151.17. A settlement conference is held in the presence of the parties, and, if the parties so wish, in the presence of their attorneys. With the consent of the parties, the presiding judge may meet with the parties separately. Other persons may also take part in the conference if the judge and the parties consider that their presence would be helpful in resolving the dispute. 2002, c. 7, s. 19.
>
> 151.18. In agreement with the parties, the judge defines the rules of the settlement conference and any measure to facilitate its conduct, and determines the schedule of meetings. 2002, c. 7, s. 19.

> 151.19. The settlement conference does not suspend the proceeding, but the judge presiding the conference may, if necessary, modify the timetable. 2002, c. 7, s. 19.
>
> 151.20. The parties must ensure that the persons who have authority to conclude an agreement are present at the settlement conference, or that they may be reached at all times to give their consent. 2002, c. 7, s. 19.
>
> 151.21. Anything said or written during a settlement conference is confidential. 2002, c.7, s.19.
>
> 151.22. If a settlement is reached, the judge homologates the transaction on request. 2002, c.7, s.19.
>
> 151.23. If no settlement is reached, the judge may not preside any subsequent hearing relating to the dispute. With the consent of the parties, the judge may convert the settlement conference into a pre-trial conference. 2002,c.7,s.19.

These new specific approaches, including case management, pre-trial and settlement conferences require some training. In Canada, newly appointed judges have this included in their curriculum for education and there is periodical training session offered to judges from all Canada to learn and master those techniques.

However, these approaches developed in the recent years in Canada do not solve all the problems. But, they contribute to reduce the delays; ease the judge's work; enhance the efficiency of the Court and finally increase the public confidence in the Judiciary

I repeat, many of these changes started with a small pilot project like this is, or ideas of leading Chief Justices, and like a snow ball it kept growing. I have no doubts that, the ideas I shared with you, will need adaptation to suit your legal framework. But we as judges all hope to create a system that is reasonably efficient, despite the problems, social, political and economic, inherent to this operation, with a fair balance between private rights and public interests.

I am convinced that your efforts, your creativity, your open-mindness and your willingness to try different approaches in your daily work will serve as an example for your colleagues in your country and abroad. I can assure you that Canadian judges will support you in this endeavour.

I am confident that this project of exchanges of ideas and collaboration between Canadian Judges and Judges from the South-East Adriatic countries will help both of us to achieve a stronger judiciary and enhance the public confidence. It will be a contribution in the edification of a strong independent Judiciary; the third Pillar of the society.

Vera Šupica
Former president of the District Court in Zrenjanin

Judges Speak the same Language

As the president and judge of the Zrenjanin District Court, I was honored to help organize and take part in a series of two seminars and help select the topics on procedural models for efficient dispute resolution that are applied by Canadian courts. The seminar was held within the Project to Support the Independence and Impartiality of Judges in Serbia and Montenegro, implemented by the Canadian Section of the International Commission of Jurists and the Belgrade-based Center for Democracy Foundation. The latter selected the Zrenjanin District and Municipal Courts to participate in the seminar. Whilst selecting the topics, I was motivated by the wish to explore the possibilities of applying these models in local court practice with the aim of improving the efficiency of trials; greater efficiency, in turn, is to result in the establishment and consolidation of independent and impartial judiciary in Serbia and Montenegro.

I must admit I was apprehensive about how much the local judges would involve themselves in the seminar activities and how they would accept the selected topics, although I knew well their professional qualities and their willingness to expand their knowledge and experience. After the first part of the seminar for Zrenjanin District and Municipal Court judges, which lasted two days (16-17 June 2003) and at which the Canadian judges presented the ADR, settlement and pre-trial conference models, I was extremely satisfied with the active participation of the local judges, their enthusiasm to apply the newly-acquired knowledge and experience, and the recommendations they adopted at the end of the seminar. The recommendations pertained to applying the pre-trial conference elements that are not in contravention with the provisions of our Law on civil procedure and to applying mediation in resolving disputes in the Zrenjanin Municipal Court cases. The seminar participants agreed they would discuss the effects of recommendation implementation at the second part of the seminar, held on 8-9 March 2004.

Although the June 2003 seminar lasted only two days, it was more than enough to reassure us that the judges in Canada and in Serbia speak the same language, that we share identical goals and aspirations, that we reason in the same way and that our stands and aspirations are largely concurrent. All this, especially the straightforwardness, frankness, spontaneity of our Canadian colleagues and their wish to share with us as much of their rich experience as possible, resulted in a genuine friendship between the Serbian and Canadian judges; we came to look forward to meeting again and continuing our cooperation.

This is why I was extremely glad when I soon got an opportunity to meet again with my colleagues - the Canadian judges I met in Zrenjanin, Hon. Michèle Rivet and Ginette Piché. Together with eight other Serbian judges I attended a seminar on mediation and ADR in Montreal on 25 Oct-1 Nov 2003. At this seminar in Montreal, I had the pleasure to meet other eminent Canadian judges, eager to generously share with us their knowledge and experience and suggest to us how to apply them best. I was proud to be in their company and have the opportunity to enrich my knowledge, to be able to share my newly-acquired skills and experience with my colleagues and so contribute to speedier

and more efficient dispute resolution in Serbia and, thereby greater court efficiency on the whole. I returned with pleasant memories and feelings of friendship and the wish to continue cooperating with the new colleagues I met at the seminar. Neither I, nor my fellow participants will ever forget the hospitality lavished upon us, the hosts' desire to make our stay as pleasant as possible, to oblige us and answer all our questions.

Everything I learned at the seminar in Canada increased my responsibility for the implementation of the recommendations adopted at the June 2003 seminar in Zrenjanin and for the effects of their implementation. I spent the time until the March 2004 seminar implementing the recommendations, monitoring the results, sharing with my colleagues the experience I gained at the seminar in Canada and looking forward to meeting again our Canadian counterparts, who have already become close friends. Again, I felt apprehensive about how successful the second part of the seminar would be, wondering whether the efforts of our Canadian colleagues and our judges had been worth the while.

Nonetheless, our efforts invested in applying the newly acquired knowledge to efficiently resolve disputes via pre-trial conference and our efforts to incorporate pre-trial conference and mediation elements in our laws (thanks to the assistance of our Canadian colleagues, who passed on to us their experience in those institutes and in ways of applying them) paid off, leading to the achievement of our goal - more efficient trials. This is why we concluded that the further implementation of the recommendations adopted at the June 2003 seminar should continue.

We also concluded that we should share the recommendations, the ways to implement them and the advantages of their implementation with other courts in Serbia. Thanks to our knowledge of pre-trial conference and mediation procedures, our acceptance of these ideas and the practical implementation of certain elements of the models, as well as the fortunate circumstance that Zrenjanin District Court Judge Jelica Bojanić Kerkez is a member of the working group drafting the basis for amending the Law on civil procedure, the ideas and solutions linked to pre-trial conference and the mediation were incorporated in those bases. All judges in Serbia will thus have the opportunity to become acquainted with these ideas, to think about them and ways of implementing them and to disseminate them, notwithstanding the willingness of the legislative body to adopt them.

I would like to conclude by saying that I am very pleased and proud to have taken part in the Project to Support the Independence and Impartiality of Judges in Serbia and Montenegro and to have met lovely new friends in faraway Canada. I have become richer, both in friends and knowledge.

Jelica Bojanić Kerkez
Judge of the District Court in Zrenjanin

Open Court Principle

The experiences of Canadian judges with the practice of conducting a preliminary conference as a meeting between the judge and the lawyers representing the parties in dispute with the goal of reaching an agreement on the trial plan, inspired the idea to attempt the implementation of this practice of planning and communicating a framework for the trial plan in our country, which would be modified and adapted to our structure of the civil procedure and to the existing legal framework.

The contemplation of this issue brought us to the realization that the model presented by our Canadian colleagues is comparable to the concept of Open Judiciary advocated in our country by Professor Triva. This concept is a reality in the contemporary world, not only in the Anglo-Saxon, but also in the Continental legal system. It has also been supported by the Recommendations of the Committee of Ministers of the European Council, which must be taken into account, especially within legislative reforms.

Elaboration of the principle of open court proceedings would imply that already in the early stages of the proceedings, after consultations with the parties or their legal representatives (lawyers), the court would establish a preliminary diagnosis of material and legal aspects of the dispute, sort out important issues from irrelevant ones, undisputed material from disputed issues and facts, and define a framework and dynamics of the proceedings and presentation of evidence. In that manner, the court would make the subsequent proceedings more efficient in the sense of content, organisation and technical aspect.

The preliminary conference, or more appropriately named - the agreement on the trial plan, would represent, when compared to the preparatory hearing, or to the cases when it is not held, a less formal manner of consultations of the representatives, or the parties themselves if they have no representatives with the court, in order for an agreement to be reached on the trial plan for a particular court case. In this manner, by communicating with each other and with the court, it would be made possible for the participants to correctly assess their role in the proceedings, and to reach an agreement on the issues that would arise as important and relevant, and on the methods which would be appropriate for inquest of these issues and establishing of the facts, in order for the parties to be timely and thoroughly prepared for the trial. The participants jointly and with suggestions of the court, would attempt to sort disputable issues out of relevant ones, reduce their evidence proposals to relevant but disputed facts, and eliminate irrelevant proposals themselves. In that manner they would rationalize their approach to the dispute. At the same time, it would allow the confirmation whether the judge's perception of the dispute is corresponding to the perceptions of the parties. The parties would have the opportunity to participate actively, represented by their lawyers as professionals, and to assess, at the very beginning of the proceedings, the course that the case would be taking. The upcoming events of the proceedings should not remain unfamiliar to the parties, and they have the right to expect that the case would be resolved before the court in a timely manner and at acceptable costs. This effort, which would be made by the court primarily for the

benefit of the parties, would express the concern of the State and its Bodies for citizens and legal entities entering legal disputes. Such concerns are founded in the fundamental concepts of justice - the principle of efficiency of the proceedings as defined by Article 10 of the Law on Civil Proceedings and the principle of equal protection of rights in the proceedings before a court of law, as defined in the Article 22 Paragraph 1 of the Constitution of the Republic of Serbia.

A less formal method of organizing, conducting and keeping the record of this meeting of the court with parties' professional representatives would save time and money, reducing the costs in general and channelling the efforts in a clear and defined direction.

In the legal sense, the court would put only the summary of the preliminary conference on the record, after hearing the opinions of the attending parties and consulting with them. If possible, the court would, at the same time, announce a plan for the dynamics of the sessions, reach the agreement on participants' addresses for notification, and would present the possibility of mediation.

Advantages of this approach are numerous. The parties are getting the opportunity to actively participate through their lawyers in defining the essence of the dispute, and to direct the process correctly from its very beginning. The court would not be burdened with transmission of correspondence to the parties, or with conducting meaningless sessions where the material is revealed little by little, but would regain the authority of the executor of the planned actions. It also has advantages for the State, which would reduce spending with a rational engagement of the judiciary by having more efficient court proceedings, and it would comply with the standards set out in Article 6 of the European Convention on Human Rights. The right in question is the right to a fair hearing, which, among other things, implies a hearing within a reasonable time. The European norm is that the citizen has the right to expect that his/hers issue is resolved before the court in a timely manner. We are fully aware that too many cases before domestic courts do not comply with this norm, and that such a situation already presents a risk for our country to be forced to pay damages in line with the decisions of the European Court, which would additionally burden the already modest budget and the funds missing for the economy and its development.

The named standard is binding for us. In December 2003, the European Convention has been adopted, and its ratification made it a part of the internal legal system. According to Article 10 of the Constitutional Charter of the State Union of Serbia and Montenegro, adopted in February 2003, as the provisions of international treaties on human and minority rights and civil freedoms, it is directly enforceable on the territory of Serbia and Montenegro.

Invoking the Convention, the Committee of Ministers of the European Council issued a number of Recommendations to the Member States, related to the procedures in civil matters. These Recommendations are not binding, but are supposed to present alternatives that have shown good results in developed legal systems. They contain useful and reasonable guidelines for Member States of the European Council which should, in a manner which suits them best, adjust to tradition, legal culture and mentality, implement certain mechanisms from the range of offered ones, as the measures taken by the

state to facilitate access to justice, improve and develop the functioning of the judiciary, reduce the pressure on the courts, but without impeding the rights guaranteed by the Convention and local regulations, before all the legality and the justice of the decisions reached by the courts. For example, related to the active role of the court during the preparation of the proceedings, the Recommendation number 5 dating from 1995, states that the communication between the parties and courts of the first instance should be improved in general in order for the parties in dispute to accept that the main proceedings should be carried out at the first instance court. It further states that much can be achieved related to the number of unresolved court cases if the parties in dispute, courts and lawyers are communicating beforehand, as demonstrated in several countries. Of course, such contact should never be of such nature that it would endanger the objectiveness and independence of the judge, but is conducted for better comprehension of correlating roles. As for mediation, even the recommendation R number 7 from as early as 1981 suggested measures for stimulation of parties' conciliation and friendly settlement, before or during the court proceedings, and the recommendation R 5 from 1995 indicated the need of giving a more active role to the courts of first and second instance, in order to encourage the agreement between the parties. Recommendation R1 from 1998 was dedicated to family mediation, and the recommendation number 10 from 2000 generally to the mediation in civil matters.

An especially significant opportunity for us has been presented by the adoption of the Constitutional Charter and the Law on Implementation of the Constitutional Charter, published in the Official Gazette of Serbia and Montenegro on February 4, 2003, especially Article 20 of the Law, which prescribes the harmonisation of regulations, including the Charters of the Member States, with the Constitutional Charter and ratified international treaties of the State Union of Serbia and Montenegro within 6 months from the date the Constitutional Charter went into effect. Related is also the full legislative capacity of the Republic of Serbia to autonomously regulate the matter of the process regulations by adopting laws on the level of the Republic, even the Law on Civil Procedure. In good faith, we expect that the issue of more efficient judicial procedure in our country would be developed further. Of course, parallel systems and recommendations of the European Council should be taken into account.

Therefore, as a supporter of the motto that openness breeds trust, and that communication can only clear misunderstandings and obstacles, as a member of the working group of the Judges Association of Serbia and the Supreme Court of Serbia for preparation of the framework for change of the Law on Civil Procedure, I have personally supported and elaborated in writing the idea to implement the preliminary conference into our law. The approach to the issue is mirrored in the question directed to the professional public, the material complementing this action and receiving praise, encouragements, critics and opposition, which are all understandable and expected. The activities of the workgroup for preparation of the framework for the change of procedural rules, which I am a member of, include panel discussions organized regionally in order to involve the widest possible range of judiciary, representatives of the bar, public defenders and professors of the Faculties of Law, as well as other legal professions showing interest for the matter. The tendency is to approach the change of procedural rules with a wide-ranged professional discussion, as it was done before the adoption of the Legal Code in

1929, which held its own for a long time, and which was an exceptionally progressive set of regulations for the time it was adopted - equivalent to the most progressive European laws at the time.

From the written testimonies of the courts, the judges, the bar and the professors from the Department of Civil Trial Law, and based on the debate in progress, the impression is that the domestic professional public is not indifferent to this issue. It is too early to speak of the results of the debate, because the process is in progress. The courts from our region expressed their support of this proposal, as well as a number of others. As for the Courts in Zrenjanin, I believe that the fact that our judges are well informed contributed significantly to such results, and for that we can thank our Canadian colleagues to a large extent. Last year, when the colleagues were speaking of the positive effects of the preliminary conference in Canada, they induced us to think and to investigate further. Coincidentally, not long after that, our individual and group reflections found an opportunity to be presented on a wider scale, to a wider professional auditorium. In the name of all supporting the idea of shaping the preliminary conference - the agreement on the trial plan - into a law, and who are not aware of the mental process which initiated it in June 2003, and the incidents that led to its writing in November of the same year, I can now, in March 2004, express once more my gratitude to our close colleagues from a distant land. As much as there are contradictions related to these issues, one is surely devoid of them - we, the judges from both sides of the Ocean, clearly understand each other, even if we don't speak the same language, for our language is one and the same - it is the language of the ones at all times prepared to invest effort into better execution of justice. It is for justice, which can be true to itself only if it arrives on time, and with acceptable costs, that we now speak of the principles of its achievement. In the context of justice and just judgments, we are speaking today of the principles of open judiciary, and mediation as alternative dispute resolution. The written material on mediation, which is now before us, and is not contained in the working material of the Judges Association of Serbia and the Supreme Court of Serbia, has also been written in November 2003, based on booklets and seminar presentations of the Canadian mediators, along with other available sources in Serbian language, as well as personal ideas for institutionalization. Of course, in its raw form, as presented, it is susceptible to corrections that I believe would ensue. For now, it may serve for better understanding of the concept of mediation and its basic principles (volunteerism, impartiality, confidentiality, privacy and flexibility), for improvisation of the training for local judges, with suggestions and advice from foreign colleagues dealing with this matter. Whether our understanding of mediation is correct can be determined even during this day, and no doubt that our well intended colleagues from Canada can help significantly. The goal of this effort is, as I see it, the exchange of experience and positive practice, with a tendency to make progress in the interest of the society as a whole. I welcome our dear guests and great humanists and I express my deepest gratitude for their effort, which we all value and admire. I hope that my colleagues share the same impressions and understand these meetings as attempts to make progress. Therefore, I thank all for their hard work and good intentions.

Aleksandra Odavić-Mak
President of the Municipal Court in Zrenjanin

Preliminary Conference and Preparatory Hearing

The judges of the District and Municipal Courts in Zrenjanin took part in the two-week seminar on efficiency of the judiciary on June 16 and 17, 2003, in the organisation of the Canadian Section of the International Commission of Jurists and the Center for Democracy Foundation.

After the exchange of experience between local judges and judges from Canada, the following recommendations have been adopted at the seminar:

In more complex cases (property litigations, contract litigations, terminations of life care contracts, evictions, division of property litigations...) the claim should be submitted to the defendant for a response, with the instructions that if the claim is disputed, the grounds for dispute and related evidence should be filed within 15 days (Art. 285, Art. 219, Art.7 and Art. 10 of the Law on Civil Procedure),

After the defendant has filed a response, the plaintiff should receive the response with a shorter deadline to respond to it and to complete the list of evidence (Art. 5, Art. 1, Art. 10 and Art. 186 of the Law on Civil Procedure),

If the defendant fails to respond within the set deadline, or the deadline expires, the court should schedule a preparatory hearing with elements of a preliminary conference (Art. 284 Art. 1, Art. 286 and Art. 287 of the Law on Civil Procedure),

A prerequisite for success is, above all, the good preparation of the judge, based on correct assessment of the applicable institute of material rights and on summarizing of the available facts needed for the dispute to be resolved (Art. 10 of the Law on Civil Procedure),

To persist with the practice of organizing a preparatory hearing, where the parties and their representatives are invited.

At the preparatory hearing, after the claim and the response to the claim are presented, the relevant facts should be sorted out from irrelevant ones, and the possibility of mediation (an out of court settlement) should be discussed,

At the preparatory hearing, an attempt should be made to reach an agreement on evidence that would be presented at the main hearing (in line with the Art. 289 of the Law on Civil Procedure),

The time needed for the presentation of evidence should be assessed by scheduling the dates and hearings for evidence (Art. 292 of the Law on Civil Procedure).

In June 2003, after the seminar, the Civil Department of the Municipal Court in Zrenjanin held a meeting and reached the decision to launch a Pilot Program - Preliminary Conference within the preparatory hearing, starting with September 1, 2003. The agreement was that each judge would manage a minimum of 2 to 3 cases

(property litigations, division of property litigations, evictions, contract litigations). The court administration departments were also informed, before all the Front Office and the Clerks Office of the Civil Department, which were labelling such cases with large letters "E" and "*", and took special care of deadlines and proper record keeping. The Office for Transcription and Delivery of the Municipal Court in Zrenjanin was also informed of the experimental program and of the meaning of the deliveries marked with "E" and a red "*", which implied urgency in handling by all administration services.

The President of the Court also informed the President of the Municipal Bar Association in Zrenjanin of the intention of this programme to show measurable results with approach and organisation backing the initiative for obligatory response to the claim, and for consultations of the court with the parties and their representatives in order to reach an agreement on the trial plan. The program lasted from September 1, 2003, to March 8, 2004, and covered 54 cases. Out of that number, 32 cases were resolved. Meritory judgments were passed in 14 cases, 8 cases were settled, in 6 cases the claim was withdrawn, and in 4 cases the claim was accepted.

These results were summarised for the next meeting with Canadian colleagues on this seminar in the District Court in Zrenjanin on March 8 and 9, 2004, with the opinion of the Civil Department of the Municipal Court in Zrenjanin that the Pilot Program was successful, due to the fact that more than 60 percent of cases were resolved. The cases have been resolved in the first instance within 2 to 3 months, in the second instance within a month, which is a significant success for the type of cases covered with this programme. The speed of case resolution was probably also affected by the prompt submission of the claim to the defendant, and the reaction of the defendant upon the receiving the information - by contacting the plaintiff and possibly accepting the claim. The speed of delivery and processing of the cases also had a positive effect on case resolution.

The problems that arose within the Pilot Program are primarily a certain reserve by some lawyers, lack of the law prescribing the filing of an obligatory response to the claim, and the related problem of paying the court fees for the response to the claim. In spite of all that, the Civil Department of the Municipal Court in Zrenjanin decided after the seminar to continue with this practice whenever possible.

On the seminar held on March 8 and 9, 2004, the judges of the Civil Department of the Municipal Court in Zrenjanin were also acquainted with the institute of mediation, its basic principles and advantages, the role of judges - mediators, the rights of the parties agreeing on mediation, the skills of a mediator, and certain applicable techniques. Apart from the video presentation informing the judges on mediation, the judges were practicing the techniques of dispute mediation in groups of three, one of them playing the judge, and the other two the parties in dispute. The impressions, problems and results that were attained individually or in a group were analysed on a joint session with all participants, with a prevalent impression of the usefulness of mediation, and the likelihood of resolving at least some cases through mediation.

Jelica Bojanić-Kerkez

A Starting Point Proposal for a Draft on Rules of Mediation

Principles and Characteristics

Mediation is an activity taken by a third, neutral party between parties in a dispute, with the goal of assisting them in finding their own solution, in accordance with their needs.

It is a voluntary process, for which the parties agreed to actively take part in.

The mediator does not have the power to decide. He/she negotiates with the parties to define the solutions that are acceptable to them. He guides and supervises that process with the goal of a favorable outcome. He/she does not impose solutions and does not interpret the law, except at the request of the parties. He may give non-binding opinions and may propose a solution.

The role of the mediator is to connect the parties in a dispute, to organize the meeting, to improve their communication, to influence them to minimize the conflict, make progress in their relationship and come to a mutually acceptable solution, which is also defined by them in a way that they find appropriate and adequate.

The Mediator is a helping instrument used by the parties to reach the agreement on peaceful dispute resolution. To that effect, the mediator establishes necessary conditions to improve the exchange of information between the parties in a dispute, related to the situations that they are in, the solutions of the problem, he conducts open and effective negotiations and, if the parties voluntarily reach an agreement, formulates the adopted solutions.

Principles

1. Voluntarism

Mediation is possible only with the consent of both parties and based on their written agreement to participate in the mediation process.

2. Neutrality

The Mediator has to be neutral and impartial at all times.

3. Confidentiality

Mediation is conducted according to the principle of confidentiality in the relations between the parties and the Mediator, and secrecy related to the court.

The Mediation process is confidential. No records are kept of the progression and the contents of a mediation process.

The Mediator may, if he/she finds it necessary, separately meet with one of the parties, and each party may at any time request a separate confidential meeting with the mediator.

A Mediator cannot be summoned to be a witness in court or for any other proceedings.

4. Secrecy

The Mediator is obliged to keep the contents of the negotiations on the agreement of the parties secret, as well as all the material used in this process, and that obligation is also binding for parties and all persons attending mediation.

The proposals and statements of the parties and their representatives given in the course of mediation cannot be used in proceedings before the court or any other government body. The persons attending must respect the secrecy of the negotiations, as well as all presented information and all documents submitted during the process. The evidence presented to the mediator can be used in court proceedings, provided that the party submitting them otherwise has the right to use that evidence in court proceedings, or does not object to it.

5. Flexibility

The parties define the rules in agreement with the mediator. The statements and proposals are given informally. No records are kept. The mediator may meet all parties, jointly or separately, or can meet with each of them separately, if the parties agree to it (alternatively - as a rule, joint sessions are held, but the mediator may, if he deems it needed, meet separately with one of the parties, and each party may at any time request a separate, confidential meeting with the mediator). The session may last up to several hours, and can also be repeated, if needed.

Processing

The parties can be sent to mediation with the goal of reaching an agreement on the disputed matter, and so (before) and during the court proceedings, up until the decision of the Appellate court on the appeal to the judgment on the disputed matter.

The court should point out to the parties the possibility of resolving the dispute trough a mediator.

The parties may jointly propose to the court to refer them to mediation, but the court may also propose to the parties to resolve the dispute through mediation, if it deems it appropriate based on the course and the results of the proceedings, as well as on the attitude of the parties in dispute.

In both cases, it is necessary that the parties voluntarily accept mediation and approve in writing that the court is referring them to mediation, with a statement accepting the rules of procedure. Based on the signed statements - the agreement of the parties - the court issues a decision to refer the parties to mediation. This decision cannot be appealed.

The decision is submitted to the parties with a call to jointly select a mediator from a list of officially registered mediators within 5 days, to pay an advance payment of the costs incurred by mediation, as well as to inform the court in an appropriate manner within the set deadline.

After the parties have submitted the agreement to the mediator and the proof of the advance payment, the court issues a decision on entrusting the mediation to the named mediator.

If the parties cannot reach an agreement, then the judge or the president of the council assigns a mediator and calls the parties to pay the advance payment of the costs incurred by mediation within 8 days.

If the parties do not pay the advance payment, the court shall withdraw the decision to refer the parties to mediation and the decision on entrusting the mediation to the named mediator, and the parties lose the right to be referred to mediation by the court during that proceeding.

If the parties pay the advance payment after they submit the proof of advance payment, the court shall submit to the parties and the mediator the NOTICE that the conditions for starting the mediation process are met, and that the process starting date is the date on the notice.

The duration of the mediation process is determined by the parties in agreement with the mediator, provided that mediation does not last more than 3 months.

Effects on the court proceedings

The mediation process is limited to a time span that will not significantly influence the duration of the court proceedings.

During mediation, the court as a rule does not perform actions related to the proceedings, except for those that cannot be postponed (alternative - the court puts the proceedings on hold). Irrelevant of the result of mediation, the court shall try to finalize the proceedings without delay. During mediation, the time statutes of limitation as defined by the law are not affected.

The rights and obligations of the parties that accept mediation

If the mediation is fruitful, the parties may close a court settlement before the court and resolve the dispute in that manner.

If the mediation is not fruitful, the parties do not lose the right of resolution through the court, without any major delays.

The parties have to be present at the mediation session. Each party decides for itself if its legal council shall be present.

The validity of the settlement proposal agreement is not assessed by the mediator, but by the court. However, the mediator may terminate the mediation process if he/she deems that the agreement is going in an inappropriate direction, or that the mediation process could lead to discrimination or evident injustice for one of the parties.

However, the mediator should voice that opinion to the parties and give them an opportunity to correct themselves, and only after that can he/she, if needed, announce that he/she terminated the mediation.

If the course of mediation is fruitful and it results in an acceptable agreement, the mediator should assist the parties in technicalities of shaping the agreement in writing, and after they have signed it, he/she should sign it and submit to the court.

Closing of the Court settlement

If the process of mediation is fruitful, the mediator should without delay inform the court in an appropriate manner, and submit the agreement reached in mediation. The court then schedules the date for admission of the agreement of the parties into the register.

The agreement reached in meditation is entered into the court records. After the records are read, the parties and the judge should sign the record, and that makes the settlement legally effective and enforceable.

The agreement or the parties in mediation is a private document, and only after it is signed before the court does it becomes a court settlement.

The settlement may relate to the whole claim before the court, or to a part of it.

The court shall not allow a settlement to be closed that is in conflict with ius cogens, public order or ethics. It shall decide on that with a decision communicated at the session (the procedure identical to the current procedure for the court settlement).

If the process of mediation is not fruitful, and the deadline for that purpose is past, (or if the settlement reached by the parties is not suitable for a court settlement), the court continues with actions related to the court proceedings, and is not bound to resend the parties to mediation.

Limitations - Exclusions

Within one court proceeding, the parties cannot be referred to mediation more than twice. Mediation is not conducted in disputes when there is no possibility of resolving a dispute in a settlement.

Rights and duties of a mediator

Mediation is done by the mediators named by the litigation court.

Only a person from a list of officially registered mediators, or a specialized institution can be named a mediator.

The mediator is required to perform the entrusted work professionally, ethically and timely, taking into account all (separate and joint) interests of the parties in dispute.

The mediator has a right to a professional fee and reimbursement of the costs.

As a rule, mediation is done by one mediator, but if the parties agree, a team can be named consisting of two or more mediators (named as team members by the parties).

Upon receiving the court notice, the mediator should take over the case and familiarize himself/herself with it, and contact the parties without delay to agree on organization

and rules of mediation. The mediator shall try to start with mediation actions as soon as possible, with the appropriate dynamics. He has the right to inform and educate both parties about the mechanism of mediation. The mediator shall respect the rule of economy of the process.

Alternative

The court may relieve the mediator of the mediation duty between the parties on his/hers request, if there exist some justifiable reasons for it.

The mediator may be excused for the same reasons and by the same procedure as a jury judge.

The court may withdraw the decision to entrust the mediation to a mediator, and assign another, if, after the objections of the parties on his/hers work and conduct, and after the consultations with him/her, the court decides that the purpose of mediation is more achievable with another mediator. In case the mediator unjustifiably refuses to perform mediation entrusted by the court, the court will decide on fining him/her, and the decision on the fine will be submitted to the register evidencing the mediators (which should enter the procedure for removal of that mediator from the list, in case of his/hers repeated refusals and fining).

Costs

The parties pay equal parts of the fee for professional help and of the costs of the mediator incurred by mediation, if not otherwise agreed.

Sending to mediation before a lawsuit

A person intending to file a lawsuit may propose (even before filing a lawsuit) to the other party, through a court of first instance competent for the place of residence of the other party, to resolve their dispute in mediation.

The court receiving such a proposal submits it to the person indicated as the other party, with a (simultaneous) call to decide, within 8 days, whether he/she is prepared to be referred to mediation with the proposer.

If the noted person does not respond, the court issues a decision that the attempt to refer to mediation process was not fruitful (and this decision reflects itself in a manner that in the further course of the proceeding on that matter, the parties can be referred to mediation only once).

If the noted person decides to enter mediation, it is considered that the participants reached an agreement on referring to mediation process, and according to that agreement the court shall proceed as previously defined for an agreement within the proceedings. The difference is that only the proposer is called to pay the advance payment of the cost incurred by mediation, and if the mediation does not result in a settlement within 3 months of the date the proposer addressed the court, the court will proclaim the decision that the attempt of settlement was not fruitful.

Recommendations Proposal of the Court Efficiency Seminar in Zrenjanin

District Court and Municipal Court - June 16-17, 2003

In more complex cases the claim should be submitted to the defendant for a response, with the instructions that if the claim is disputed, the grounds for dispute and related evidence should be filed within 15 days.

After the defendant has filed a response, the plaintiff should receive the response with a shorter deadline to respond to it and to complete the list of evidence.

If the defendant fails to respond within the set deadline, or the deadline expires, the court should schedule a preparatory hearing with elements of a preliminary conference.

A prerequisite for success is, above all, the good preparation of the judge, based on correct assessment of the applicable institute of material rights and on summarizing of the available facts needed for the dispute to be resolved.

The judge invites both parties and their attorneys for the preliminary hearing.

At the usual preliminary hearing, after the parties present the complaint and the response to the complaint (addition to current), the hearing is continued as preliminary conference.

Relevant facts should be sorted out from irrelevant ones.

Review and estimate the possibility of mediation*.

In case that the parties refuse to consent on mediation - the preliminary conference continues, by stating the need of presenting evidence.

With realistic estimation and suggestions, the judge tries to achieve the settlement, and to eliminate irrelevant and superfluous evidence.

Estimate the time necessary to present the anticipated evidence.

Strictly respect the deadlines (setting the terms and sessions for presenting evidence) for submitting the evidence ordered by court, by the parties as well as other participants (reaction, warnings, demands).

Monitor and record cases which implement this particular method, compare with other cases, organize a periodical overview of the results, exchange experience, organize debates on problems and consultations between departments with the participation of judges from higher levels in order to overcome possible problems. At the end of the experimental period, summarize the overall results by the presidents of courts and compile a report that includes the evaluation of achieved effects, and a general attitude towards the implemented method.

Organize a joint meeting (with a possible initiative for the institutionalization and adoption of written rules on preliminary planning of the trial and mediation).

Presidents of courts should provide an initiative and announce the changes to the representatives of the Bar.

*** Mediation**

Achieve an agreement to persist in implementing mediation and making it realistic and accessible. Prerequisites:

- Introduce the idea with an explanation.
- Draft a form for the statement of consent for mediation and a form for the minutes of the mediation process.
- Provide additional office space for conducting mediation (2 rooms for one mediator).
- Engage a typist to be present.
- Plan the necessary time (not within working hours).
- Provide communication between all participants.
- Plan announcements in the media.
- Inform the Bar.
- Initiate trainings for mediators.
- Register the mediation cases.
- Initiate a proposal for a draft of official rules on mediation and/or proposal for the changes in the Law on civil procedure.

Gordana Mihailović
President, Second Municipal Court in Belgrade

Judges from Serbia as Citizens of the World

Nothing can fulfil a person as much as learning and creation. Judges have a great responsibility of administering justice and a great pleasure of constantly using their intellect when rendering judgments. In order to do that in the best possible manner, they need continuous training. Each and every opportunity to learn something new is valuable and can not be missed. That is why we are immensely grateful for all the effort and good will invested in us by the Canadian organisation ICJ and our colleagues, Canadian judges.

Through the last two seminars we had the opportunity to get acquainted with the different legal systems, different way of thinking and some new legal institutes, as well as to meet new and precious friends.

The seminars and constant communication with our Canadian colleagues encouraged the introduction of new methods in the work of our court, enriched our knowledge about the mediation techniques, opened new ways of cooperation and enabled us to learn something new and disseminate our knowledge between our colleagues, sharing the experience with courts other then our own.

The seminar organised by our Canadian colleagues and held in Montreal last October was of a highest quality and it is a true pity that all the judges dealing with mediation in their everyday practise have not had the opportunity to participate in it.

The cooperation with ICJ Canada made us feel like citizens of the world.

The Second Municipal Court in Belgrade and ICJ-Canada jointly organized two seminars on court efficiency, which marked the beginning of their cooperation. Focused on enhancing work efficiency and improving the quality of work in the local judiciary, we are trying to come up with new solutions, useful tips and ideas which will result in better performance. In this regard, the first seminar gave us notions on how the Canadian courts handle cases and we came to a conclusion that our judges are preoccupied with administration. These administrative affairs should be transferred to judge's assistants. In order to apply and test this conclusion in practice, we appointed assistants in two court councils - to work with Judge Vesna Filipović and Judge Zorica Kitanović starting in June 2003. Apart from office clerk and typist, each of the two judges have at their disposal one assistant responsible for case administration.

The experiences are very positive, but not applicable to all judges due to lack of office space in the courthouse as our working conditions are such that this good practice is technically impossible.

At the time of the last seminar, we had already introduced mediation through The Settlement Week dealing with old cases. After we understood the experience of Canadian judges, and after I had the chance to stay in Canada and see more of the experiences of Canadian colleagues, we decided to introduce the mediation procedure in new cases at

the beginning of the proceeding. We also kept the mediation procedure in the old cases as one of the possible means that would reduce the number of those old cases.

Pursuant to the provision of Article 321 of the Code on Civil Procedure, the court shall introduce the parties to the possibility of reaching a court settlement and help them negotiate an agreement. In accordance with this article, I instituted the procedure of mediation by passing the decree on introducing the mediation procedure. As mediation is an informal procedure whereby a third party is trying to make the parties communicate in order to reach a settlement, that is, negotiate a peaceful agreement to the dispute, and bearing in mind that our law at this moment does not allow the third party to be outside the court, we decided that the third party should be the judge mediating the case, who is not in charge of judging the case, but only mediating it. The court prepared special registration forms for case management, special covers where the case is stored, as well as clear marks so that record keeping could be easier, thus also trying to have a better psychological effect on the parties. Special mediation rules were passed and distributed to judges so that all judges involved in case preparation and the process of mediation could have a similar approach. We produced special invitations, special records, and special reports as statements of defence and sent them to parties inviting them for mediation. A special department comprising nine judges and headed by Judge Vesna Filipović was also formed. Mediation normally takes place in the afternoons, which means that it is an extra activity for the judges since their regular judicial obligations are performed in regular working hours, i.e., in the morning.

Those judges who commit to mediation need to go through additional training. They should attend all mediation-related seminars. Such seminars were also organized by the Forum for a New Serbia, in cooperation with the Belgrade Centre for Human Rights. As we are in need of additional capacity building, by ourselves we organized a study trip to Slovenia in order to get to know the process of mediation which is conducted in the Municipal Court in Ljubljana. We thought that their experiences would be helpful to us, as Slovenia was once part of the same federation and had the same legal system.

It is necessary that we pursue with further capacity building of judges mediators and, naturally, capacity building of the very institution of mediation, as we are of opinion that the experiences of judges from the Second Municipal Court can build the institution of mediation and introduce it in the Serbian judiciary. We also think that the judges of this court would be able to pass on their experience to other judges in the Serbian judiciary. That should not only be the learning adopted by "training of trainers" system, but the know-how acquired through development of an institution, as well as through practice - from the very idea of the institution to its implementation.

Vesna Filipović
Judge

Results of the Pilot Project Introducing Mediation as a Regular Procedure at the Second Municipal Court in Belgrade

Considering the modern trends in the European judiciary and the state of the local judiciary, the Second Municipal Court in Belgrade has attempted to contribute to the quicker and more efficient resolution of civil disputes, both in new and old cases.

In leading European and international judiciary systems, mediation has yielded excellent results in attempts to reach an agreement between the parties to a dispute; there is certain practice and experience in this area.

Pursuant the recommendation of the Serbian Supreme Court, our court has tried to primarily resolve old cases, in the interest of both parties some of which have lasted for years and even a decade.

Therefore the court attempted to settle disputes through discussions with the two parties with the aim of reaching an agreement that would be in both parties' interests. I must admit that initially only few old cases were resolved in this manner, but this had resulted in parties and attorneys becoming interested in this manner of resolving disputes. They came to us to ask about mediation and its practice in our court. After some time, lawyers themselves issued claims for their cases to be subject of mediation. They would come with the other party and insist on a settlement. This was a positive step and initiative that led us to introduce a week of mediation as the last week of every month. We decided that mediation should be recommended in the cases of compensation, property gained in marriage, and debts, as well as in the cases where the acting judge believed there were grounds for settlement and the possibility of both parties finding a common interest in resolving the dispute. A special department and special register "M" were established at the Court, where such cases were registered and presented to the mediating judges. Currently, there are nine mediating judges. There are both older, more experienced judges as well as those younger, who are also successful. The mediating judge then schedules appearances and summons the parties and their legal representatives, and attempts to find a common interest and resolve the case through settlement. This applies separately both to the plaintiff and the defendant, and together, because it is the judge's obligation in every phase of the procedure, in line with the Law on Civil Procedure, to point out the possibility of settlement and assist them in reaching it - with the aim of reaching an efficient resolution to disputed relations.

In this way we have managed to provide the basic principle of mediation - confidentiality, as the minutes from the mediation hearings are kept in M files, along with possible written entries and proposals by both parties for settlements. These files are kept separately from trial files and thus have no effect on the trial in the event that mediation fails.

Even though we have limited experience, having begun mediation in October 2003, we have so far achieved good results; one third of the cases that have been presented in mediation were resolved through settlements. Our experience has also shown that both parties are mostly pleased with the new practice of someone being prepared to listen to the reasons for their suit, and the response, rational explanations of legal interests and perhaps receive a suggestion for a fair settlement. The mediator tries to reduce discussions on final settlement proposals, but directs the dialogue between the two parties towards their mutual interests so that they would reach an agreement in the given case.

Unfortunately, the Second Municipal Court is limited in space and conditions, since three judges share one courtroom and office, so mediation hearings can only be scheduled for the afternoon, which is a problem for legal entities, taking into account the eight-hour workday.

Also, the last week of the month has been declared as the mediation week, and has become regular every month and will continue to be so, when all litigation parties that wish to resolve or attempt to resolve their suits through settlement with the assistance of a mediator, are given the opportunity to settle their case efficiently, quickly and in their best interest. When a party comes forward with the proposal for the suit to be resolved through mediation, and if it is assessed that there are conditions for a settlement, the case is scheduled for that month, or the following one. In that way parties can resolve their dispute much faster than through regular trial.

Even though this is a relatively new institution that needs to be accepted by both the judges and the parties, mediation has great potential in the more efficient resolution of disputes between parties in the future. First of all, the parties should be informed of such a possibility, which they need to accept realistically - as one of the possible outcomes of the dispute. This also applies to their attorneys who should accept this institution as one of the possibilities for resolving disputes, primarily in cases where such a solution is the best one for the party in the given situation. This has proven to be the greatest problem, as some attorneys see their interest in the length of a new case (for example, what has been acquired during the marriage), and advise their clients not to accept any agreement or settlement under any conditions, even if the other party is willing to make great concessions. However, it has also turned out in some case that after several hours of mediation parties have recognized their interests and the court's effort to bring together the interests of both parties and resolve the case through settlement, even when this was impossible due to the unwillingness of one of the attorneys to accept such an agreement. The party would then appear in court, informing the mediating judge that the attorney has been dismissed, and ask for a new mediation session in order to reach an agreement with the other party, and settle the case.

In an effort to increase efficiency and effectiveness in closing cases and disputes between parties within the given frame of procedural law, the Second Municipal Court has made great efforts aimed at resolving certain cases through settlement, and in the interest of both parties.

I would like to reflect on the results of another pilot project regarding the preparatory hearing, and an attempt to assign an associate to every acting judge. Following a sem-

inar on the topic, we agreed to act more efficiently in the process of earlier case investigation. Thus, after having received the claim, the judge instructs the prosecutor to put the indictment in order and submit all necessary documents. After this, the judge presents the claim for a response and schedules a preliminary hearing. This has reduced the period for acting on such an issue, as well as more efficient case handling. However, since the Law on Civil Procedure has not been changed, nor is party disciplining sanctioned, we are once again in a situation where violation of even repeated court orders for putting charges in order and submitting the documents, i.e. submitting proposals for presentation of evidence which is sanctioned by rejecting charges or passing a rejection decision because the party did not provide sufficient adequate evidence or proven the likeliness of the claims, has regularly been annulled by higher courts, without exception. Rulings are still annulled in cases where claimants propose presentation of new evidence in their appeals, so not much could be done towards disciplining the parties and particularly their attorneys. This would be possible with full support of the higher court, and the support of attorneys by bar associations in smaller communities, such as Zrenjanin.

On the other hand, I can say that we have tried to create a situation where a judge has an associate who would assist him/her in all steps of the procedure, from receiving the suit to passing the judgment. Thus the associate would hand over to the judge the new cases; having studied the charges the associate would order the prosecutor to prepare the charges, submit certain necessary documents or suggest the presentation of other necessary evidence. The job of the judge would only be to review the proposal, and possibly to supplement it. In this phase the associate would also issue an order for court fees to be paid. A great portion of the workload would thus be transferred to the associate, who would also become acquainted with various disputes, institutions. In specific cases he/she would assist the judge in preparations for the preliminary hearing by finding and printing out regulations or possible court judgments in such cases.

In the further proceeding, the associate took care of the course of all proceedings, the conduct of the parties in cases that are on record awaiting execution, and issued repeated executive orders. When supplement was submitted by the party that had been issued an executive order, the associate would check whether the court order had been executed entirely, and if so, only then would the case be presented to the judge, who would schedule a preliminary hearing. Otherwise the executive order would be repeated to the particular party. Finally, because of the great number of cases and a certain number of cases that lasted more than a year, in a situation where several judges took part in one case, the associate reviewed the entire case and presented it to the judge prior to execution. Therefore, the judge could focus on what evidence should be presented and what written evidence should be requested, in order to close such a case more rapidly and efficiently, with the tendency to avoid any shortcoming that would result in the annulment by a higher court.

The associate also plays an important role in drafting the judgment. The acting judge would thus instruct the associate to draft various judgments so that he/she could grasp all institutions of civil law and civil-legal procedure, which would also achieve an educational end and facilitate the judge's work. Finally, it is the judge's obligation to review such a judgment, and then hand it over to the associate who is in charge of determining court fees for appeals and judgments.

The associate has also contributed to the mediation process. Several associates have been appointed to mediating judges, where judges hear mediation cases in the afternoons and after regular working hours. Due to those cases, they can dedicate less time to their own cases. This is why the associate prepares and presents old cases that have lasted for several years, and presents the case to the mediating judge as well as the council prior to the hearing as most of us are members of a three-judge council. In this way the council is informed of the details of the case, presented evidence, what is disputable and what is undisputable before the hearing. All this facilitates further mediation, which is aimed at bringing together the interests of both parties and preventing disposal contrary to general interests.

I believe that the role of an associate is very efficient, since the associate becomes familiar with the entire civil procedure, from receiving the suit to drafting the judgment. It also helps him/her to get the most comprehensive training for future work as a judge or the work of an associate within a singe-judge council (which is the most expedient in regards to the judge), since he/she is freed of the technical part of the procedure, searching regulations and decisions, as well as drafting certain judgments. Such affiliation with an associate has greatly helped me and allowed me to allocate part of my working hours to mediation.

I must also add that it is my impression that the mediation process, which was established as a new method, is increasing in popularity. We have more and more requests by the parties themselves for their cases to be heard in mediation, as is the case with settlements in this procedure.

Zorica Kitanović
Judge

Mediation in Marital Disputes

Mediation helps parties in a dispute to establish communication with each other, and to decide on all or at least some crucial issues that emerge due to the disrupted relationship.

The majority of disputes steered into mediation refer to the division of all marital property. These disputes last for a long time because of the complicated relationship between the parties as for example when one spouse leaves the other, the second one becomes vulnerable and offended, and has trouble communicating. The divorce procedure and separation proceedings often take place at the same time.

Bearing in mind our patriarchal background, one must admit that the most often case in our practice is that the husband is the owner of the more valuable property and registered as such in public records. Therefore, there is a possibility that the husband, if he feels hurt and betrayed, might alienate or burden the property.

In such a situation, it is a great success if the parties accept the invitation for the mediation process, meaning that they voluntarily enter the mediation process.

The first phase of the process is to assess whether the case is suitable for mediation. That calls for the case to be prepared and studied, and for at least a small number of common positions of the parties involved to be found. After that, the parties are sent specials summons presenting a clear description of the purpose of the mediation. The summons end with a slogan: "Come with good faith."

At the first mediation session, the parties and their legal representatives are presented with the idea of mediation and its objective. The parties often complain, seeking additional explanation and asking the mediator to indicate the winning party in the dispute. It is then that the mediator must make an additional effort to underline the difference between a judgment passed by a court and an agreement reached by the parties to a dispute with the assistance of the mediator, and in line with the existing law. If this is successful, then the second phase starts. In this phase the mediator talks with the parties involved (sometimes with both parties at the same time, sometimes with each of them separately, which depends on the level of disruption of their relationship), and then with their legal representatives. It is often at this point that their dissatisfaction erupts, for various reasons such as - because the children live with the other parent, because of strained personal relations, because of the husband using the entire property while the wife is renting an apartment.

This is when, for example, the mediator steps in and directs the parties to present significant facts pertinent to:

- the duration of the marriage,
- whether they owned or did not own property before the marriage,
- who took care of the household and children,

- who earned more and how much,
- the number of common children whose parents are both parties involved,
- whether they received any valuables while in marriage or anything that would be important to them.

In an informal confidential conversation with the mediator, the parties practically make up a summary outlining the most important facts and gradually, with the mediator's assistance, shape their claims (exposing their own interests). If the parties reach no agreement, the mediation process fails on that session or the following one. The case is then returned to regular procedure.

When the parties wish to cooperate just like their legal representatives, individual talks with the parties and their legal representatives start. In these separate talks, the parties are more open and more willing to come up with concrete offers because they often do not wish to do so in the presence of the other party. For example, husbands avoid giving concrete offers fearing that they would offer more than what the other party wants, and in principle they accept all conclusions. The wives, on the other hand, are commonly unrealistic in their expectations or insist on items of lesser value (wedding rings, tapestries) because of the pain caused.

In this phase, the parties loosen up and even come up with real proposals. Sometimes they ask that apart from immovable property, movable property which was not the subject of the claim be discussed. Sometimes they wish to fulfill their obligation by selling other special property, buying out the spouse, etc. It is a common occurrence that the parties have prior unresolved property issues such as illegal construction, uncertified sales contracts, etc.

It often happens that, during the divorce procedure, one of the spouses give away his/her property to the children, which brings the issue of validity of this contract as well as the issue of solving their mutual relations.

This is when the mediator's skills come to light. The mediator should convert the wishes of the parties into an acceptable and legally sound agreement, with the assistance of their legal representatives whose role is accentuated at this point.

Once this agreement is reached, the two parties are satisfied with the outcome. This is more so considering the efficiency and effectiveness of the procedure by normalizing mutual relations and achieving a lasting solution for themselves and their family. The legal representatives and the court improve their reputation through their swiftness and efficiency.

And in conclusion: "Everyone wins with mediation."

Maja Cvetić
Judge

Mediation Experience at the Second Municipal Court in Belgrade

By decision of the President of the Second Municipal court regarding annual judge assignment, and based on previous consultations, my colleagues Tatjana Jeremić, Dragana Rovčanin and I were assigned, in addition to our regular duties in the litigation department, to the so-called Special department for mediation of the Second Municipal Court in Belgrade. We opted for what might be considered volunteer work, wishing to support the great enthusiasm of the president of the court to end cases faster and with greater efficiency, bearing in mind the voiced dissatisfaction regarding the condition of our judiciary system. This is contained in the blanket assessment by the average citizens who face lengthy procedures, expensive attorney fees and other problems on the path to exercising their rights. This is not only because of "incompetent" judges, as it is often claimed, but also because of numerous social issues that have accumulated over the years. The three of us focused on this task precisely because it provides quicker and better resolution of disputes, bearing in mind that protecting the rights of people is the priority and one of the basic principles of the judicial function. We are also of the opinion that an agreement between the parties to a dispute achieved with our assistance could facilitate the process of resolving the disputed issue. In doing so we focus on resolving disputes between people, rather than concentrating on the number of cases closed.

Honouring the guidelines, that is, the rule book which was delivered to all the judges of the Second Municipal Court, we started working on mediation towards the end of the year, and were somewhat disappointed after the first hearings (it happened that neither party appeared at the first mediation hearing, or only one party appeared, which might have been the result of the holiday season or perhaps something else - we didn't know what). Nevertheless, every beginning is difficult and requires some effort. Even though we have worked for two months only, we settled three cases and scheduled mediation in another ten cases. We felt true pleasure when "warring" sides thanked us for ending their distress after a ten-year dispute, shook hands with us and left the court wishing us good luck in resolving all disputes through settlements.

The problem that we would primarily like to emphasize is one that we frequently face - that is the lack of understanding of the institution of mediation. Because of this, parties without sufficient knowledge come with distrust and presumption that it is better to have the dispute "resolved in a proper court" and that it would be better for them to prove that they are right, regardless of how long the process would take or at what cost ("village conciliation council").

Another problem that we as judges face is that that we do not have enough knowledge about the comparative law practice. Therefore, we are uncertain how open we may be with the parties to a dispute concerning the adequacy of the claim and how thin this demarcation line can be. Is it upon us, as mediating judges in a concrete legal matter, to

assess the issue, or put forward the chances for success or failure in the dispute? Is there a skill or tactic that would allow us to explain - between the lines - what awaits them if they do not come to an agreement, if by doing this we may even cast a doubt on the conscientious and responsible behaviour of the judge whose case has been brought before us for mediation (if we warn them about the length of the dispute and entailing costs, an average citizen who has brought charges in an attempt to exercise his/her rights may reasonably question the nature of the procedure, its length and expenses and may even question the competence of a judge to resolve the dispute).

One of the problems is the issue of office space, which the Second Municipal Court faces in its daily operations. The courtrooms and chambers are shared by as many as three judges and three court clerks and are now used for mediation in the afternoons. Since hearings are scheduled after office hours, after 3.30 p.m., it is very difficult to reach a settlement. Namely, the legal representatives employed by companies, and the republic, military and municipal defence attorneys as legally authorized representatives, are not required (nor is it in their interest) to appear in court, to "show good faith for the resolution of the dispute" as we like to put it, since their workday is over by that hour. A number of settlement attempts were cancelled, which led the other party to back down and seek a trial resolution, following the rules laid down by the Law on Civil Procedure. In addition to this, lengthy trials are in the interest of attorneys and they prolong them through abuses of procedural rights, they encourage a quicker and less painful resolution of the case and are not willing to appear in court in afternoon hearings, which is when they usually meet with clients. Even when there is a possibility of resolving the case through settlement, there is a problem of high costs of lengthy trials. This means that attorneys are actually those who prevent the parties from reaching an agreement.

For one of our upcoming cases we have scheduled mediation hearings for morning hours. The mediation procedure will take place in offices, since one of the parties involved is the State of Serbia and Montenegro. The fact that three judges share one office is an additional problem. One of our colleagues will have to leave her office on that day so that we could hold this hearing. In several cases, we have postponed mediation hearings since the parties expressed their willingness to make a settlement, and we gave them time to reach an agreement.

Another problem that we face in the process of mediation is that the law clerks attending these hearings are without powers to close a settlement.

I would further note that our current regulations regarding civil law do not provide for a settlement to include the obligation for a public apology to the opposed party, which is why mediation was dropped as a solution in one case, since the party was told that such a settlement was not possible ("bee keeper").

One of the reasons for failed settlement attempts is the general poor financial situation that we all face. Even if the parties to a dispute reach a settlement, guided by their own interests and the interest of the opposed party, they abandon the settlement because they lack the means to fulfill their end of the bargain, and do not expect to be able to do so in the near future, so they leave it up to the courts to give the final word - "whatever it may be."

Since this is a "pioneer" undertaking for our court, some cases seemed to be inappropriate to be presented in mediation, i.e. the cases where the parties did not express any willingness to settle the dispute. This problem will be resolved at our professional meetings.

Bearing in mind that our trial council has been resolving disputes in this manner for only two months, it is believed that perhaps these are not the greatest problems. The greater problems appear to be those we momentarily face. I believe that as mediation progresses and as more cases are settled, there will be more new cases directed toward this negotiating method, negotiating skills, the knowledge of litigator psychology. That will provide experience for reaching settlements in disputes.

We recently had an interesting case of marital property separation. The wife filed a suit claiming rights to a half of the apartment that had been bought during the marriage. The husband agreed to one half, but the plaintiff subsequently asked for 60% of the apartment and finally for 3/5 of the apartment. The plaintiff was late for the mediation hearing. We spoke with the defendant and we concluded that he was willing to settle the dispute. The plaintiff arrived subsequently and we found out from the discussion with her that their relationship was seriously troubled, but that the plaintiff was prepared to settle for one half of the apartment if other property items acquired during the marriage were subject to separation through mediation. This mediation procedure was successfully concluded both in respect to the apartment and other items, and the parties left the court satisfied, since mediating judges had saved them time that would have been lost in a lengthy trial.

I believe that this seminar and similar seminars would contribute to the quicker and better training of mediating judges at the Second Municipal Court and resolving disputes through mediation.

Nataša Radonjić
Branislav Radojčić
Court Assistants

Appendix to the Report on the Seminar held with Canadian Judiciary Representatives

In Belgrade, March 11-12. 2004

A pilot project was started in September 2003 at the Second Municipal Court in Belgrade, aimed at boosting work efficiency, increasing the quantity and quality of results of the trial councils as well as to educate court assistants and their more thorough training for future independent activities.

Court assistants partake in every phase of the trial procedure in order to achieve the given goals. After the claim has been received, they verify the regularity of the case and its aptness for further processing, then they collect valid legal regulations as well as opinions from judicial practice aimed at a more complete clarification as to the case matter. Also, the associates draft judicial decisions (verdicts and rulings) and make sure that court fees are properly and timely calculated and paid.

The role of the court assistant is also significant in the mediation process, where the assistant is responsible for presenting the contents and history of the case to the mediating judge, accentuating the demands of parties, presented evidence and possibility of an out-of-court settlement.

Thus the assistant has the comprehensive and worth-while opportunity to prepare for further independent activities, through daily practice in the trial council, processing various cases involving civil law on a material and legal basis, with supervision from acting council president and consultations with him/her.

This approach was initially applied in two councils of the Second Municipal Court in Belgrade. The experiences of both the judges and court assistants in these councils indicate the need to introduce this new mode of operation as the common practice in our court.

Recommendations Proposal of the Court Efficiency Seminar in Belgrade The Second Municipal Court

June 20-21, 2003

Preliminary Hearing

Upon receiving the claim, the acting judge will attempt to concentrate the evidence in the greatest possible extent until scheduling the trial.

Upon receiving the claim, the judge will assign the plaintiff to prepare the claim. If the claim is not properly prepared, the judge will issue a request for submitting all necessary written evidence that have not been provided.

The claim will then be sent to the defendant alongside with the written documentation with the request for his/her response to the claim with a deadline specified by the law. The defendant has to propose the evidence related to the facts stated in the response to the claim.

Before scheduling the preliminary hearing and after the defendant has filed a response, the claim will be issued to the plaintiff for response which should include all written evidence.

Subsequently, the preliminary hearing will be scheduled and held for more complex cases.

During the preliminary hearing, the disputable and non-disputable elements of the request will be determined as well as the facts which cannot be disputed by the two parties.

Invite the parties and their authorized representatives to the preliminary hearing.

In case the defense attorney requests for delay so that the defendant can make his/her statement to the claim, and the defendant is present at the preliminary hearing, the claim will be read to the defendant with a brief presentation of the allegations stated in the claim. The defendant will then be requested to state whether he/she disagrees or not with the request and the facts.

During the preliminary hearing, the acting judge will estimate if there is sufficient grounds for reaching settlement.

If there are no grounds for reaching settlement, the judge will estimate if circumstances allow the possibility for mediation. In that case the judge will present the case to the President of the Court and the mediation judge, in order to schedule a mediation session.

During the preliminary hearing, the acting judge will insist that the parties declare their statements on all evidence proposed, in order to concentrate the evidence.

The judge will insist as much as possible that the deadlines are respected, even though the deadlines are not preclusive.

Monitoring new cases in accordance to these recommendations and the evaluation of achieved results.

Mediation

All acting judges will focus their attention to recognize possibilities for introducing mediation in cases they are dealing with in their every day practice. When this becomes a possibility, all such cases will be presented to the President of Court and to the judge conducting mediation in order to schedule the mediation session.

New cases should be included in mediation as an experiment, in order to monitor the development and potential for resolving cases in this manner.

Mediation will be conducted by the judges of this court after working hours (considering the lack of office space) as well as by persons outside the court who are not regularly involved in the cases.

At the main trial session the consent of both parties is needed to redirect the case to mediation prior to the main trial.

Mediation will be institutionalized as a regular activity so that from now on mediation sessions will be scheduled once a week, namely the last week of the month (Settlement Week).

Court Administration

Court assistants will pay more attention in preparing the documentation before it is presented to the judge. They will make sure that the documents are attached, that the claim and subpoenas are sent to the opposing side as ordered, by controlling the postage receipts in precise short intervals and repeating the delivery in order to secure the respect of the procedure necessary to schedule the trial. Moreover, the assistants should make sure that, after the trial, the judgment is issued to the parties and that all the evidence of delivery is gathered.

A court assistant will be assigned to perform all administrative work related to a certain case in the preparation phase for the trial. The assistant will make sure that all procedural elements are fulfilled, that the documentation is gathered, that the delivery is repeated. The assistant will briefly present the case and the elements of the claim to the judge in order to facilitate his/her better preparation for the preliminary hearing as well as the trial.

Canadian speakers and participants from Serbia at the Seminar in Montreal

Mediation and alternative dispute resolution Seminar

October 25 to November 1, 2003
Montreal, Canada
SpringHill Suites Marriott, 445, Saint-Jean Baptiste

List of Canadian speakers

General Concepts of Mediation and Alternative Dispute Resolution: Experience of the Judiciary

Judge **Michèle Rivet,** *President of the Quebec Human Rights Tribunal and Commissioner of the International Commission of Jurists, Geneva*
Judge **Michel Robert,** *Chief Justice of the Quebec Court of Appeal*
Judge **André Deslongchamps,** *Associate Chief Justice, Superior Court of Quebec*
Me **Pierre Gagnon,** *Bâtonnier of the Quebec Bar*

Arbitration: the role of Judges and Arbitrators

Professor **Alain Prujiner,** *Laval University, Quebec*
Me **Babak Barin,** *Osler, Hoskin & Harcourt*

Family Mediation

Mr. **Daniel Camozzi,** *Social worker, family mediator accredited*
Mrs. **Lorraine Filion,** *« Centre Jeunesse de Montréal »*
Director of psychosocial assessment service and family mediation service
Me **Carole De Lagrave,** *Lawyer and mediator*
Child representation, role of the lawyer
Judge **Ginette Piché,** *Superior Court, Quebec*

Civil and Commercial Mediation: Development of mediation skills

Judge **Melvin Rothman,** *Quebec Court of Appeal*
Me **Serge Roy,** *Lawyer and Mediator*
Me **Dominique Bourcheix,** *Arbitrator, Mediator*
Professor **Nabil Antaki,** *The Quebec National and International Commercial Arbitration Center and Professor at Laval University, Quebec*

Workshop on mediation skills

Judge **Louise Otis,** *Quebec Court of Appeal*
Mr. **Louis Marquis,** *Dean of the Law Faculty, University of Sherbrooke*
Me **Hélène de Kovachich,** *Lawyer and mediator, Groupe Option Médiation*

Criminal Mediation

Judge **Michèle Rivet,** *President of the Quebec Human Rights Tribunal and Commissioner of the International Commission of Jurists, Geneva*
Judge **Gilles Hébert,** *Superior Court of Quebec*
Judge **Réjean Paul,** *Superior Court of Quebec*

Role of permanent education

Judge **William Kelly,** *Supreme Court of New Scotia*
Me **Jean-François Roberge,** *Senior Advisor, National Judicial Institute*

List of participants from Serbia

Judge **Vida Petrovic - Škero,** *Supreme Court of Serbia*
Judge **Jelena Borovac,** *Supreme Court of Serbia*
Mrs. **Leposava Karamarković,** *Former President of the Supreme Court of Serbia*
Judge **Gordana Mihajlović,** *President, Municipal Court II, Belgrade*
Judge **Vera Šupica,** *President, District Court, Zrenjanin*
Judge **Branka Bajić,** *Deputy President, Municipal Court, Novi Sad*
Judge **Ljiljana Mišević,** *President, Municipal Court, Niš*
Judge **Branka Bančević,** *President, District Court, Sremska Mitrovica*
Mrs. **Ljubica Pavlović,** *Advisor, Supreme Court of Serbia*

Participants of the Court Efficiency Seminar at the District Court and Municipal Court in Zrenjanin and Program of the Seminar

Pilot Courts - Project in Serbia
Municipal Court and District Court of Zrenjanin

Judges – participants from the Municipal Court and District Court of Zrenjanin :

District court:

Vera Šupica, *president*
Jelica Bojanić-Kerkez
Dušanka Babić
Ivana Grubanov
Radoslava Mađarov

Municipal court:

Aleksandra Odavić-Mak, *president*
Ružica Milošev-Duraković
Suzana Radaković
Milka Vuković
Edit Čordaš
Dragoslava Tabakov-Tošić
Jasmina Babić-Stankov
Borislav Gajić
Zagorka Živankić
Bogdanka Prodanović
Vojislava Veselinović
Ljiljana Momirski
Zoltan Nađivan
Jadranka Trifković
Žana Pribišić
Snežana Vidrić

First seminar (June 16-17, 2003)

Topics:

- Case management and pre-trial models
- ADR: General introduction
- Settlement conference
- Possibility of introducing ADR to the Serbian courts
- Development of skills of a good mediator
- Possible recommendations for the improvement of efficiency of courts in Serbia

Canadian speakers:

Judge **Michèle Rivet,** *President of the Quebec Human Rights Tribunal and Commissioner of the International Commission of Jurists in Geneva*
Judge **Melvin Rothman,** *Court of Appeal, Quebec*
Judge **Ginette Piché,** *Superior Court, Quebec*
Me **Randall Richmond,** *Deputy Chief Prosecutor for Organized crime in Quebec*

Second seminar (March, 08-09, 2004)

Topics:

- Implementation of the Recommendations of the District Court in Zrenjanin proposed on first seminar – June 16-17, 2003
- Report and evaluation of accomplished results
- Demonstration of the practical aspect of leading mediation
- Simulation of mediation concerning employment issues and intellectual property
- Family mediation
- Practical side of mediation – successes and obstacles
- Review and estimates of mediation possibilities and techniques
- Possibility of introduction of the Recommendations of the Zrenjanin Municipal and District court at a larger scale in Serbian courts (legal regulation, accordance with regulations, trials to which the mediation is applicable)

Canadian speakers:

Judge **Michèle Rivet,** P*resident of the Quebec Human Rights Tribunal and Commissioner of the International Commission of Jurists in Geneva*
Judge **Ted Scanlan,** *Supreme Court of Nova Scotia*
Judge **Ginette Piché,** *Superior Court, Quebec*

Participants of the Court Efficiency Seminar at the Second Municipal Court in Belgrade and Program of the Seminar

Pilot Courts - Project in Serbia
Second Municipal Court of Belgrade

Judges – participants from the Second Municipal Court of Belgrade :

Gordana Mihajlović, *president*
Ljiljana Milosavljević
Olga Arsović
Tatjana Jeremić
Biljana Tasić
Dragana Rovčanin
Snežana Ilić
Mirjana Prentović
Branka Milovanović
Dobrila Strajina
Zorica Kitanović
Sanja Agatonović
Marina Klarić-Živković
Dragana Marčetić
Vukica Šumić
Maja Cvetić
Vesna Filipović
Tamara Kostić
Irena Filipović
Vera Nikolić-Kujović
Jelena Stanković

First seminar (June 20-21, 2003)

Topics:
- Case management and pre-trial models
- ADR: General introduction
- Settlement conference
- Possibility of introducing ADR to the Serbian courts
- Development of skills of a good mediator
- Possible recommendations for the improvement of efficiency of courts in Serbia

Canadian speakers:

Judge **Michèle Rivet,** *President of the Quebec Human Rights Tribunal and Commissioner of the International Commission of Jurists in Geneva*
Judge **Melvin Rothman,** *Court of Appeal, Quebec*
Judge **Ginette Piché,** *Superior Court, Quebec*

Second seminar (March, 11-12, 2004)

Topics:

- Implementation of the Recommendations of the Second Municipal Court of Belgrade proposed on first seminar – June 20-21, 2003
- Report and evaluation of accomplished results
- Demonstration of the practical aspect of leading mediation
- Simulation of mediation concerning employment issues and intellectual property
- Family mediation
- Practical side of mediation – successes and obstacles
- Experience of the Second Municipal Court in the area of mediation
- Review and estimates of mediation possibilities and techniques
- Possibility of introduction of the Recommendations of the Second Municipal court of Belgrade, at a larger scale in Serbian courts (legal regulation, accordance with regulations, trials to which the mediation is applicable)

Canadian speakers:

Judge **Michèle Rivet,** *President of the Quebec Human Rights Tribunal and Commissioner of the International Commission of Jurists in Geneva*
Judge **Ted Scanlan,** *Supreme Court of Nova Scotia*
Judge **Ginette Piché,** *Superior Court, Quebec*

Project team

International Commission of Jurists (ICJ) – Canadian Section

Judge **Michèle Rivet**
President of the Quebec Human Rights Tribunal, Chair of International Projects Committee ICJ-Canada and Commissioner of the International Commission of Jurists, Geneva

Caroline Meilleur
Project Director, Independence and Impartiallity of Judges South-East Adriatic

Manon Monpetit
Deputy Project Director

Center for Democracy Foundation (CDF)

Nataša Vučković
Program Director

Slobodan Vučković
Legal programs Director

Vesna Marjanović
Project Coordinator

Svetlana Vukomanović
Project assistant

Aleksandra Odavić-Mak, Melvin Rothman, Ginette Piché,
Randall Richmond, Caroline Meilleur, Vera Šupica i Vesna Marjanović

Učesnici seminara u Zrenjaninu
Participants of the seminar in Zrenjanin

Ginette Piché, Michèle Rivet, Vera Šupica, Melvin Rothman
Zrenjanin, 16-17. juni 2003.

Seminar u Zrenjaninu
Seminar in Zrenjanin

Seminar u Zrenjaninu – Radionice
Seminar in Zrenjanin – Workshops

Ginette Piché, Michèle Rivet

Vera Šupica
Bivša predsednica Okružnog suda u Zrenjaninu
Former president of the District Court in Zrenjanin

Diskusija u Zrenjaninu
Discussion in Zrenjanin

Michèle Rivet, Randall Richmond
Konferencija za štampu u Fondu Centar za demokratiju
Press Conference at the Center for Democracy Foundation

Slobodan Vučković
Direktor pravnih programa FCD
Legal programs Director, CDF

Caroline Meilleur
Direktor projekta, ICJ
Project Director, ICJ
Manon Monpetit
Zamenik direktora projekta, ICJ
Deputy Project Director, ICJ

Nataša Vučković
Direktor programa FCD
Program Director CDF
Michèle Rivet
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Michèle Rivet, Slobodan Vučković

Nataša Vučković, FCD
Michèle Rivet, ICJ

Michèle Rivet

Predsednica Suda za ljudska prava, Quebec, predsednica Komiteta za međunarodne projekte Međunarodne komisije pravnika – Kanada sekcija i Komesar Međunarodne komisije pravnika u Ženevi

President of the Quebec Human Rights Tribunal, Chair of International Projects Committee ICJ-Canada and Commissioner of the International Commission of Jurists, Geneva

Učesnici seminara u Zrenjaninu
Participants at the seminar in Zrenjanin

Ted Scanlan, Ginette Piché

Ginette Piché, Jelica Bojanić-Kerkez, Michèle Rivet, Vera Šupica

Sudije zrenjaninskog suda
Zrenjanin Court Judges

Ted Scanlan, Ginette Piché, Jelica Bojanić-Kerkez, Michèle Rivet, Vera Šupica

Učesnici seminara Drugog opštinskog suda u Beogradu, Pravosudni centar
Participants of the Second Municipal Court Seminar in Belgrade, Judicial Training Center

Sudije Drugog opštinskog suda u Beogradu
Judges of the Second Municipal Court of Belgrade

Gordana Mihajlović, Michèle Rivet, Dušan Protić, Slobodan Vučković

Ted Scanlan, Ginette Piché, Leposava Karamarković