ADR Update

Fall/Winter 2011 Newsletter of:
ADR Atlantic Institute, Arbitration & Mediation Institute of Manitoba, ADR Institute of Ontario, ADR Institute of Saskatchewan.

Inside this issue:

1 From the Editors' Desk
2 Should Judges Interview Children in Custody Cases?
4 Mediation Organizations Collaborate
6 Who Are We When We Mediate?
8 ….and Building Defect Claim costs just keep going up.
10 Work it Out at Work: The Art and Science of Managing Workplace Conflict
11 An Introduction to Collaborative Family Law
13 Family Circle Mediation
14 The Use of Subpoenas In Arbitrations
16 Book Reviews
18 "The Interrupters": Lessons for Mediators
19 Conflict in Family Business
21 Bill 168 Update

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Colm Brannigan, Ontario, Co-Chair
Ken Gamble, Saskatchewan
Anne E. Grant, Ontario, Co-Chair
Lawrence Herman, Ontario
James Musgrave, Nova Scotia
Jennifer Schulz, Manitoba

The ADR Atlantic Institute, ADR Institute of Ontario, Inc., ADR Institute of Saskatchewan, Inc. and Arbitration & Mediation Institute of Manitoba, Inc. are regional affiliates of the ADR Institute of Canada. They are non-profit, private organizations established to provide leadership in the promotion of alternative dispute resolution for ADR professionals and users of ADR services.

From the Editors' Desk

Welcome to the Fall edition of our newsletter. The major news with this issue is the expansion of the distribution beyond Ontario to the members of our regional affiliates in the Atlantic Provinces, Manitoba and Saskatchewan. We welcome our new readers and look forward to their contributions to future issues.

Along with this geographic "expansion" we have added new committee members. They are Larry Herman from Toronto, Jim Musgrave from Halifax, Ken Gamble from Regina and Jennifer Schulz from Winnipeg. This increase in the size and breath of our committee will allow us to draw on ADR perspectives and experiences from outside of Ontario. It will also make it easier for us to work towards our goal of a quarterly newsletter. It is an exciting development.

In this issue we present articles on a variety of topics in keeping with our mandate to provide our readers with practical and useful information. It is not our intention to duplicate the more formal tone of the ADR Institute of Canada's Canadian Arbitration and Mediation Journal but we are interested in articles and notes about best practices in the ADR world. Case and legislative comments are also most welcome.

To do this we need your contributions. Please forward your article(s) to janet@adrontario.ca for review and distribution to the appropriate committee members. When writing for the newsletter please remember that we have a limit of 1000 words, more or less, for each article. We would also appreciate if you could check your spelling and grammar before sending it to us as doing this saves a great deal of time for the editors. And of course, do not forget to send us an up to date photo to go with your article.

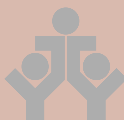
In ending, we would be remiss in not thanking Mary Anne, Janet, Mena, Rob and Brenda at ADRIO who make this newsletter possible.

We hope you will find this latest issue of the newsletter interesting and informative. Enjoy reading it and best wishes for the holidays.

Colm Brannigan, on behalf of the Newsletter Committee:

Ken Gamble
Anne E. Grant
Lawrence Herman
James Musgrave
Jennifer Schulz

ADRIO Winter Week-End SKILL-BUILDER'S RETREAT



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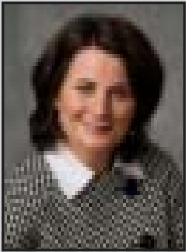

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Attention Newsletter Contributors Deadline for Spring Issue March 31st 2012:

Just a reminder, submissions:

- Should be no longer than 1,000 words in length
- MUST be submitted in WORD (not PDF)
- MUST be accompanied by the author's short bio with contact information

janet@adrontario.ca

Barbara Landau, Psychologist, Lawyer, Mediator, Arbitrator

Should Judges Interview Children in Custody Cases?

There is a movement to give children a voice in contested custody cases.

Barbara Landau, Ph.D., LL.M., Psychologist, Lawyer, Mediator, Arbitrator President, Cooperative Solutions www.coop-solutions.ca

The UN Convention on the Rights of the Child, Article 12 states that where children are directly affected in a legal proceeding, they have a right to express their views, which should be considered based on their age and maturity. These views should be expressed either directly or through a representative or an appropriate body. I **agree**.

This principle has been interpreted as giving children in contested custody cases a **RIGHT** to speak to the judge hearing their case. I **disagree**. The focus should be on more appropriate options to achieve this objective.

I agree with the position of Madam Justice Claire L'Heureux-Dube and Madam Justice Rosalie Abella who wrote that the judicial interview should be a last resort:

"The practice of interviewing children in Chambers is not an ideal way to ascertain a child's wishes. The interview is conducted in an intimidating environment by a person unskilled in asking questions and interpreting the answers of children. In the relatively short time those interviews take, it is difficult to investigate with sufficient depth and subtlety those perceptions of a child that explain, justify or represent the child's wishes. Moreover the interview may be perceived as a violation of the judge's role as an impartial trier of fact who does not enter the adversarial arena."

R. Abbela & C. L'Heureux-Dube (eds), ***Family Law, Dimensions of Justice,*** Toronto: Butterworths, 1983 at p. 329

Recent Family Law reforms encouraged parent education and triage to direct couples to less adversarial alternatives when appropriate, or fast tracked high conflict, complex cases to judges for their legal expertise. There is widespread agreement that the process for managing family cases needs repair; however other ideas seem more worthy of our attention.

First is the establishment of a Unified Family Court, with specialist judges who are assigned on the basis of one judge-one family. Today judges are not necessarily family specialists and couples may appear before a series of judges – a fact that further complicates judicial interviews.

I agree that:

1. Children should be given an opportunity to have a VOICE in

the parenting decisions that most affect them.

2. There should be an obligation to determine the child's interest in participating before choosing a methodology. For example, is the child seeking:
   - An opportunity to encourage his/her parents to reach an amicable resolution?
   - Clarification and understanding of the court process?
   - An opportunity to participate in the decision-making process by having a VOICE?
   - An opportunity to raise concerns about his/her safety – physical or psychological?
   - An opportunity to decide, as a "party"?
   - Other?
3. There should be a number of options for matching the interest to the process.

   One or more of the following options could be offered:
   - A video
   - A children's information session
   - A meeting with a mediator or assessor
   - A booklet
   - A meeting with a Children's Lawyer
   - Internet programs
   - A written submission
   - Meeting with the judge
   - Other

Note: Patients entering a hospital emergency department might prefer the Chief Surgeon; however, someone does a triage assessment to determine the most appropriate process. Similar reasoning is needed on this issue.

Concerns:

1. What is the judge's objective in meeting with a child? Does the judge's objective match the child's?

Does the judge want to:
- Form an impression of each child?
- Gather evidence about each child's views and preferences?
- Clarify the court process?
- Other?

Who will decide if the objectives coincide? How much time will the judge allocate to each child – since children are very different in their needs and preferences? How will the court determine who wishes such a meeting?

2. The manner in which the child exercises a VOICE should take into account his/her:
   - age
   - stage of development
   - communication skills, and
   - any parental pressure
3. Most children do not ask questions about the "Law". They express concerns about being caught in the middle of parental conflict and have practical questions about their future– will they have to move or change schools? These are not questions that require judicial expertise. Most children want their parents to cooperate, minimize conflict and make appropriate parenting decisions.
4. Parents who are litigating custody or access should be required to attend an additional parent information session, on the possible impacts on children, and to encourage less adversarial alternatives. In Alberta and B.C. parents are required to attend two 3 hour sessions on Parenting After Separation.
5. Other less adversarial options should be canvassed before a trial proceeds. Many mediators are trained and willing to meet with children. Some jurisdictions assist parents by covering some of the costs. This is cheaper and likely more effective as demonstrated in Australia.
6. In high conflict cases, custody assessments are a logical option. Children are seen individually, together, and with each parent. Information about the children's needs is gathered from other relevant professionals. The assessor summarizes the information in a Report which provides a history of the family, an assessment of the personality and significant background of the family members and recommendations as to important aspects of a Parenting Plan.

   One obstacle is that assessors today are reluctant to accept assessments because lawyers have taken a litigious approach, attacking the assessors by filing complaints with their Colleges to prevent reports from being presented to the court. Also, the cost of assessments has risen greatly as assessors take exceptional steps to protect themselves.

Summary of Objections:

My chief concerns are that judges are not trained to interview children. Also, mediators, assessors and mental health professionals are less costly, well trained and do not have a conflict of roles.

Children have complex motives for stating a preference: protecting a vulnerable parent, choosing the parent who sets minimum limits, punishing the parent who separated. The task of sorting through a child's motives requires time and training.

I fear that prior to a judicial interview, children will be pressured to take sides and later will feel guilty or at risk of retribution from one or both parents.

A significant concern is that many judges hearing family cases are not family specialists and there is no continuity in case assignments. A properly funded and resourced Unified Family Court could address all these objections!

Mediation Organizations Collaborate

Last month, the Presidents of OAFM, ADRIO, AFCC-O, and OCLF met and formed the new Ontario working group DR5 (Dispute Resolution 5).

The group represents Ontario based dispute resolution professionals through their respective organizations. The group is enthusiastically committed to promoting awareness about dispute resolution to the public and other professionals and to sharing information, resources and educational development. Furthermore, DR5 hopes to be able to join forces to work on and advocate for our mutual interests on any newly anticipated legislation concerning ADR on both the provincial and federal government levels.

In addition, the group discussed the possibility of co-sponsoring a conference in or around the Toronto area in 2013. We welcome your feedback, suggestions and questions. DR5 is a new and exciting collaborative working group whose main purpose is to strengthen all 5 organizations by sharing resources and reaching a common ground which we hope will benefit all of our members.

Following is a short bio about each organization and their 5 presidents.

The Ontario Association for Family Mediation, (OAFM) was established in 1982 as a not-for-profit association promoting mediation as a dispute resolution process in the resolution of family disputes. OAFM designates members who have met their education and experience criteria as Accredited Family Mediators, "AccFM." Information about OAFM can be obtained on its website: www.oafm.on.ca.

Richard W. Shields LL.B., M.A., LL.M., Ph.D. "Rick," is a collaborative lawyer, family mediator, family arbitrator, and an ADR and Collaborative Practice trainer, whose practice is based in Hamilton, Ontario. He is the current president of OAFM.

The Ontario Collaborative Law Federation (OCLF) (www.oclf.ca) was established in 2001. It currently represents 18 groups of collaboratively-trained legal, family and financial professionals who support couples during separation and divorce without going to court. The OCLF provides training and professional development opportunities for members, educates the public about the collaborative process, supports the formation of collaborative groups in Ontario, develops and promotes professional standards of practice, and represents collaborative practice and the 18 member groups to government and other organizations.

> The group is enthusiastically committed to promoting awareness about dispute resolution to the public and other professionals...

John Ferris, the president of Ontario Collaborative Family Law Federation practises law in Creemore, Flesherton and Dundalk, Ontario in the areas of Collaborative Family Law, Mediation & Arbitration, Real Estate, and Wills and Estates. He has completed a Certificate in Dispute Resolution (*York, 2002*) and LL.M. (ADR) *(Osgoode 2004)* and is a qualified Collaborative Family Law Trainer and a Chartered Mediator. John has facilitated ADR and conflict resolution seminars and workshops in Ontario, Ethiopia, Thailand, India, Tanzania and Nigeria.

John is an active member and former president of the Collaborative Family Law Group of Grey-Bruce and a member of Collaborative Practice Simcoe County.

Association of Family and Conciliation Courts (AFCC) - is an interdisciplinary and international association of more than 4000 members, including family law judges, lawyers, mental health professionals, social workers, mediators, court administrators and other professionals in the family justice system dedicated to the resolution of family conflict. The Ontario Chapter (AFCC-O) established about three years ago, is the first Canadian Chapter with more than 275 members. We share a strong commitment to education, innovation and collaboration to benefit communities, empower families and promote a healthy future for children. Please visit our website to learn more about us and see what we offer ww.afccontario.ca.

Barbara Jo Fidler, Ph.D., C.Psych. Acc.FM. is a registered psychologist who has worked with separating and divorcing families for more than 28 years. She provides mediation, parenting coordination, consultation, expert testimony and therapy in Toronto.

She is an author and provides professional training. She is the current president of AFCC-O.

ADR Institute of Ontario (ADRIO), a professional association of mediators and arbitrators with 850 members and 5 full-time staff. One of 7 affiliates of the ADR Institute of Canada with 1800 members across Canada. Institute designations (C.Med, Q.Med, and C.Arb), recognized nationally and internationally. Family designations Cert.F. Med. and Cert. F. Arb. recognized provincially. Approved to qualify mediators for international certification by the International Mediation Institute. Nationally recognized *Mediation Rules* and *Arbitration Rules*, *Code of Conduct* and *Code of Ethics*. Markets the use of ADR, advocates for new mediation and arbitration opportunities. Recently led a family law process reform project with the result that the Attorney General installed family information and mediations services in every family court in Ontario. Link: www.adrontario.ca

Joyce M. Young, M.Sc., C.Med, Acc. F.M has been in private practice as a mediator, consultant, and trainer in conflict resolution for 25 years, and is the current President of the ADR Institute of Ontario. Joyce holds an Advanced Degree in Family Mediation from the University of Waterloo, and a Masters in Applied Behavioural Science. She is an Accredited Family Mediator with the (OAFM) and a Child Protection Roster Mediator. She is also a mediator at the Superior Court of Justice.

Family Mediation Canada/ Médiation Familiale Canada (FMC) is the national association for conflict resolution and family mediation established in 1985. FMC is dedicated to the promotion of mediation while assisting families experiencing the stress of separation and divorce with conflict resolution. FMC members are an interdisciplinary group of professionals trained in family mediation - as neutral facilitators helping parties reach mutually acceptable agreements and facilitating communication between family members. FMC members work collaboratively to create co-operative conflict resolution for the many issues related to separation and divorce such as; adoption, child welfare, military and diplomatic divorces, elder mediation, wills and estates, parent/teen, international family disputes, child abduction mediation and child protection issues. Additionally, FMC supports the ongoing development of excellence and professionalism within its organization and in the practice of mediation. FMC's certification standards for family mediators are amongst Canada's most stringent. www.fmc.ca.

Mary Damianakis is an FMC comprehensive certified family mediator specializing in cross border and child abduction mediation. Mary's experience with Hague Convention work began in Europe and now continues in Canada. She is a PHD candidate interested in both cultural aspects with Hague Convention cases along with jurisdictional challenges that can be present in this growing and challenging area of family mediation. Mary brings 25 years of experience in this field and is also IMI certified and a founding member of MBB.

Congratulations to the following members who received their designation of Qualified Mediator or Certified Mediator:

New QMeds	New CMeds
John H. Becker, Q.Med (ON)	**Deborah R. Aarenau**, C.Med (ON)
Christal Coté, Q.Med (ON)	**Jennifer Maria Bell**, C.Med (ON)
Edit Farun, Q.Med (ON)	**Joel Cohen**, C.Med (ON)
Julie Gill, Q.Med (ON)	**Michael Erdle**, C.Med (ON)
Dana Holmes, Q.Med (ON)	**Amanda B. Chodura**, C.Med (ON)
Leisa MacIntosh, Q.Med (ADRA)	**Sarah Gayer**, C.Med (ON)
Shannon L. O'Meara, Q.Med (ON)	**Valerie A. Hazlett Parker**, C.Med (ON)
Bertha Tobin, Q.Med (ADRA)	**Kathleen Murphy**, C.Med (ADRA)
	Margaret K. Rees, C.Med (ON)
	Nancy Watson, C.Med (ON)
	Paul Wesley, C.Med (ON)

Elaine Newman, B a, LL.B, LL.M Arbitrator and Mediator

Who Are We When We Mediate?

What is it that we are doing in the room? Are we just there to get the deal done? Are we there to ensure that there is fairness of outcome? Are we there to defer to party self-determination? To nurture a relationship? To what extent do our own values have a place in the room?

Elaine Newman is a mediator and arbitrator in Toronto, working in a private practice. She is the designer and lead instructor of the Advanced Certificate Program in Dispute Resolution, Atkinson Faculty of Liberal and Professional Arts, York University, and is the designer and author of the ADR Institute of Ontario course entitled, "Practical Ethics for Working Mediators", 2011. The comments in this paper are that of the author alone. They are limited to application in the (non-family) arena of civil justice, her area of expertise.

To what extent, if any, do we care about the substance of the outcome? To what extent MUST we care about the substance of the outcome?

These are more than the questions of mere reflective practice. They are more than questions of mediation styles. These questions assume that we have already settled the question of whether we are evaluative or facilitative, methodologically subtle or directive. These are questions that go beyond the models for working through the mediation dilemmas that are caused by laudable mediation values coming into conflict.

These are questions that go to the root of what we do and what our place is as a profession.

In order to help us answer these questions, or at least to help us provide a way of working through the problems, the ADR Institute Ontario will be offering an on-line course in the ethics of mediation. It is entitled, "**Practical Ethics for Working Mediators**".

Why do we need this?

It was Canada's Chief Justice, The Honourable Brian Dickson who, twenty years ago, said the following words:

> ...if the right kind of cases are being channelled into ADR and if ADR functions effectively then there is no question that it can play a useful role in promoting justice. But it seems to me that as we round out the judicial process with other settings in which to resolve disputes, we need to be extremely careful that the values that underlie those settings are consistent with those that have evolved over many centuries and that lie at the heart of our judicial system. For it is these values which ensure that our system of justice is respected.

And it was 1984 when Owen Fiss, the American advocate and Yale professor of public law published his work, *Against Settlement*[1]. Professor Fiss argued, and argued vehemently, that ADR processes in court connected environments are "a highly problematic technique for streamlining (trial) dockets". He warned of coerced consents, unauthorized bargains, and an absence of justice.

Now, as working mediators, and as pragmatists who appreciate the benefits of making a living in this field, we know that there is not a lot of time in the throes of process to contemplate the significance of our every move. We are retained to get a job done. And we do get the job done – tidily, quickly, in a cost-efficient manner. Our work is dynamic, vital, and in 2011, a critical piston in the machinery of justice. And while we are working, we are very busy people. There are data to impart,

trust to establish, openness to generate, interests to discover, positions to shatter, BATNAs to explore, litigation confidence to dissect, (legal advice to avoid), psychology to apply, solutions to generate, details to track, agreements to nurture, and closure to complete. All of this, and more, we do on our own, without colleagues to consult, and with little but our training, experience and instincts to govern our actions and our words.

A work day is a busy day - an energetic, focussed and an exhausting day.

We can justify an easy deal on the ground of mediator effectiveness. Why would one cause the parties the enhanced time and money, when all they want is to get the thing done, and close the file?

We can justify an easy deal on the ground of a rationalized sense of justice – "The Defendant caused this Plaintiff all kinds of misery and uncertainty. It ought not to get the benefit of a windfall just because she caught a lucky break".

We can rationalize an easy deal on the ground of normalcy. This is, after all, litigation, and (though we may deny it,) everyone lies. The adversarial justice process causes us to lie. Besides, cross-examination notwithstanding, judges cannot boast a perfect track record of rooting out the lie.

The Ways of Working Through

So, what do we do with this problem? Stop mediating? Live with the fact that our skills, experience and passion for the work do, from time to time, mean that we are co-conspirators with manipulative parties? Accept that it comes with the territory? Or try not to think about it? Do the job and move on, and save the analysis for the classroom?

My view is that it is not good enough to get the deal done. To do so, without having regard and genuine concern for how we address these issues is a thoughtless way to go. It is to erode the heritage of the Canadian justice system, and to serve a mediocre model.

Ultimately, each one of us must ask, to what end do I offer my services? Who am I when I mediate?

Ultimately, each one of us must ask, to what end do I offer my services? Who am I when I mediate?

If the mediator chooses, he or she may start to grapple with these issues, and experience a moment of deep discomfort as the chaos of these problems fogs in. That discomfort, in my view, is a very healthy phase of the process to work through, and one which ought not to be avoided.

But then, if the mediator chooses, he or she may start to unpack these issues against one or more of the thoughtful and elegant methods proposed in the literature by those who have devoted their academic careers to mediation ethics.

Part of what we are doing in the development of the ADRIO course, **"Practical Ethics for Working Mediators"** is to help make that literature accessible, and to offer the working mediator options among the most useful and dynamic tools to learn and adopt.

Authors Robert Baruch Bush[2] and Catherine Morris[3], for example, have long held that the key to working through ethical dilemmas in mediation is found in an individual process of recognizing the commonly held "mediation values": confidentiality; party self-determination; mediator neutrality; balancing power; ensuring fairness of process; achieving settlement and maintaining mediator reputation, then designing an individual and personal prioritization of these values. That is, deciding which of the mediation values is closest to the personal ethic of the practitioner. Then comes the hard part: testing one's priorities against a challenging fact-based scenario or two, to see if the blueprint holds water.

Author Katherine Mills[4], for example, has offered the enticing option of organizing these thoughts against a paradigm that proposes the adoption of different, but clearly defined, mediation models and different codes of conduct, for different types of disputes.

Arbitration and Mediation Handbooks

These two useful guides are excellent reference manuals for ADR practitioners. Those wishing to supplement their training will find them to be an invaluable educational resource. They are also superb primers and a great resource to familiarize anyone wishing to understand the arbitration and/or mediation process in a commercial or business context.

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Or, one might turn to the model suggested by Ellen Waldman in her excellent new book, "Ethics of Mediation"[5], and consider whether one's own mediation model is a "norm-generating model, a norm-educating model, or a norm-advocating model". The quite excellent work professor Waldman contributes runs this fresh paradigm through a comprehensive series of factual scenarios, followed by commentary from a range of well-known authors. What emerges is a finely honed set of very practical and useable clues that may be employed while working, in the interests of bringing some order to the chaos of realizing that one is working in the bog of an ethical minefield.

In working through the course, the mediator will have exposure to summaries of the international literature in the field of mediation ethics. The mediator will have opportunity to consider specific fact situations and problems. The mediator will have opportunity to assess his or her approaches to those of her peers. He or she will have the tools to enable meaningful analysis of their own ethical blueprint.

No judging. No marking. Just learning, asking, and reflecting. Plus, practical tips for maintaining awareness of one's ethical reflex. Look for the program launch, coming to an on-line system near you!

1 Fiss, Owen, "Against Settlement", 93 Yale Law Journal 1073 (1984)
2 Bush, RAB, "Symposium: The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications" (1994) Journal of Dispute Resolution 1.
3 Morris, Catherine, "The Nature of Discourse on Ethics in Mediation", found in Macfarlane, Julie, Rethinking Disputes: The Mediation Alternative" 1997, E. Montgomery Publications pp. 301 – 347.
4 Mills, Katherine, "Can a Single Ethical Code Respond to All Models of Mediation?" (2005) Bond Dispute Resolution News (2005), paper 21.
5 Note 2, above

….and Building Defect Claim costs just keep going up.

Enough already! Does anyone else see a growing sense of entitlement in building envelope lawsuits? It seems that more and more claimants are looking for money rather than repair of the building defects. Knowing that most cases don't go to court, claims tend to get settled even though the value of the settlement is totally out of proportion with the value of the repairs. It brings to mind the Eagles' tune having the words, *"you haven't been the same since you had your little crash but you might feel better if I gave you some cash....".* Yes, that's it... Building performance can be satisfied with a big wad of cash. There are other phrases in the tune that are perhaps as applicable… involving what "Billy" thought we should do about lawyers (that is your homework).

Gerald R. Genge, P.Eng., C.Eng., BDS, BSSO, C.Arb., Q.Med. is a Principal of GRG Building Consultants Inc. and Arbitech ADR and has been active in standards development, education, and improvement in building science technology for over 30 years. He specializes in building science, litigation support, dispute resolution, and neutral evaluation for engineering and construction disputes and can be reached at jgenge@grgbuilding.com or 1.800.838.8183

Claimants are taking advantage of the awkwardness and expense involved in civil litigation and in the growing trend involving damages measured by replacement rather than repair. Since "damages" is measured in dollars, repair work (as rational as that seems) is unusual as a means of remedy.

Now it seems that it is sufficient to assume construction defects will cause problems.

What's worse is that the sufficiency of the investigation is suffering. Now it seems that it is sufficient to assume construction defects will cause problems (not "may", but "will"). While there may be extensive reporting of defects, the connection between performance and defects is frequently tenuous at best. It's a wholly unscientific approach. Counsel on one recent case proudly announced that they funded $100,000 or so of engineering expense to collect data on defects. Yet all the defence experts were astounded at the absence of any connection between the claimed defect and the conditions reported. Apparently, the thoroughness of the report was measured in its weight rather than its reasoning. The claimant still ended up with a substantial settlement; but science had nothing to do with it.

At the opposite extreme, the claimant on another case had obtained engineering advice that new windows on their building were the cause of (a very few) leaks. Notwithstanding that claim was based on very limited testing, the owner proceeded to replace all windows. Others had demonstrated that the leaks were caused by factors not involving the windows; however, the owner had

already embarked on a path that would generate several million dollars in costs without a cogent connection between accruing damages and actual defects. Since there's no proof of anything either way, it'll likely settle for more than the true cost to actually repair the leaks. How either approach promotes efficient use of materials, landfill, or technical resources is mind-boggling.

Litigation consulting for building claims could help non-technical ADR neutrals come to grips with the technical issues.

Everyone would agree that owners are entitled to a building that performs in a manner consistent with the contracted performance. But, no contract I have ever read expects perpetual perfection. So, as ADR professionals, what can we do about this? One step is to engage a neutral technical expert who can assess the quality of the claim from a technical perspective. Litigation consulting for building claims could help non-technical ADR neutrals come to grips with the technical issues. There's little more deflating for an expert witness than to spend several days presenting technical arguments assuming the neutral has a grasp of the technology and then have the neutral ask a very fundamental question showing they have no idea what has been said.

…. engage a neutral technical expert who can assess the quality of the claim from a technical perspective.

For example, I recently acted as a neutral technical evaluator on a case involving a $4M plus repair on a 15-year old building. After the reality check on betterment, litigation risk, and inappropriately claiming for deferred maintenance, the claim was settled in one day for under $200K - long before the legal and engineering fees began to mount. Unfortunately, all too often, once a path is struck, counsel and consultants alike are too invested in their opinion and they are unwilling to reconsider. After all, that could be embarrassing, career limiting, and certainly not revenue generating.

There have been a few cases that are "heard" by ADR professionals prior to formally going to court. The result is not-binding and there may not even be a decision rendered; but, it does give a fair idea of what might happen if the case does advance. It's not a bad idea. Given the expectation that all the evidence is in front of all parties anyway, it is simply a process to allow all parties to actually hear what the other side(s) have to say in a structured way and to accrue a real sense of the merits of the technical arguments.

…"Hot Tubbing" becomes a preliminary discovery of soft spots in the other's case.

There also is a growing effort to have opposing experts sit together and develop an agreed statement of findings. I don't have as much confidence in this as the legal profession seems to have. More often this "Hot Tubbing" becomes a probing of soft spots in the other's case. The idea is a good one though. Technical professionals should be able to sit about a table and work out the reasonable approach that would be applied by the reasonable person. Note to the lawyers… Perhaps if the case managing judge was in the same room, the expert's egos would be less evident and intransigence would be less prevalent. It's just a suggestion.

As an engineer, I guess I can't fully appreciate the reasoning behind trying to make a claim that is based solely on financial compensation. It would seem that if the foundation of a claim is that something in a building doesn't work as it is supposed to work, it should be fixed or the fix paid for by the party that got it wrong. But to advance a legal claim on presumed costs for issues that are unsubstantiated or only remotely linked to a real performance problem is disingenuous. A non-technical person may not see the situation this way because winning debates, making arguments, and reading decisions that have only scratched the technical essence of the claim are normal to them. But if real ADR is going to work, maybe there needs to be a different way to think things through. Maybe, a technical review of all sides of the claim needs to be added to the system. It might chip away at the barriers enough to get a realistic solution – should anyone be interested.

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by Monya Kian, Pasadena, CA

Work it Out at Work: The Art and Science of Managing Workplace Conflict

In a recent study conducted by the consulting firm CPP, "employees spent 2.8 hours per week dealing with conflict, equating to approximately $359 billion in paid hours in 2008 in the United States.

Monya Kian, M.A. is Program Director at the Western Justice Center, a non-profit organization dedicated to conflict resolution, with a specialty in workplace conflict management training.

With today's dwindling resources, conflict is not something to be ignored or quashed. To the contrary, workplace conflict can become an investment opportunity for companies and organizations if the underlying roots behind such conflicts are managed and resolved. This will reduce turnover costs, sick pay due to employee absence, wasted time in the office, loss of morale, and of course, money.

Conflict Resolution Training for all Levels of Staffing

With hectic schedules, competing interests, differing goals, unique personalities, and fluctuating budgets, conflict can happen over almost anything at the office. It does not need to manifest itself in the form of nasty gossip or office bullying. Instead, it could present itself in the subtle and unsaid challenges; the reoccurring and unproductive conversations or other ways that interpersonal cooperation is undermined. Given the wide-reaching impacts of conflict, it is important for all employees of an organization to be trained in workplace conflict resolution skills and processes. Conflict management and resolution training is critical because these skills – while simple in theory – are not innate and difficult to practice.

The contents of workplace conflict management training can be as short or as elaborative as the time and resources of the company or organization permit, but such training should encompass a few key components. This includes an orientation to the dynamics of conflict and the general types of conflict that commonly occur in the workplace – including interpersonal, organizational, change management, and external factors – and also basic negotiation and communication skills. By understanding common workplace issues faced across industries and professional levels, employees also become aware that they are not alone.

According to Abby Leibman, Executive Director of MAZON, a Jewish non-profit with a mission of alleviating world hunger, listening skills are critical skills to cover in basic training for employees. "Most people want to know that you have heard and understood what's of concern to them – you may not resolve things to their satisfaction but if they feel as if they had their say and it was given some weight they ought to feel better about the result." Training focused on active listening skills can help employees better communicate and resolve underlying issues causing conflicts. For these skills to take root for participants, a significant portion of the training must include experiential components, such as role-plays, interactive exercises, and worksheets. In this way, employees learn together to practice these skills in real-life situations. By providing a safe and comfortable environment to practice these skills, employees can also gain trust and confidence in them and in processes such as mediation and arbitration. Managers, human resource professionals, and supervisors will need to model these skills, and encourage the use of these skills in day-to-day work.

Promoting Change Management

"Research has demonstrated time and time again that addressing workplace conflict in a positive manner has a strong impact on the bottom line," states organizational development consultant Marjorie Sims, "and really affects the performance of employees." The first step in creating a shared

organizational culture is to examine the origins and current state of the organizational culture. This introspective work includes engaging in discussions with various levels of staffing about the ongoing conflicts within the organization's culture as well as suggestions for improvement. Without this introspective work and analysis, those same conflicts will take root and become entrenched within the organizational culture itself – and create ongoing burdens and costs for the company. Creating a shared organizational culture requires HR professionals to spearhead collaboration within an organization, and the skills and techniques learned in the conflict resolution training can help employees work to create a new model. "Positive employee relations definitely create a healthy bottom line," says Sims, "and the best way to navigate workplace conflict is by cultivating a shared culture."

So how can executives create such a system? Investigating the values and goals of employees, clients, and managers alike is important to beginning the process. A new culture must address how employees will be rewarded for delivering results, and how workplace issues can be resolved efficiently. Asking and collectively answering these questions can begin the process of creating and institutionalizing a shared workplace culture. A culture that fosters and encourages employees to negotiate problematic issues before they escalate to bigger problems, and providing a private space dedicated to such conversations along with the negotiation skills covered in the first prong can be one element in the overall conflict resolution system.

Creating Conflict Resolution Systems

Driving this systems change will involve great leadership and innovation by managers, supervisors, "and it is important for the leadership at the top to promote trainings in workplace conflict resolution, and to implement these tools at work," says Sims. This process especially needs the support of HR professionals given their unique positioning in the work environment, and HR "should work with trained conflict resolution experts who can create models appropriate for their unique workplace," advises Sims. Regardless of the systems created – whether the feedback loops include mediation, peer review, dialogue, or arbitration – having these systems in place will help to address those reoccurring issues that waste time, induce health costs due to conflict-induced stress, waste opportunities for synergy, and leave employees feeling exhausted and appear to be more difficult than they really are. In short, these systems changes save employers' valuable time and money in the long run.

Valerie Hazlett Parker, C.Med., McGibbon Bastedo Armstrong & Armstrong, Oshawa, ON

An Introduction to Collaborative Family Law

Valerie Hazlett Parker, C.Med. holds a B.A. in Psychology and Sociology, and an LL.B. from the University of Western Ontario. She practises law in Oshawa, focusing on Family, Estates, Employment and Human Rights law. Valerie is also a Collaborative lawyer, an Accredited Family Mediator, a Deputy Judge, Superior Court of Justice, Small Claims Court, and Chair of the Canada Pension Plan/Old Age Security Review Tribunal. Valerie also represented children as a Panel Lawyer for the Office of the Childrens' Lawyer for twelve years. Valerie has presented papers and workshops to a number of audiences on a variety of topics, including employment law, family law, mediation, and collaborative family law.

Those who do not practice family law often see it as an area of law fraught with conflict, high and difficult emotion and no good outcome for the parties. Some family law practitioners would agree. While the end of a marriage or common law relationship is very emotional and heart-wrenching, it is not necessarily a tragedy for all concerned.

Social science research shows that the fact that a marriage/common law relationship ends is not tragic in and of itself. It is tragic for all parties, including spouses, children, extended family members and friends if the parties who separate can not find a way to resolve the issues that arise from the end of the relationship in a mature fashion, that also fosters co-operation between the parties in the future.

Many family law practitioners also find the traditional approach to family law, being litigation, unsatisfactory. The litigious system can alienate parents from each other, and even pit grandparents against children/children-in-law. In the worst cases, teenage (or younger) children become pitted against a parent in litigation.

Fortunately, many family law practitioners have adopted more reasonable approaches to resolve these legal disputes. Mediation is a field that has grown and flourished in the family law arena. This process invites a neutral practitioner to assist parties to discuss, negotiate

and resolve their differences themselves, rather than have a solution imposed by an unknown third party who knows very little about the parties, their family, and the children (a Judge or Arbitrator). In mediation, the parties are also able to discuss and resolve many of the non-legal issues that also arise upon the end of their relationship.

For example, I mediated for one family who both wanted the Wife to be able to remain in the family home, although she had lost her job and wouldn't be able to qualify to take on the mortgage. If this matter had proceeded to traditional litigation, the home would have been ordered to be sold, the remaining debt (there was effectively no equity in the home) would have been paid, and neither party would have been able to afford a new home for themselves and the children. Instead, the parties agreed that, until the mortgage term ended (approx. one year away), they would not make any change to title to the property, the Wife would pay the mortgage payments, and the Husband would delay his plans to purchase and finance another residence until she was able to take on the mortgage to this property.

Normally, to keep costs to a minimum for the parties, and to allow for more free-flowing negotiations in mediation, counsel do not attend mediation sessions in family law matters. This results in some difficulties because, of course, the Mediator can not provide legal advice to either party. This results in delays and frustrations, as the mediation process can be interrupted/delayed to allow one or both parties to obtain legal advice on tentative agreements that have been reached in this process.

From this (and for many other good reasons), more and more family practitioners are practicing collaborative family law. This is a method of practice that has been embraced by the Bar in California, British Columbia, Ontario and other provinces. The basic tenets are as follows:

- immediately after both parties retain collaborative counsel, the first collaborative meeting is held (this limits frustration at delay)
- The parties and counsel sign an agreement that states they will not proceed to court, nor threaten to do so to obtain a result that is favourable to them (the Participation Agreement)
- No one will take advantage of an error made by the other
- The parties, with counsel, commit to attend meetings
- Settlement meetings are focused on attacking problems, not people
- Parties (and counsel if necessary) are encouraged to speak constructively and respectfully to and about the others in the process
- All experts brought into the process are retained jointly and agreed to in advance (i.e. real estate appraiser, financial advisor, parenting coach)
- The parties, with the assistance of counsel, negotiate a resolution to the issues that is acceptable to all parties.

The parties and counsel sign an agreement that states they will not proceed to court, nor threaten to do so to obtain a result that is favourable to them...

The added benefits of this process to the clients are numerous. They include:

- The parties are involved in the entire process.
- The decisions made about their family are made by the parties. It is not imposed on them by anyone else, i.e. some third party who has never met them, nor knows what it has been like to live in their home.
- The parties identify what issues must be resolved. All issues are discussed and agreed on by the end of the process. Many times, non-legal issues drive disagreement between the parties. They can be identified and addressed in this process, allowing the parties to 'move on' and deal with legal issues.
- Appropriate third parties can be brought into the discussion. For example, if the children are at an age and maturity that the parents agree they should have a 'voice' in the proceedings, a method of doing so can be arranged. This is much more complicated in the litigation process
- Any fear/anxiety that something may be 'hidden' from the negotiations is allayed, as the parties agree to full disclosure. The Participation Agreement also contains a provision that a party's lawyer must withdraw from the process if their client refuses to disclose something.
- Lawyers have the opportunity to discuss with their client and instruct them regarding positive communication, and demonstrate how effective this can be as they continue to parent their children, and deal with difficulties in the future.

There are also many many benefits to counsel when assisting clients

continued on page 20

Joyce Young

Family Circle Mediation

This is the story of a child protection case which I mediated using the Circle Process. The youth's lawyer, who referred the case to me, said that Peter had agreed to become a crown ward and his mother agreed but was concerned about whether she would see him. The lawyer also told me that they had some "communication issues". I agreed to take the case.

I met with Peter at the hospital where he is in a full time treatment program for substance abuse. He has been living in a foster home for two years. He goes home on weekends. Peter has been diagnosed with Attention Deficit Disorder and Oppositional Defiance Disorder.

When Peter was 11 years old, his father died from cancer. He had always been closest to his father. By the time he got to high school, he was using marijuana daily. In grade 10 he began using pharmaceuticals. By grade 11 he was also dealing drugs to fund his habit.

Peter said that his mom is controlling and treats him like a child. At 17, he feels that he should be able to make his own decisions. He's close to his younger brother and sister, but he feels like his mom gives them preferential treatment.

He described how hard it was to beat his addiction and stay clean. He doesn't feel that his mom gives him credit for the hard work he has done on himself.

Peter likes his mom's boyfriend Jason. They are getting married in a few months. He said "Jason gets me". He requested that Jason attend the mediation.

I was very impressed with this young man. He demonstrated awareness of his strengths and short-comings, and insight into his relationship with his mom.

Joyce Young, MSc., C.Med., is a trained Circle Mediator and Lead Trainer for Peacebuilders International. Joyce practices family and child protection mediation.

Peter's mother Cindy grew up in a very strict Catholic family. She left home at 19 because her parents wouldn't allow her to date. She soon married Sam and they planned a family. She struggled through three miscarriages and then Peter was born. After two more miscarriages, she gave birth to a daughter and then a son. When her husband fell ill, she struggled for three years to look after him and their three young children.

She tried to get Peter into counseling and treatment but he simply wouldn't go. She sent him to special schools and he broke the rules and got expelled. "Nobody could reach him" she said. Finally, in desperation, she called the police and Children's Aid. Peter was taken into care. Cindy took Peter to court and he was ordered into treatment.

When the family came together, I said the purpose of the meeting is to figure out how and when Peter would spend time with his family. Peter shook his head. "No, I'm moving back home". Cindy nodded. "Since we met with you, Pete and I had a long talk and I want him to come back home. I think we're ready."

I suggested we do Circle mediation and explained the process. "We sit in a circle. The mediator poses a question and passes the talking piece. We take turns speaking in order around the circle. If you don't want to say anything, the circle will respect your silence. What's said in the circle stays in the circle. Are you open to trying it?" The family agreed and we signed the Agreement to Mediate.

I began by sharing a story about respect, and invited the others to tell about a time when they felt respected or disrespected.

Peter began. "I know I messed up big time, and I'm sorry I put you through all that" he said to his mom.

"When you called the cops on me and the Children's Aid on me I was really, really mad. "But now I know you did it because you care. And you never, ever gave up on me. And Jason, when you started dating my mom, our family

was in a mess. But you didn't walk away. And you treat my mom awesome". He passed the talking piece to his mother, who was in tears.

"Pete, when you were born it was such a gift. We had tried and tried and it was all worth it because we had you. I wish I could have figured out how to get close to you when you were little. But then your brother came along and then your sister and then Sammy was dying and I just couldn't cope. But I'm really proud of you that you stuck with the program and stayed clean. I respect you for that."

Cindy passed the talking piece to Jason. "Pete, I was really happy when Cindy told me you wanted me to come to the mediation. Thank you for inviting me. You've been through so much, losing your dad at such a young age. But you didn't give up, you didn't quit. I really respect your courage. And I respect your mom for not giving up on you." Jason passed the talking piece to me.

"It sounds like there's a lot of caring in this family and a lot of good intentions. To put good intentions into practice, we need some guidelines and structures. We need a shared understanding of roles and responsibilities and boundaries. So what are the issues we need to talk about to help this family go forward in a good way?" I passed the talking piece.

Peter wants a cell phone, he wants to be allowed to go to a rave and he doesn't want to be forced to go to church every Sunday. Cindy wants Peter to do chores on the weekend, to not swear when he's at home and to spend less time playing computer games. Jason wants to have family meetings to develop a chores list and agree on ground rules for homework. We tackled the issues one by one and the family came to consensus on every issue. Then we wrote up the agreements.

The family asked if we could meet again, before Peter moves back home. I agreed.

I invited the family to do a Circle mediation because I believed they would benefit from a deeper conversation and that they had the maturity to talk on a deeper level. I thought they would benefit from hearing each others stories about the difficult times: Sammy's death and Cindy's decision to call the police and Children's Aid. I wanted Peter to learn how much Jason respects him.

The family had a long laundry list of day-to-day issues. Now that they all understand the choice that family members made at those difficult time, they will be able to negotiate the day-to day issues. Their mutual respect and a level of trust has been restored.

Joyce Young, MSc., C.Med., is a trained Circle Mediator and Lead Trainer for Peacebuilders International. Joyce practices family and child protection mediation.

by Harvey J. Kirsh

The Use of Subpoenas In Arbitrations[1]

A prominent American arbitrator was known to tell counsel that, if they wanted him to issue a subpoena to a witness, *"all they have to do is ask"*.

Harvey J. Kirsh
Arbitrator and Mediator with the Global Engineering and Construction Group of JAMS, the largest private provider of alternative dispute resolution services in the world

Aside from issues as to the relevance and scope of the subpoena, what was not contemplated in his gratuitous commitment was how to enforce non-compliance. Is a non-party witness compellable to produce documents, to attend at a pre-hearing deposition or discovery, and to attend at an arbitration hearing ? And what steps are available to enforce compliance, or to penalize non-compliance ?

In the United States, section 7 of the *Federal Arbitration Act* provides an arbitrator with subpoena authority to compel both the attendance of non-party witnesses and the production of their documents *at an arbitration hearing*. However, despite differing interpretations of the legislation (creating what one judge described as a "*virtual minefield*"), most U.S. courts have concluded that *pre-hearing discovery* of non-party witnesses is not compellable by subpoena. This is consistent with the view that extensive and protracted discovery, as permitted in litigation, eliminates the main

advantages of arbitration in terms of cost, speed and efficiency.

If any person refuses to obey a subpoena, the United States District Court has authority to compel such person to attend the arbitration hearing, and may also impose penal sanctions for contempt. However, this authority is circumscribed by the limits imposed on District Courts to enforce their process outside of their own territorial jurisdiction.

Some arbitrators in the U.S. will sign any and all subpoenas that are provided to them in blank form by counsel without objection, and then leave enforcement to the parties, while other arbitrators, feeling that they may have no powers of enforcement, and disapproving of creating the impression that they do, are concerned that issuing an unenforceable subpoena would diminish the credibility and standing of the arbitration process.

Typically, in Canada, the question of whether an arbitrator has the authority to issue a subpoena to a non-party witness is governed by any applicable statute governing the dispute, by the arbitration agreement between the parties, and by the governing rules of any sponsoring institutional ADR service provider under whose auspices the arbitration has been constituted.

In terms of institutional rules, it may be noted that Rule 21 of the JAMS Comprehensive Arbitration Rules provides that an arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the hearing. However, neither the ICC Rules of Arbitration, nor the National Arbitration Rules of the ADR Institute of Canada, nor the UNCITRAL Arbitration Rules (2010), nor the LCIA Arbitration Rules, nor the ADR Chambers Arbitration Rules contain any express provision authorizing an arbitrator to issue a subpoena, notice or summons to a non-party witness for evidence.

Each of the common law provinces and territories in Canada has both a domestic and an international arbitration statute. Each province's domestic arbitration legislation (such as Ontario's *Arbitration Act*) provides that an arbitrator may issue a "*notice*" to a non-party witness to produce documents and to attend and give evidence at an arbitration hearing. Either a party or the arbitrator may apply to the court for an order with respect to the taking of evidence, thus permitting the examination of a witness from another province.

Furthermore, section 19.4 of Ontario's *Evidence Act* provides that a "*court*" (which is defined to include an "*arbitrator*") may issue a subpoena compelling the testimony of, and the production of documents by, a non-party witness "*wherever he or she may be in Canada*".

In the context of an "international" commercial arbitration, it is to be noted that legislation (such as Ontario's *International Commercial Arbitration Act*), which incorporates and is based upon the UNCITRAL (United Nations Commission on International Trade Law) Model Law, provides that the court's assistance may be sought in the taking of evidence. *Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands Inc.*, a 2005 decision of the Alberta Court of Queen's Bench, specifically considered the issue of "*whether an arbitration panel, free to develop its own procedure, has the jurisdiction or authority to order non-parties to the arbitration to submit to pre-hearing examination for discovery or, for that matter, production of documents*", and determined that it did not. However, one year later, the Alberta Court of Appeal overturned this decision and confirmed that Article 27 of the UNCITRAL Model Law gave an arbitrator the authority to obtain third-party evidence, in accordance with the practice of the court. The court further clarified that Article 27 was intended to include the taking of evidence through discovery, and was not limited to evidence at a hearing.

Finally, in general terms, unless the governing arbitration statute provides otherwise, either by an express prohibition or a mandatory provision, the parties are free to determine their own procedures through an arbitration agreement. The scope of the arbitrator's authority, particularly with respect to requiring the attendance of non-party witnesses, is dictated by how broadly or narrowly the arbitration provisions in the agreement are drafted.

1 This article is to appear in the December 9, 2011 issue of The Lawyers Weekly published by Lexis Nexis Canada Inc.

Attention Newsletter Contributors – Deadline for Spring Issue - March 31st 2012:

Just a reminder, submissions:

- Should be no longer than 1,000 words in length
- MUST be submitted in WORD (not PDF)
- MUST be accompanied by the author's short bio with contact information

janet@adrontario.ca

Book Reviews by Colm Brannigan

Is Everyone at the Table?

by Ernest G. Tannis
Ottawa: ADR Centre (Canada) Inc, 2010.
ISBN: 978-0-9813864-1-6
153pp

Ernie Tannis is very well known in the ADR community in Canada. His first book, *Alternative Dispute Resolution That Works!*, published in 1989 was probably the first book on ADR in Canada and certainly the first by a practitioner. We have had to wait 20 years for his second book and in my opinion it was worth the wait.

I started reading this book, which is sub-titled *18 Life Lessons in Problem Solving*, while waiting for an appointment and was so taken with it that I took it home and finished it that evening. It has a magical quality to it as Ernie pulls together the threads that made up his journey through the world of ADR in search of A Dignified Resolution to various kinds of disputes.

Mediation and its practice is in a constant state of change and generates a significant amount of article and monograph literature. This book is not about theory which seems to be the subject of most ADR literature published today. It is about stories and Ernie is a master storyteller. Although based on Ernie's own personal experiences, it reminds me of Deborah Kolb's *When Talk Works: Profiles of Mediators* from 1997 which is one of my favourite books about mediation. The message from that book was that mediators often say one thing when discussing theory and do another in practice. I do not have that feeling about Ernie's work.

Drawing on his vast and pioneering experience in the field, Ernie sets out a series of questions and then illustrates the answers by examples from his life and practice. The book is set out in short chapters each of which answers a specific question. They are, in fact a checklist to consider when considering how to resolve disputes:

1. Is everyone at the table?
2. Is your house in order?
3. How do you bring relief to the situation?
4. Who benefits from conflict?
5. Is biting back the best response?
6. How do you achieve harmony?
7. Are you looking in the right place for the solution?
8. What do you value?
9. Who or what do you trust?
10. Did you think it through before forming an opinion?
11. Do you follow your own principles?
12. How many sides are there to a story?
13. What do you know about anger?
14. Can you apologize and mean it?
15. What is your language really saying?
16. How do you persevere through life's hardships?
17. Are you sure every issue is on your list?
18. How is your story connected to other stories?

It would be easy to underestimate the importance of this book by looking at it as just a series of personal anecdotes. It is far more than that. Ernie is truly a "reflective practitioner"[1] and a master of expressing complex ideas and experiences in easy to understand terms. There is a great deal of wisdom in each story. There are also lessons we can all learn from and increase our effectiveness as professionals in a fast changing field.

Whether you are an experienced mediator or just starting out, it is always worth reading about the journey of another through our chosen field. Some argue that the "unscientific" examination of the results of mediation makes it difficult to develop good theory from day-to-day experience. That may be so, but good storytelling always conveys useful lessons.

Ernie's life time of dedication to helping resolve conflict is an uplifting tale and confirms that study and practice of conflict and conflict resolution is extremely rewarding. If you want something that departs from the necessarily dry norm of professional literature, you should read this book.

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1 For more information see Donald Schön, *The Reflective Practitioner: How professionals think in action.* New York: Basic Books, 1983.

Marketing

One of the goals of our newsletter is to help our members make a living by publishing articles on marketing as well as practice. This edition of our marketing column is a book review of *8 Simple Keys to Building and Growing a Successful Mediation or Arbitration Practice* by Dianna Mercer and James Michael Davis which was published earlier this year.[1]

One of the perennial questions for mediation and arbitration practitioners is how to market an ADR practice. There is no one size fits all and it is different

than traditional professional practices which are well established in the public eye. Even when you get your practice going how do you even out what is for many, a feast or famine cycle? There are now several books on marketing ADR although most are focused on mediation and none are by a Canadian author. A gap that we will hopefully see closed soon? This relatively short book is a positive contribution to that stock of growing literature. It is also unique as it applies equally to the marketing of a mediation or arbitration practice.

Diana Mercer is a highly experienced lawyer-mediator in the United States. She has partnered for this work with James Michael Davis a marketing and legal consulting expert. The end product is a tightly focussed well written practical work which can be used as a guide for the perplexed mediator or arbitrator through the marketing maze.

Mention marketing to most ADR professionals and their eyes glaze over. We too often equate marketing with advertising and we do not want to do that. There is of course much more to it. ADR professionals can use the same skills they bring to the table, especially in mediation, to persuade clients to hire them.

The book is focused on sole practitioners and small practice marketing. It is divided into two parts: Part I: Act Now, Think Later and Part II: Think Now, Act Later. Part I is for those who want to "do something now, and worry about planning later while Part II is for those who want to begin with a "well thought-out plan", for both the long term and short term. There is also an "ADR Marketing Workbook" at the end of the book to help "putting your plans on paper". It makes sense to take this approach. Often we have great ideas about how to build up our practice but procrastinate and never take action. By nudging us towards immediate action, which will pay off quickly, the authors also make it more likely that we will follow their advice about long term planning. Both are essential components of a successful marketing plan.

The parts are divided into chapters. Part I has five chapters:

Chapter 1 Sixty Things You Can Do This Week.
Chapter 2 Getting Started – Classical Marketing.
Chapter 3 The Future is Here – Web Marketing.
Chapter 4 Turning Potential Clients into Actual Clients.
Chapter 5 Some Easy Way to Get (and Stay) Ahead of Your Competition.

This mix of topics runs from traditional marketing to the wild world of the web. Chapter 1 is a call to action and it meets our insatiable need for "to do" lists!

Part II has only three chapters:

Chapter 6 Creating a Marketing Plan for Your ADR Business.
Chapter 7 Long-Term Marketing Strategies.
Chapter 8 Opening a New Practice or Reviving a Tired One.

This part sets out how to plan to do all those things we have been putting off about marketing. It also will encourage you to actually put the plan into effect.

And what are the "8 Simple Keys" mentioned in the title?

1. Do something every week.
2. Try the basics first.
3. Decide what you enjoy doing.
4. Figure out what's working and do more of that.
5. Stop what doesn't work and replace it with new things.
6. Check what your competition is doing.
7. Repeat keys 4-6.
8. Repeat key 1. Marketing is a journey, not a destination.

In the complex and ever changing world of Twitter, LinkedIn and Facebook where we are barraged by never ceasing invitations of marketing gurus to try one marketing trick (sorry, approach) after another, it is good to know that there is still some good common sense marketing advice around. And a good chunk of common sense is in this book.

This book is a call to action. I will end by saying, as the authors do, the "action without planning is unfocused and unproductive and planning without action is worse". This book can help us avoid those traps. At this time of the year as we look forward to the holidays and what the New Year will bring, you might want to think about reading this.

Colm Brannigan is a Chartered Mediator and Arbitrator and can be contacted through his website, www.mediate.ca or by e-mail at colm@mediate.ca

1 8 Simple Keys to Building and Growing a Successful Mediation or Arbitration Practice *by Dianna Mercer and James Michael Davis, Playa del Ray, California: Peace Talks Mediation Services, 2011. ISBN: 978-0-9841093-2-6. 142pp.*

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Jeanette Bicknell, Ph.D.

"The Interrupters": Lessons for Mediators

I had a chance last week to see *The Interrupters* – a new documentary about mediators in Chicago who work to reduce gang violence.

The film focuses on three "violence interrupters" who intervene in conflicts before they become violent. All three work with the organization "CeaseFire," founded by Gary Slutkin. Slutkin, an epidemiologist at the University of Illinois in Chicago, believes that gang violence is a public health problem and that the spread of violence mimics the spread of disease. The solution is similar in both cases: Find those who are most infected and stop the infection at its source.

Critics have said that the film is "riveting" and I would have to agree. It is fascinating to see, up-close and first-hand, the work done by these brave men and women. The film also has some lessons for mediators of non-violent conflicts.

Words matter: Ameena Matthews, one of the mediators portrayed, tells us early in the film: "They say 'sticks and stones will break my bones but words will never hurt me'? Words will get you *killed*." Even when violence is an unlikely possibility, choice of words – and the respect or disrespect that those words convey – can have a crucial effect on negotiations. Mediators may need to coach clients about their choice of words and get them to reflect on the possible consequences of those choices.

Credibility is key: The mediators portrayed in the film can be successful only if they are respected by the people they work among. Their personal histories, experience with violence, and the force of personality they display all contribute to their credibility. While "credibility" will mean something different for mediators working with a different clientele (say, Bay Street lawyers rather than youth-at-risk) its importance should not be underestimated.

Gain trust by demonstrating that you understand the client's perspective: In a powerful scene, Ameena and some other mediators intervene in a confrontation taking place right outside their offices. We see her conversation with one of the young men she has just hustled away. At first, it seems (incongruously) that she is praising him for almost getting involved in a violent conflict: "You came to protect your family, right? You came down because your sisters called you?" We see the point of her strategy later. The young man is prepared to listen to Ameena when she appeals to his protective impulses: "How are you going to protect your family if you're in jail? How will they cope with that?"

Use the clients' own values in getting them to think about their actions: The violence interrupters are not neutral with respect to the outcome of their negotiations. Their goal, in every case, is to reduce violence and save lives. One of their techniques (familiar to mediators everywhere) is to get their clients to think about whether their actions are in harmony with the values they express. We see mediator Cobe Williams working with two brothers who are members of rival gangs. The brothers claim to love one another, but bicker with one another and with their mother until Cobe wonders (and we wonder) if he can make a breakthrough.

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The turning point comes when he asks each brother in turn, "If they (the gang) was coming after your brother, would you protect him?" When each brother sees the other answer in the affirmative, they seem to realize that their bickering and trash-talking and posturing are out of place.

Listening works: Many of the people we see involved with CeaseFire are very charismatic. Tio Hardiman, head of the violence interrupters program, and Ameena Matthews in particular, come across as very strong personalities and powerful, effective orators. The film contains several splashy scenes of their work and the positive influence they have on others is evident. Yet the film also contains quieter, yet equally powerful moments, when all the mediator seems to do is maintain his composure and listen, and then demonstrate that he has heard the speaker. Several times, we see violent impulses drained away as the speaker realizes that his grievance has been heard and understood.

The Interrupters isn't light or escapist entertainment. But I think that anyone interested in conflict resolution will find it fascinating.

Joel Cohen, FCA, C.Med

Conflict in Family Business

Shareholders who want their companies to survive and thrive past the time of the founders must address the issues of management and succession.

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'The more family members and generations in the business, the more challenging these problems can be. By the time a mediator is called in to mediate conflict in a family company, tension and emotions are running high. A clear understanding of the reasons for these disagreements may help to assist the parties.

Family businesses can become a hotbed of conflict when business and family matters become co-mingled. Picture this scenario: two brothers start a business. One has good technical skills and product knowledge. The other has good sales skills and builds a satisfied customer base. The brothers have complementary skills and are dependent on each other. When disagreements occur, they're discussed and resolved. The main goal to grow and expand the company succeeds.

However, with the introduction of the next generation, problems arise. The founders mistakenly believe that fair treatment of their children requires equal compensation for all. Some of the children work hard and deserve advancement; others show little interest or aptitude in the work and abuse their position by coming in late and incurring personal expenses that they charge to the business. Other employees resent the privileged position of the founders' children leading to friction and demoralization among employees, siblings and cousins. The business falters because it lacks cohesive direction, strong decision making and committed motivated employees.

> Family businesses can become a hotbed of conflict when business and family matters become co-mingled.

During my long career as a Chartered Accountant consulting to businesses, I've seen many such problem areas. Here are some suggestions to help minimize conflict and give family businesses the best chance to succeed.

A) Bringing family members into the business

- Key factors to consider when bringing family members into a business are: interests, aptitudes, skills and experience. A parent might be concerned that if one child is invited to work at the business that the other might be jealous, yet rivalry between siblings in a business can be disruptive especially if one feels she's contributing more than her sibling.
- When starting a family member in the business, it's important to base placement and advancement on merit not on family connections. The family employee should work at a job that is commensurate with his education, experience and motivation. He should be expected to keep the same hours and have the same responsibilities as non-family members. Nothing undermines respect for management more than family members who take advantage.
- It is helpful if a family member works outside the family business

first. He'll return with confidence and fresh ideas. Other benefits: He'll understand the discipline of the work environment and have compensation established by competitive market forces.

B) Different Management Styles and Goals

- The successful founder of a family business may be perceived as old fashioned by his daughter who is eager to introduce new ideas and embrace new technology. "This is the way it's always been and that's how we're going to do it." Decision making that is seen as autocratic instead of fair, rational and cooperative can lead to conflict. The daughter is likely to feel unappreciated and undervalued.
- Family members may have different appetites for investment and risk. Some see the need to grow and innovate while others are content to stay the course. A founder who is approaching retirement age is more likely to be concerned with security than his son who's looking for growth. It's useful for Management to prepare a written business plan and determine the resources required to execute it. However, even with a business plan, that doesn't mean the parties will agree. A mediator can be helpful in getting the parties to focus on objectives to enable family members to reconcile investment with expected outcomes.

C) Transition Planning

- Businesses go through the cycles of birth, maturation, decline and death. Competitive factors change and advances in technology either commoditize some products or render them obsolete. Families should be realistic about evaluating their business to assess its prospects for continued success. If some family members are determined to keep the business and others want to sell, a mediator may be called to help resolve the conflict. Consideration of the underlying emotional components that impact rational evaluation is important.
- If a family business has the capacity to be competitive beyond the first generation, the transition must be carefully planned. Training people in specific roles and responsibilities and hiring outside managers to complement existing skills leads to continued success. However, if a founder is suddenly incapacitated and can't operate the business before a successful transition has been assured, other options should be explored. It would be better to sell a business than watch it decline because of inexperienced or ineffective management.
- A founder may ease her way towards retirement and implement an estate freeze issuing new common shares to the next generation. Common shareholders, who are running the company and want to be able to make the decisions, will expect voting control. Conflict may ensue with preferred shareholders who continue to have voting control.
- Sometimes founders may not be prepared to relinquish their role even when it is appropriate and timely to do so. A founder should ensure financial security by making arms-length arrangements for compensation and share redemptions, etc. However, once this has been achieved and control turned over to the next generation, the founder should be a trusted advisor when required and not a "second guesser".

Mediation can be effective in helping resolve conflict in family businesses and smooth transition from one generation to the next. Understanding the reasons why family members take particular positions can help the mediator get the parties to focus on what they really want and what the alternatives might be. A skilled mediator who understands the concerns and teases out the reasons behind them can help the parties focus more dispassionately on the issues, options and desired outcomes.

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continued from page 12

through this process. Counsel for both parties work together to assist both parties to resolve their issues. While each lawyer has an obligation to their client, it is also in their client's best interest to have the matter resolved in a constructive manner.

Many of the stresses of practicing, including worry over whether documents are correct, arithmetic is correct, is alleviated, as counsel will not take advantage of any such errors. Time constraints for the filing of pleadings, financial statements, tax returns, etc. is also alleviated as timetables for disclosure are agreed to at meetings, and any such timetable takes into account the many variables that can affect this.

Finally, practicing family law through this process is much more satisfactory on a personal level. It allows counsel to assist parties not just with legal, but with financial, parenting, and other important issues that could not be addressed in litigation. Clients are fully a part of the entire process, and are responsible for crafting the resolution. This process allows the parties to retain their dignity and continue to raise their children together, from different homes.

by Mary Beth Currie

Bill 168 Update

The *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009, ("*Bill 168*")* took effect on June 15, 2010. In the fifteen months since enactment, there have been a few decisions awarded, but it is clearly "early stages" in the development of a body of caselaw interpreting and applying the legislation.

by Mary Beth Currie
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Of the few cases in which decisions have been issued to date, the majority are arbitral decisions...

There are three arenas in which jurisprudence may be developed:

1. before the Ontario Labour Relations Board ("OLRB") in the event of section 50 reprisal complaints, or if an aggrieved party should appeal an order issued by the Ministry of Labour ("MOL") officer;
2. before an arbitrator appointed under a collective agreement when discipline, including termination for cause, is imposed on a unionized employee; and
3. before the Ontario courts in the event of a prosecution for a breach of the amendments made to the OHSA under Bill 168.

Of the few cases in which decisions have been issued to date, the majority are arbitral decisions in which arbitrators adjudicate the appropriateness of the penalty imposed in the event of a workplace violence incident. However, there is an important decision issued September 23, 2011 by the OLRB which provides clear guidance to those subject to the OHSA about the extent of the obligations imposed by Bill 168 dealing with workplace harassment.

1. OLRB Decision

A section 50 reprisal complaint[1] was filed in which the worker alleged he was fired *because* he asserted that he had been harassed, thereby transforming the termination into a reprisal action. The OLRB rejected the claim, but the worker filed a reconsideration application. In the re-consideration application, the Vice-Chair (Brian McLean) first addressed whether the OLRB has the jurisdiction to consider whether termination for making a harassment complaint alone is a violation of the OHSA. He concluded the OLRB does not have the jurisdiction to make any inquiry into a termination following the allegation of discrimination UNLESS a) the worker complains that he is subject to adverse conduct because he exercised a right under the OHSA; b) a worker has given evidence or c) the worker has sought the enforcement of the OHSA. If one of those three conditions is not met, the OLRB has no jurisdiction to enter into an inquiry to determine if there has been a breach of the OHSA.

In the reconsideration decision, the Vice-Chair compared the language in the OHSA that addresses workplace violence with the language which addresses workplace harassment. The Vice-Chair concluded that the language of the OHSA amendments require an employer to put a workplace harassment policy and program in place, and to provide a worker with information and instruction as appropriate, but nothing more. In particular, (unlike

when addressing workplace violence) the OHSA does NOT provide that the duties under sections 25, 27, and 28 apply with respect to workplace harassment. The Legislature could easily have required that an employer has an obligation to provide a harassment free workplace (as it did with violence) but it did not. The Vice-Chair expressly noted that "in the case of an employee who complains that he has been harassed, there is no provision in the OHSA that says an employer has an obligation to keep the workplace harassment free" (para.15). In the decision under reconsideration, the Vice-Chair noted that it is difficult to see how raising a verbal complaint about "harassment" constitutes exercising a right under the OHSA or seeking enforcement of the OHSA.

The power of the OLRB (and MOL, when enforcing the legislation) rests in the language of the statute. This decision makes it clear that with respect to workplace harassment provisions, the OLRB's authority is very limited.

b) Arbitral Decisions

A limited body of decisions has started to trickle in and so far, it seems that all have dealt with discipline of a grievor who has threatened violence or engaged in actual violent behavior at the workplace. The most recent, and the one which reviews the earlier decisions decided after the enactment of Bill 168 is decided by Arbitrator E. Newman.[2] After 7 days of hearings, it is a lengthy decision (almost 300 paragraphs). It is "a must read" because the arbitrator identifies how the decision making analysis has changed, post- Bill 168 and provides a framework in which other decision makers can now analyze workplace violence claims.

She concludes that there are 4 significant ways in which the Bill 168 amendments will have an impact on how arbitrators reach a decision when faced with a grievance challenging the imposition of a penalty imposed due to violent acts.

First, the Bill 168 amendments have clarified the way in which the workplace parties, adjudicators, arbitrators and judges, must think about incidents involving the inappropriate use of language in the workplace. Arbitrator Newman suggests that language that threatens the end of a person's life or that suggests impending danger, falls into a new category of its own. It is not just language, it is violence. Thus, decision makers need to understand they cannot rely on pre-Bill 168 rulings as guidance for post-Bill 168 penalties.

Second, Arbitrator Newman suggests that the Bill 168 amendments have changed the manner in which the employer and a worker must react to an allegation of a threat. An employer may not hide its head in the sand, or take a passive stand, hoping that things will sort themselves out. It must not trivialize the allegation. Workers similarly cannot ignore a threat made. For all workplace parties, the utterance of a threat is workplace violence, and must be reported, investigated, and addressed. However, the arbitrator does recognize that the OHSA does not require that anyone found to have engaged in violent behavior must automatically be terminated. Arbitrators must still assess the appropriateness of the penalty, which must be reasonable and proportionate. Bill 168 did not provide an automatic right of an employer to terminate for cause if the behavior amounts to workplace violence.

Third, the Bill 168 amendments should cause arbitrators to consider such misconduct at the grave end of the scale and raise the bar on the factor of seriousness of the offence when assessing penalty.

Fourth, Arbitrator Newman identifies that the Bill 168 amendments will cause an additional factor to be added to the list of those usually considered when assessing the reasonability and proportionality of the discipline. That factor is workplace safety. She suggests now that arbitrators must now ask a further question when assessing the reasonableness of the penalty which is this: "To what extent is it likely that this employee, if returned to the workplace, can be relied upon to conduct himself or herself in a way that is safe for others"? Put another way, "to what extent is it predictable that the misconduct demonstrated here will be repeated?" Asking and answering this question is necessary because the employment relationship will be incapable of reparation, if the offending employee is likely to render the employer incapable of fulfilling its obligation to provide a safe workplace under the OHSA.

So, if you are mediating or arbitrating, this decision provides a thoughtful analysis of how decision makers need to tweak their analysis of the reasonableness of any penalty imposed after it is alleged the grievor engaged in

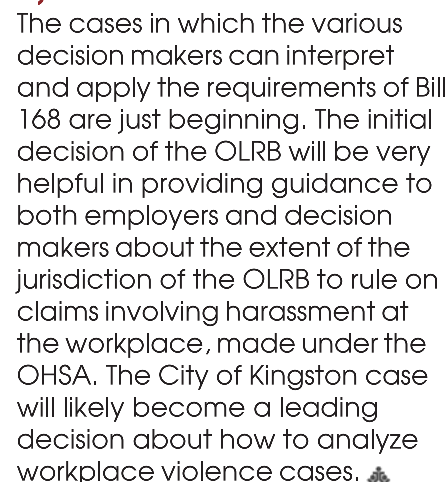
... the Bill 168 amendments have clarified the way in which the workplace parties, adjudicators, arbitrators and judges, must think about incidents involving the inappropriate use of language in the workplace.

violent conduct.

c) Court Decisions

There have not been many prosecutions of employers who have failed to ensure a safe workplace, free from violence is provided. However, the two prosecutions cited below suggest that the authorities can and will prosecute.

On October 31 2006 a female security guard in her second week of employment with Garda Canada Security Corporation was assigned to guard the construction site of a strip mall at night. She was working alone. The construction site was not fenced off to prevent unauthorised entry and the employer had not done a (required) risk assessment of potential hazards. During her shift, the security guard was attacked and sexually assaulted by an intruder who had entered the construction site.



Following an investigation by police and occupational health and safety inspectors from the Alberta Ministry of Employment and Immigration, Garda was charged with failing to ensure, as far as was reasonably practicable, the health and safety of the security guard as required by the general duty provision of Alberta's occupational health and safety legislation. In February 2011 Garda pled guilty, and on July 5, 2011 it was sentenced to a penalty of $92,750, which included a fine of $5,000, $750 victim impact surcharge and an $87,000 contribution to the Alberta Construction Safety Association. [3]

In August 2009, before the passage of Bill 168, in a prosecution against the Centre for Addiction and Mental Health in Toronto, the employer was fined $70,000 for failing to protect workers after two workers were assaulted by mentally ill patients being treated in the facility. The employer had failed to provide appropriate written measures, procedures, communication devices and training for protection of workers.

d) Conclusion

The cases in which the various decision makers can interpret and apply the requirements of Bill 168 are just beginning. The initial decision of the OLRB will be very helpful in providing guidance to both employers and decision makers about the extent of the jurisdiction of the OLRB to rule on claims involving harassment at the workplace, made under the OHSA. The City of Kingston case will likely become a leading decision about how to analyze workplace violence cases.

1 Conforti v. Investia Financial Services Inc. 2011 *CanLII 60897 (Sept 23, 2011) reconsidering 2011 CanLII 28377*

2 City of Kingston v. CUPE Local 109 (Hudson) *[2011] O.L.A.A. No. 393*

3 *See Calgary Herald, Feb. 23, 2011 and Calgary Sun, July 9, 2011*

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