THE IMPACT OF COURT-CONNECTED ALTERNATIVE DISPUTE RESOLUTION ON THE PRACTICE OF LAW IN ONTARIO: A LITIGATOR'S PERSPECTIVE

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INTRODUCTION

Litigation has been defined as a "contest in a Court of law for the purpose of enforcing a right or seeking a remedy."[1]

When I was called to the Bar and began practicing litigation in April, 1988, this definition was accurate as litigation was generally viewed as a contest in Court. Although actions frequently settled prior to trial, the rules governing litigation in Ontario at that time did not require the parties to meet formally to discuss settlement prior to an action proceeding to trial.[2]

The practice of litigation began to change in Ontario in 1994 with the creation of the "ADR Centre" in the Toronto region.[3] This originated as a two year pilot project jointly sponsored by the Provincial Ministry of the Attorney-General and the Ontario Superior Court. From this initiative evolved the Ontario Mandatory Mediation Program which now applies to all civil, non-family law, actions in the Superior Court in Toronto and Ottawa.

In my view, the advent and growth of Court-connected alternative dispute resolution ("ADR")

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[1] *Black's Law Dictionary*, 5th Edition, West Publishing Co., St. Paul, Minnesota, 1979, at p.841.

[2] An exception to this statement would occur if a Court ordered that a pre-trial conference be conducted and that the parties attend at the pre-trial. In my experience, outside the area of family law, these orders were rarely made by the Court.

[3] The ADR Centre was properly known as the Ontario Court of Justice (General Division) Alternative Dispute Resolution Centre.

has had a more profound impact on the practice of civil litigation in Ontario during the past ten years than any other factor. In this paper, I shall examine the impact which Court-connected ADR has had upon the practice of litigation in Ontario.

The paper shall begin with an overview of the growth of Court-connected ADR in Ontario, from its roots at the ADR Centre to the system of mandatory mediation which now governs all civil, non-family law actions in Toronto and Ottawa. I shall then examine the integration of ADR into a litigation practice examining the steps which a lawyer must take to ensure that the ADR experience is a positive and productive one for the client.

Although the focus on ADR in Ontario has been on mediation, this paper shall also examine two other forms of ADR which are available and may be successfully integrated into the litigation process. This paper shall demonstrate that the advent of Court-connected ADR has had a large impact on the practice of litigation in Ontario and, ADR shall continue to have an even greater impact on litigators and their practices in the future.

COURT - CONNECTED ADR IN ONTARIO

The ADR Centre

The ADR Centre was the first Court-connected ADR program for non-family law cases in Canada. It began in October, 1994 as a two year pilot program in the Toronto Region for the purpose of testing whether the availability of ADR technics improved the conduct of civil cases.[4]

The ADR Centre was jointly sponsored by the Provincial Ministry of the Attorney-General and the federally appointed Superior Court of the Province. The pilot project was designed and implemented by a steering committee which consisted of representatives of the Bench, Bar and Ministry of the Attorney-General.[5] The ADR Centre was staffed by a Project Director and four dispute resolution officers.

The operation of the ADR Centre was governed by a practice direction, which stated that the objective of the Centre was to ensure the availability of "more timely and cost effective access to justice for both defendants and plaintiffs."[6]

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[4] *Ministry of Attorney-General, Civil Justice Review, Supplementary and Final Report*, Section 5.2 Alternative Dispute Resolution, which may be found on the Ministry of the Attorney-General web site at www.attorney-general.jus.gov.on.ca.

[5] Ibid

[6] Practice direction - ADR Centre (1994), 16 O.R. (3d) 481 at p.483. See also, a revised practice direction at (1994), 24 O.R. (3d) 161.

Under the pilot project four in every ten cases filed at the Ontario Court (General Division) in Toronto were referred to the ADR Centre.[7] Certain cases, such as applications, family law matters, motor vehicle claims and construction liens were excluded.[8] Cases were referred to the ADR Centre after a statement of defence was filed. The mediation sessions were generally scheduled for two hours duration.

The ADR Centre represented a significant departure from the traditional role of the Court as its key features were early intervention and impartial settlement assistance being offered to parties and their counsel.[9] The parties were compelled to attend at a mediation, but there were no sanctions against parties for failing to settle. Further, under the pilot project and substantially different than the current mandatory mediation, there were liberal provisions to allow parties to opt out of the mediation.

The ADR Centre was developed as a response to a growing public perception that litigating civil disputes was too complex, too costly and too time consuming.[10] These concerns were also being

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[7]Supra, note 4.

[8]Although construction lien cases were not selected for referral to the ADR Centre at the time pleadings were filed, it was frequently the practice of the construction lien Masters to order that the parties attend at the ADR Centre for a mediation prior to scheduling examinations for discovery or obtaining a trial date in construction lien matters.

[9]Genevieve A. Chornenki and Christine E. Hart*, Bypass Court - a Dispute Resolution Handbook*, Second Edition, Butterworths Canada Ltd., Toronto, 2001 at p.179.

[10]Ibid.

identified by the legal community as well, and it was generally acknowledged that action must be taken to address these concerns.

The Civil Justice Review

In 1994, the Civil Justice Review was established at the joint initiative of the former Chief Justice of the Ontario Court of Justice and the former Attorney-General for Ontario. The mandate of the Civil Justice Review was "to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice."[11]

In March, 1995, the Civil Justice Review released its first report which set out 78 recommendations designed to create the framework for a modern civil justice system. A key component of this framework was that the report envisioned Courts as becoming "dispute resolution centres" adopting a "multi-door" concept of dispute resolution and integrating alternative dispute resolution techniques.[12] Although the first report endorsed the concept of Court connected ADR in principle, it deferred consideration of the model to be used and funding until an evaluation of the ADR Centre pilot project had been completed.

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[11] *Ministry of Attorney-General, Civil Justice Review, First Report.* The First Report of the Civil Justice Review may be found at www.attorney-general.jus.gov.on.ca.

[12] Ibid. at Section 1.3. *Dispute Resolution as a Whole: The Courts and ADR, or the "Multi-Door" Approach.*

In the first report, the Civil Justice Review noted that the Dispute Resolution Sub-Committee of the Law Society had recently examined the role of lawyers with respect to ADR and had recommended that "the Rules of Professional Conduct should be amended to place a positive obligation on lawyers to inform their clients of alternatives to litigation." The first report of the Civil Justice Review recommended that the Law Society act on this recommendation.

In May, 1996, the Law Society adopted this proposal and amended Rule 10 of the Rules of Professional Conduct to require the following:

> "...the lawyer should consider the appropriateness of ADR to the resolution of issues in every case and, if appropriate, ...should inform the client of ADR options and, if so instructed, take steps to pursue those options."[13]

The Evaluation of the ADR Centre

An external evaluation of the results of the pilot project at the ADR Centre was conducted by a team led by Dr. Julie Macfarlane of the University of Windsor Law School. The evaluation conducted by Dr. Macfarlane was based on user surveys and interviews and culminated in a report ("The Macfarlane Report") released on November 30, 1995.[14] The Macfarlane Report

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[13] *Professional Conduct Handbook (Toronto): Law Society of Upper Canada (1996 Edition),* at p.35.

[14] Dr. Julie Macfarlane, *Court-Based Mediation of Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre (*Queen's Printer for Ontario, 1995). Dr. Macfarlane's report covered cases referred to the ADR Centre from January 1, 1995 to

found that cases which settled at the ADR Centre did so in approximately half the amount of time when compared to Ontario Court (General Division) cases not referred to the ADR Centre that settled before trial.

The Macfarlane Report found that a strong majority of the lawyers and parties who participated in the pilot project were satisfied with their experience at the ADR Centre, both in cases that settled and those that did not. The report concluded that there was a strong and broad approval for the availability of ADR as part of the litigation process.[15]

The most frequently noted concerns by lawyers in the report were the scheduling process which simply notified lawyers of a date and time and the mandatory selection of mediators.

The Macfarlane Report concluded that there was no significant opposition among lawyers or litigants to the mandatory nature of ADR in the pilot project and that referral to ADR should continue on an "opt-out basis after the filing of the first statement of defence."[16]

Civil Justice Review - Supplementary and Final Report

The Supplementary and Final Report of the Civil Justice Review ("the Final Report") carefully

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September 30, 1995.

[15]Ibid. at p.71.

[16]Ibid. at p.73.

considered the results of the pilot project at the ADR Centre as set out in the Macfarlane Report. The Final Report concluded that the settlement results of the pilot project were impressive. After reviewing these results, the Final Report recommended the mandatory referral of all civil, non-family cases to a three hour mediation session to be held following the delivery of the first statement of defence, with a provision for "opting-out" only upon leave of a Judge or Case Management Master.[17]

With respect to the selection of a mediator, the Final Report recommended that the session should be conducted by a mediator selected by the parties from a list of accredited mediators or, failing agreement by the parties, a mediator selected from that list by the Court.

The Final Report of the Civil Justice Review also found that referral to ADR must be effectively integrated with the proposed case management system. In my view, this recommendation was most important as it addressed the concern that the ADR component of a case should not present new opportunities for those who wished to cause delay.

The Final Report of the Civil Justice Review recommended that the Court-connected mandatory referral to mediation operate with a roster of accredited private sector mediators and that the Court roster mediators be paid a regulated fee. The report also made various recommendations with respect to an application procedure for prospective Court roster mediators and the development of standards and an accreditation process for ADR providers in Ontario.

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[17]Supra, note 4 at Section 5.2, Alternative Dispute Resolution.

The Ontario Mandatory Mediation Program

On January 4, 1999, Rule 24.1[18] introduced a common set of rules and procedures governing mediation of non-family law civil case management cases in the Ontario Superior Court of Justice in Ottawa and Toronto.

The impact of the introduction of Rule 24.1 was significantly different for Toronto than Ottawa. Prior to January 4, 1999, Court-connected and essentially voluntary mediation was utilized in Toronto through a relatively small pilot project for only a small percentage of the case-managed civil cases.[19] Conversely, Ottawa had for two years prior to January 4, 1999, under a local practice direction, already conducted mandatory mediations for all civil case management cases.

When the Civil Rules Committee enacted Rule 24.1, it included a provision that the Rule would sunset on July 4, 2001. The Civil Rules Committee constituted an evaluation committee of members of the Bench, Bar, mediation community and the public to oversee an evaluation of the rule.

The Ministry of the Attorney-General retained Robert Hann & Associates Limited to prepare the independent evaluation. The evaluation entitled "Evaluation of the Ontario Mediation Program"

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[18]Ontario Regulation 452/98, s.1.

[19]*Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations*, March 12, 2001 at p.3, available on the Ministry of the Attorney-General web site at www.attorney-general.jus.gov.on.ca.

(Rule 24.1: Final Report - The First 23 Months)[20] (the "Evaluation Report") was submitted to the Civil Rules Committee: Evaluation Committee for the Mandatory Mediation Pilot Project. The Evaluation Report conducted an extensive review of the operation of Rule 24.1 and examined issues such as the pace of mediated litigation, the cost of mediated litigation and the impact of Rule 24.1 on dispute resolution outcomes.

The evaluation report contained twenty-nine recommendations to the Civil Rules Evaluation Committee. The key recommendations made to the Evaluation Committee included the following:

R. 1. The Rule be extended for the current types of cases covered beyond July 4, 2001.

R. 2. The Rule be amended, or other procedural changes be made in line with the finding in the report, as part of a process of continuous improvement of Rule 24.1.

R. 3. The Rule be extended to other civil cases in Toronto and across the province as part of the expansion of case management.

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[20] *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report–The First 23 Months,* (Queen's Printer for Ontario), available on the Ministry of the Attorney-General web site at www.attorney-general.jus.gov.on.ca.

The Evaluation Committee of the Ontario Civil Rules Committee reviewed the Evaluation Report and delivered its own report on March 12, 2001.[21] After reviewing the pros and cons of mandatory mediation as examined in the Evaluation Report, the Evaluation Committee of the Civil Rules Committee concluded and recommended that the sunset provision in Rule 24.1 be revoked and that the rule be made a permanent feature of the Rules of Civil Procedure. In the report, the Evaluation Committee also made a series of recommendations suggesting possible amendments to improve the Rule.

The Evaluation Report clearly found that mediation has had a positive impact on the speed, costs and outcome of litigation and in general, parties and lawyers have been satisfied with the mediation process. As a result of the findings of the Evaluation Report, and the recommendations of the Evaluation Committee of the Civil Rules Committee, the sunset provisions of Rule 24.1 have been removed. On July 3, 2001, Toronto moved to full case management. At that time, all civil, non-family law, actions in the Superior Court in Toronto became subject to mandatory mediation.

In a period of less than seven years, the Toronto Region has moved from the introduction of ADR as a limited pilot project at the ADR Centre to the wide-spread use of ADR through the mandatory mediation of all civil, non-family law, actions in the Superior Court. This radical transformation is startling when considering that prior to the pilot project at the ADR Centre, the

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[21]This report was entitled *Report of the Evaluation Committee for the Mandatory Mediation Rule Pilot Project* and may be found on the Ontario Government web site at www.attorney-general.jus.gov.on.ca.

vast majority of litigators in the Toronto Region had little or no experience with alternative dispute resolution.

This factor was recognized by Christine Hart at the time she created and implemented the ADR Centre. Ms. Hart states that the element of compulsion in bringing the parties to the table to negotiate was included in the ADR Centre as the civil litigation bar at that time had little or no knowledge or experience in the process of mediation and was likely to reject it for that reason.[22]

In the discussion of the Canadian ADR initiatives in her text, Hart states that it was theorized by the designers of the ADR Centre that once parties and counsel had experienced the flexibility and informality of the mediation process, it would be perceived as valuable assistance to them in achieving resolutions to their disputes.[23]

The feedback from participants at the ADR Centre as set out in the Macfarlane Report and the feedback obtained by the authors of the Evaluation Report, clearly indicate that parties and lawyers have embraced the advent of mandatory mediation.

In my view, it is only a matter of time until mandatory mediation is extended to the balance of the Province of Ontario. All litigation practioners must acknowledge the role of ADR and

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[22]Supra, note 9 at p.180.

[23]Ibid.

consider how ADR may impact upon their law practice. This paper shall now explore the integration of ADR by lawyers into their litigation practice.

INTEGRATING ADR INTO A LITIGATION PRACTICE

Educating the Client about ADR

A client retains a litigation lawyer to represent their interests when they are unable to resolve their differences with another party. At that point in time, parties frequently rely upon their litigation lawyers to advise them as to how to proceed and to serve as their advocate in representing them with respect to the other party. Litigation is an adversarial process and litigators serve as the advocates of their clients in this process.

Mediation is a process in which the parties to a dispute meet with an impartial third party, a mediator, who helps them settle their differences.[24] Initially, after retaining a litigation lawyer to represent their interests, parties may be reluctant or distrustful of attending at a proceeding where they will sit in the same room with the very party that they have retained a litigator to fight.

With the advent of mandatory mediation, litigation lawyers have no alternative but to educate themselves with respect to mediation and to use this process to assist their clients in resolving or narrowing the issues in their legal disputes. Initially, the ADR Centre pilot project was made mandatory to compel the parties to participate and not to reject the process with which counsel

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[24]Supra, note 9 at p.79.

was generally unfamiliar. This mandatory nature of the process continues to be of benefit to counsel, as all parties are required to attend at the mediation. Therefore, a lawyer who embraces the mediation process is not regarded as weak or afraid to go to Court, as the mediation process is a mandatory step in the litigation.

In jurisdictions with mandatory mediation, such as the Toronto Region, the mediation process should be explained to clients at the initial meeting.[25] Failure to advise the client at this early stage of the mandatory mediation may lead to problems in the lawyer client relationship as the client may question why their litigation lawyer is adopting a conciliatory approach early in the litigation proceedings.

Preparation for Mediation - the Selection of a Mediator

The first step in the mediation process is the selection of a mediator.[26] Under Rule 24.1, in the event that the parties do not select a mediator within 30 days of receiving the notice to mediate from the Court, the Court shall appoint a mediator from the roster.[27]

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[25]Cinnie Noble, L. Leslie Dizgun and D. Paul Emond, *Mediation Advocacy, Effective Client Representation in Mediation Proceedings*, Emond Montgomery Publications Limited, Toronto, 1998 at p.15.

[26]A very helpful list of questions to consider when selecting a mediator is contained in Roderic G. Ferguson, *Squeezing the Lemon: Getting the Most Out of the Mediation Session*, Ontario Bar Association Annual Institute, January 25, 2002, Alternative Dispute Resolution Section.

[27]See Rule 24.1.09(4), (5) and (6).

In my experience, the selection of a mediator may well be the most important step in the mediation process. The Court roster for Toronto consists of approximately 284 mediators,[28] bringing vastly different experiences and approaches to the mediation. Obviously, some mediators have more experience than others and may be in a better position to deal with difficult issues which may arise during the mediation.

Knowing the approach of the mediator[29] and the manner in which they conduct a mediation may assist counsel in preparing the witness for mediation. Many factors must be taken into consideration when selecting a mediator[30] including, not only the experience and approach of the mediator, but also the mediator's personality, the personality of the client and the availability of the mediator.[31]

It is interesting to note that counsel in Ottawa have had considerable more success in agreeing

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[28]This was the total number of roster mediators listed in the Toronto Roster of Mediators - July 9, 2002 which may be found on the Ministry of the Attorney-General web site at www.attorneygeneral.jus.gov.on.ca.

[29]With respect to the approach of mediators and factors to be considered see, John Lande, *How Will Lawyering and Mediation Practices Transform Each Other*, 24 Florida State University Law Review 839 at pp.844-856.

[30]For a practical discussion of qualities to look for in a mediator see Robert B. Munroe, *Finding the Deal Maker and Avoiding the Deal Breaker: What Lawyers Look for in a Mediator*, Ontario Bar Association Annual Institute, January 25, 2002, Alternative Dispute Resolution Section.

[31]A helpful discussion with respect to the selection of the mediator and factors to be considered is contained in Noble, Dizgun and Emond,, supra, note 25 at Chapter 4.

upon the selection of a mediator prior to the assignment of one by the Court than their counterparts in Toronto.

As of November 1, 2001, of the 5,308 cases mediated in Toronto in which roster mediators were used, the mediators were assigned by the Court in 2,964 or 55.8% of the cases.[32] Conversely, of the 3,724 cases in which roster mediators were used in Ottawa, only 29.0% of the time were mediators assigned by the Court.[33] Only further time will tell whether this difference is attributable to the fact that mandatory mediation has applied to virtually all civil, non-family law, cases in Ottawa for a longer period of time or whether there is a higher degree of co-operation among the litigation Bar in Ottawa than in Toronto.

In any event, the selection of a mediator is crucial in all cases and represents an important opportunity for counsel to ensure that the mediation process may be productive. In my practice, I always canvass the selection of a mediator with opposite counsel to determine whether a mutually acceptable mediator may be agreed upon prior to the imposition of a Court appointed mediator from the roster.

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[32] *Ontario Mandatory Mediation Program Status Report* for the period ending November 1, 2001.

[33] Ibid.

Preparing for Attendance at the Mediation

The onus is on counsel to ensure that the client understands the nature of the mediation process, the duration of the session, strategic concerns and what is expected of the client at the mediation session.[34] Obviously, the nature of the explanation and preparation required will vary from client to client, but it is imperative that counsel ensures the client understands and is fully prepared for the mediation session.

Prior to attending at a mediation, it is necessary to conduct a pre-mediation meeting with the client to explain the stages of mediation and how it differs from the litigation process. It is also important that the client understand what to expect and how the mediation shall proceed.[35]

In the pre-mediation meeting, counsel should attempt to achieve the following:[36]

1. Make certain your client understands the process.
2. Prepare your client to participate in the process.
3. Prepare your client to be conciliatory.

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[34]Barry Kuretzky and Jennifer MacKenzie, *Mediating Employment Disputes*, Canada Law Book, Aurora, 2001 at p.66.

[35]Michael P. Silver, *Mediation and Negotiation: Representing Your Clients*, Butterworths Canada Ltd., Toronto, 2001 at p.116.

[36]Judge Darrel Lewis (Ret.), *Preparing for Mediation*, found online at www.mediate.com/articles/Judgelewis.cfm, May, 2002.

4. Take advantage of the opportunity for creativity.

5. Make sure your client understands the full financial analysis of settlement versus trial.

Counsel must be careful not to assume that the client understands what terms such as "ADR" or "mediation" mean. In the pre-mediation meeting the client must be informed that a mediator is not a Judge or arbitrator and shall not render a decision. The client must also be informed that the mediation process is "without prejudice" and accordingly, any position taken at the mediation or settlement proposal put forth shall not be disclosed to a Trial Judge prior to the completion of the trial.

It is important that lawyers encourage clients to participate in the mediation process. With respect to client satisfaction, it is much more probable that the client will find the mediation experience to be a positive one. Also, a properly prepared client, shall often make a positive impression upon opposing counsel, the opposite party and the mediator and may assist in achieving a settlement at the mediation.[37]

The client should be encouraged to adopt a conciliatory approach toward the other party at mediation. It is possible to express understanding or empathy with the other side's position

[37]A helpful discussion of preparing a client to participate in the mediation process is found in Elizabeth Pillon, *Preparing Your Client to Shine at Mediation*, a paper delivered at the Canadian Bar Association, Ontario, Continuing Legal Education, Maximizing the Mediation Process, Wednesday, November 24, 1999.

without conceding that it has a legal basis. In some instances, it may be necessary for a client to express such understanding or even to provide an apology at the outset of the mediation.

A number of years ago, I participated as counsel at a mediation between my client, a small construction company, and homeowners who had a contract for a renovation on their home. My client had run into financial difficulties on another construction project and had used some of the money provided by the homeowners to attempt to complete the other project. This was not successful and the financial difficulties of my client prevented it from completing the renovation. At the outset of the mediation, my client expressed sincere apologies to the homeowners for the disruption which had been caused to their home and lives. Following this apology, a settlement was negotiated at the mediation.

It is important to explain to a client that a mediation offers the opportunity to structure a settlement in any legal manner which the parties may agree. This is important when contrasted with the result which will be determined by a Judge at trial, which in some circumstances is satisfactory to neither party. It is also important to advise the client to consider their interests and explore non-monetary factors which may be included in a settlement.

Counsel should ensure that the client fully understands the financial costs which may be incurred in the litigation process. As mandatory mediation occurs very early in the process, generally a client will have paid a relatively small amount of legal fees to that point in time. Unless the client is a repeat litigant, they may have no idea of the costs which shall be incurred in taking a

case through trial. Also, the client should be advised of difficulties which may be encountered in attempting to collect a judgment and the availability of the appeal process which may prolong the litigation.

It is also necessary that counsel encourages the client to take a serious look at the merits of the case. When representing a plaintiff, even if counsel has provided an opinion that the case appears to have good prospects of success, counsel must advise the client to take into account the possibility that the claim may not succeed or that the amount sought may be reduced by a Trial Judge. When acting for a defendant, it is very important that counsel clearly identifies the potential liability for the party, including the prospect of having to pay not only the amount awarded by the Trial Judge, but also interest, a portion of the other party's legal costs and their own legal costs.

Although the preparation with the client prior to mediation need not be as extensive or detailed as preparation for trial, it should be similar to the preparation of a client which would be conducted prior to an examination for discovery. In addition, when preparing for a mediation, counsel and the client are also required to focus upon the strengths and weaknesses of the case and to consider what compromise the client is prepared to make in order to settle the case.

The advent of mandatory mediation has required counsel to develop and exhibit a new set of skills to successfully integrate ADR into their litigation process. Just as effective advocacy is

required in trial preparation and in the advocate's performance at trial, it is also required in preparation for a mediation and at the mediation itself.[38]

To conduct a mediation effectively[39], counsel must approach the preparation for the mediation and the strategy to be employed in much the same manner as when preparing for a trial. The importance of this preparation is clear when considering that it is more probable that the final resolution of the dispute shall be achieved at the mediation rather than at trial.

BEYOND MEDIATION: CONSIDERING ADDITIONAL FORMS OF ADR

With the advent of mandatory mediation, all litigators who practice civil litigation in the Superior Court of Justice in the Toronto Region and in Ottawa have been exposed to mediation. The findings of the Macfarlane Report and the Evaluation Report clearly indicate that mediation has received the approval of a majority of these litigators. The challenge now for the litigation bar who have integrated mediation into their practices, shall be to expand the use of ADR in their practice to enable their clients to resolve disputes in a more cost-effective and time efficient manner. In this paper, I shall briefly examine two additional forms of ADR which are available

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[38]L. Leslie Dizgun, *Mediation Advocacy*, Chapter 14 found at supra note 33 at p.115.

[39]For a helpful list of issues to consider when preparing for mediation, See, Eileen Barker, *Tips for Attorney-Preparing for Mediation*, found on line at www.mediate.com/articles/ebarker.cfm.

and which I have used in my litigation practice, mediation/arbitration ("med/arb") and arbitration.

Med/Arb

Med/Arb is a variation on the mediation process which offers parties the opportunity to mediate, followed, in the event the dispute is not resolved, by binding arbitration.[40] Typically, the same person is appointed both to mediate and, if necessary, to arbitrate the dispute[41]

I was introduced to the concept of med/arb approximately six years ago. At that time, opposing counsel and I were confronted with an acrimonious business dispute which involved two brothers and their stepfather. Counsel managed to resolve all outstanding issues between the parties, except for the value of the corporation which would then determine the amount to be paid by the brothers to purchase the stepfather's interest in the corporation. When approached to arbitrate the matter, the mediator that we selected suggested that we proceed by way of med/arb and counsel accepted his recommendation.

Under the terms of the Med/Arb Agreement the mediation was scheduled to be conducted on a specified date. In the event that a settlement was not reached at the mediation, a fixed date had

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[40]Julie Macfarlane, *Dispute Resolution Readings and Case Studies*, Emond Montgomery Publications Limited, Toronto, 1999 at p.326.

[41]D. Elliott, *Mediation/Arbitration: Fraught with Danger or Ripe with Opportunity?* (1995) 34 A.L.R. 163.

been scheduled for the arbitration approximately one month after the mediation date. At the mediation, a negotiated settlement was reached and in that instance, it was not necessary for the arbitration to be conducted.

A few years later I was presented with the opportunity to revisit the concept of med/arb in a complex corporate dispute involving issues of product liability. In that instance, opposing counsel proposed, and I agreed, that an agreed upon mediator would be retained to conduct a mediation, failing which he would become the arbitrator in the matter. On that occasion, the matter was not resolved at mediation and the arbitration was conducted approximately five weeks after the mediation. This was a complex matter which involved expert reports and expert evidence given during the course of the arbitration. Certainly, the knowledge which the mediator/arbitrator had obtained with respect to the matter, including a site visit to the premises of both parties prior to the actual commencement of the mediation, was of considerable assistance in allowing the arbitration to proceed rapidly and to be completed within the three day time period agreed to by both counsel and the mediator/arbitrator.

Med/arb is a process which gives rise to a number of concerns. These arise as the concept of mediation as an open process seeking a consensual agreement differs considerably with that of arbitration where a final decision is imposed upon the parties in much the same manner as a trial. A specific concern which has arisen is whether the type of open communication sought in mediation may be constrained if the parties are aware that the matter could shortly be arbitrated

by the same person. An additional concern is how the mediator/arbitrator treats confidential information provided by a party in caucus during the mediation process.[42]

One manner of dealing with the concerns raised above is to provide that if a settlement is not reached at the mediation, a different individual shall conduct the arbitration. This would address the concerns which have been raised that having the same individual serve as mediator and arbitrator could restrict the openness of the parties at mediation. The disadvantage of having a different individual conduct the arbitration is that, all benefits which were achieved in having the mediator understand and be familiar with the matter are lost. Accordingly, the cost savings and time efficiency which are achieved by using the same person may be lost when using two different individuals.

The overriding advantage in using med/arb is that the process may be designed to serve the specific needs of the parties. In my experience, considerable time is expended on the negotiation of the med/arb agreement to ensure that the interests and objectives of the parties are met. Although med/arb will not be suitable to resolve all disputes, it is an interesting form of ADR which is available for counsel to integrate into their litigation practice.

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[42]Julie Macfarlane, supra, note 38 at at p.327.

Arbitration

"Arbitration is both an adjudicative process similar to litigation and an ADR process different from judicial adjudication."[43] Although arbitration operates outside of the Court process, in many respects it is a process more akin to a trial than to a mediation.

In my view, arbitration is a form of ADR which is under utilized by litigators.[44] The advantages to the client of proceeding by way of arbitration rather than trial are clear. First, counsel may select the decision maker who shall make the arbitral award. The ability to chose the decision maker is almost never available in the trial process. All litigators have conducted trials before Judges who were unfamiliar with the area of law which was the subject matter of the trial. In the arbitration process, counsel may select the decision maker and ensure that they are familiar with the area of law to be covered.

An overwhelming advantage of an arbitration for counsel and the parties alike is that, the parties may select the date and time for which the arbitration is to be scheduled. Even though great advances have been made under case management, the Courts remain unable to offer a fixed date and time for trial, except in rare circumstances. With respect to the timing of the arbitration, the arbitrator may also agree with counsel and the parties with respect to the hours during which the

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[43]Julie Macfarlane, supra, note 38 at p.532..

[44]In this paper all references to arbitration shall be with respect to non-labour arbitration. Clearly, arbitration has been widely used in the labour area and the discussion of arbitration in this paper is directed toward the resolution of civil and commercial litigation disputes.

arbitration may be conducted. In my experience, arbitrators have exhibited considerable flexibility to allow arbitrations to be completed in a short period of time.

In an arbitration, parties are able to design not only the procedure to govern the resolution of the dispute, but also the scope of the arbitrator's jurisdiction to grant an award.[45] Once the decision has been made to proceed by arbitration, great care must be taken in the drafting of the arbitration agreement.[46] One of the most important considerations in the arbitration agreement is the limits which shall be placed upon the rights of the parties to appeal the arbitral award. Appeal rights are a fundamental part of the judicial process and the importance of the loss of a right to appeal the decision of an arbitrator should not be under estimated.[47] In some instances, the loss of a right to appeal could outweigh the possible advantages which arbitration might offer.

In designing an arbitration agreement, counsel should remember the benefits which exist in the legal system and make use of these benefits. When participating in an arbitration, I often design

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[45]Prior to agreeing to submit a dispute to arbitration, and before drafting an arbitration agreement, counsel should be familiar with the legislation governing non-labour arbitrations in Ontario. There are two such Acts, The Arbitration Act, S.O. 1991, c.17, which governs domestic disputes and the International Commercial Arbitration Act, R.S.O. 1990, c.I.9, which governs international commercial disputes. Although the scope of this paper does not allow a review of these Acts, see George L.R. Ranking, *Overview of the Domestic and International Commercial Arbitration Acts,* Department of Education, the Law Society of Upper Canada, October 31, 2001, for a review of this legislation.

[46]For an excellent discussion of matters to consider when preparing an arbitration agreement see, David Morritt, *Commercial Arbitration - Strategic Considerations for the Pre-Hearing Phase*, Department of Education, Law Society of Upper Canada, Conducting the Commercial Arbitration, October 31, 2001.

[47]Ibid. at p.2-6.

the arbitration agreement to include pleadings and documentary and oral discovery in much the same manner as that called for under the Rules of Civil Procedure. A well drafted arbitration agreement shall take advantage of the benefits which exist under the Court process but, may include sufficient flexibility to ensure cost saving and a more expeditious resolution. For example, although examinations for discovery may be included, generally an agreement can be made to restrict the time available to counsel to conduct the examinations for discovery.[48]

When negotiating an arbitration agreement, I attempt to include a schedule which includes specific time periods for the completion of all steps in the arbitration, including the exchange of pleadings, exchange of affidavits of documents and copies of productions, dates for examinations for discovery, dates for exchange of experts' reports, dates for the exchange of document books to be used on the arbitration and the actual dates upon which the arbitration is to be conducted. Such an agreement provides certainty as to when the matter will be completed and allows counsel and the parties to arrange their schedules accordingly.

The advantages available to counsel and their clients when proceeding by way of arbitration are obvious. These advantages are also apparent to the many former justices who now serve as

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[48]The discovery process has been criticized as being too time consuming and expensive for clients. This has resulted in the extension of the Simplified Procedure under Rule 76 to actions for an amount of $50,000.00 exclusive of interest and costs. Also, in March, 2002, the Ministry of the Attorney-General announced the appointment of a Task Force to examine the discovery process. The Report of the Task Force is expected in the fall of 2002. A consultation paper setting out the mandate of the Task Force and the background to the call for reform of the discovery process may be found at www.ontariocourts.on.ca/discoveryreview/consultationpaper.doc.

arbitrators available to resolve matters on a private basis which would have previously proceeded through the Court system.

In my view, counsel have an obligation to advise their clients of the benefits which may be achieved by proceeding with an arbitration and to discuss these benefits with their clients. This may result in providing the client with a more cost efficient and expeditious resolution of their dispute and ensure that the client remains a happy one.

CONCLUSION

This paper has shown the great impact which Court-connected ADR has had on the practice of civil litigation in Ontario during the past ten years. At the time the ADR Centre began as a pilot project in October, 1994, the civil litigation bar had little knowledge or experience in dealing with mediation. This paper has examined the rapid growth of Court-connected ADR culminating in the mandatory mediation of all civil, non-family actions in the Superior Court in Toronto and Ottawa.

The feedback obtained from the civil litigation bar as set out in the Macfarlane Report and the Evaluation Report clearly indicate that parties and lawyers have welcomed the advent of mandatory mediation. Even though this is the case, much more can be done by counsel to integrate ADR into the practice of litigation.

This report has clearly demonstrated that the selection of a mediator is one of the most important steps in the mediation process. Surprisingly, counsel in Toronto have chosen to have the mediator appointed by the Court in a majority of the cases mediated in which roster mediators were used. In order for Toronto counsel to ensure that the mediation process is a productive one, they should follow the lead of the Bar in Ottawa where in cases which roster mediators were used, the mediator was appointed by the Court only 29% of the time. It appears that the Ottawa Bar have recognized the importance of the selection of the mediator and have chosen to take control of this important decision rather than having a mediator assigned by the Court.

Once counsel have become familiar with and embraced the concept of mandatory mediation, the next challenge is to broaden the use of ADR in the litigation process. Arbitration and med/arb are two additional types of ADR which I have found to be helpful in providing a timely and cost efficient resolution of disputes for my clients.

I look forward to the challenges ahead and to the development and growth of additional forms of ADR which may be used to assist our clients in achieving an expeditious and cost efficient resolution of their disputes.

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