



Alternative Dispute Resolution

ALTERNATIVE DISPUTE RESOLUTION SECTION /
SECTION DES MÉCANISMES DE RÈGLEMENT DES CONFLITS

Volume 16, No. 3
June/Juin 2008

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"Looking Back – Moving Forward: Rule 78"

An Evening with The Honourable Warren K. Winkler,
Chief Justice of Ontario

*Deborah Anshell**



By 2004, the general sentiment in Toronto was that Case Management and early mandatory mediation were not working. It was perceived that the waiting times for motions and trials were unacceptably long and growing. To quote the Chief Justice, the system was in a "meltdown". In his then role as Regional Senior Justice, His Honour sought input from various stakeholders. The result was a new Practice Direction, which later became Rule 78. The Chief Justice recently completed his report on Rule 78, and presented his views with respect to Rule 78 to members of the Civil Litigation Section and the ADR Section at the Albany Club for a dinner meeting on April 7, 2008.



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The evening was co-chaired by Jeffrey Radnoff, Co-Chair of the Civil Litigation Section Executive and Deborah Ansell of the ADR Section. Kathleen Kelly, Co-Chair of the Civil Litigation Section Executive was the moderator. The evening was entertaining, provocative, and certainly educational.

The Chief Justice began by referencing his impatience with the system in the summer months of 2004. At that time, the waiting time for routine motions was more than six months. There was a three year wait for long trials, and a full year wait for shorter trials. Further, Chief Justice Winkler noted that statistically approximately 40 per cent of cases were settling with early mediation. Essentially, it was felt that litigation in Ontario and in Toronto in particular was too expensive and too slow.

The Chief Justice identified four problem areas that were in dire need of repair: the long trial list; the simplified rules cases; early mandatory mediation; and the case management system.

With respect to the Long Trial List, the system was clogged with cases that although listed for trial, were not yet ready for trial. In the spring sittings in 2004, 38 cases on the Long Trial List had been missed. Chief Justice

Winkler noted that a creative repair had to be found. The trial system has fixed resources, so other solutions had to be considered.

With respect to Mandatory Mediation, it was felt that mediations were being conducted too early. The secret of mediation is timing, and the Chief Justice felt that it was necessary to alter the timing of mandatory mediations. Pursuant to the Practice Direction, mandatory mediation was preserved, but the timing has been delayed considerably. Essentially, under the Practice Direction, mediation can now take place at any point in the process, but should be conducted before the pre-trial conference. For regular cases, the mediation must take place “at the earliest stage at which it is likely to be effective” and in any event within 90 days of the action being set down for trial by any party.

Simplified Rules Cases constitute 25 per cent of the cases in Toronto. After consultations with the ADR Section of the OBA, Chief Justice Winkler was convinced that it made sense to impose early mandatory mediation on these cases. Further, the Chief Justice advocated that early mediation be required for wrongful dismissal cases. Mediations for both of these types of cases must now be held within 150 days of the close of pleadings.

Finally, the Chief Justice felt that case management should not be automatically imposed upon every case in Toronto. Rather, his motto was “case management where necessary, but not necessarily case management”. Parties are now left to run their own lawsuits. The thinking here is that lawsuits should be returned to the lawyers to manage, and flexibility is to be the touchstone in cases that are to be case managed by the Court. Cases can still be dismissed for delay pursuant to a Rule 24 motion. Further, on such a motion, the court can make an order fixing a specific timetable for the remaining steps. We have returned to the Status Hearing model, where a case is not set down for trial within two years of the claim being issued.

The Practice Direction has now been renewed for a further three years, so will run until at least the end of 2010. It has been declared a success. The waiting time for motion dates and trial dates are down. In some

cases, such as masters' motions and trials under 10 days, the reductions are especially dramatic. Dates for trials under 10 days are now available within less than one month for trial that are five days or less, and available within five months for trials of six to 10 days. For long trials, the waiting time has been reduced from approximately three years to just over 12 months.

With respect to mediation, anecdotally the success rate for mandatory mediations has almost doubled. The number of pre-trials in simplified procedure cases has been reduced to about one third of the former number, now that mediation has been imposed on those cases.

The Chief Justice delivered a good news story to the audience in attendance with respect to the Practice Direction. He touched on the subject of expanding the Practice Direction to other Regions outside of Toronto, and this is currently an initiative which our Section is exploring and supporting.

On behalf of our Section, I want to extend my thanks to Chief Justice Winkler for joining us in April, and sharing his efforts and thoughts with respect to the ever-challenging subject of civil justice reform.

The Report of the Honourable Chief Justice Warren K. Winkler, EVALUATION OF CIVIL CASE MANAGEMENT IN THE TORONTO REGION - A Report on the Implementation of the Toronto Practice Direction and Rule 78 was submitted in February 2008, and is available on the Ontario Courts' website. The link to the report is: <http://www.ontariocourts.on.ca/coa/en/ps/reports/rule78.pdf>. The Section program was recorded on video and is available on the OBA website at: http://www.oba.org/En/pd/cle_en/winkler_rule78.aspx

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Message from the Chair

Summer's Around the Corner

*Deborah Anshell**



It's hard to believe that this will be my final column in the newsletter as Section Chair. It has been such a fulfilling year for me personally, and I think a challenging and exciting year for our Section as a whole. Programming has been the highlight this year, and we had many opportunities to collaborate with other Sections so that our programming reached more members of the OBA generally, and we achieved a high profile for our Section. Here is a brief summary of our Section's work as our year wraps up:

Programming

- We started out the year with The Roger Fisher Tribute on September 27, 2007. Our Section, together with the Civil Litigation Section represented the OBA as one of the four host organizations involved with this gala presentation.
- Our second program of the season was a joint venture with ADRIO and CBA National. Bill Eddy from California spoke to us on resolving disputes with high conflict individuals.
- In November, we had our third annual Great Debate with Lorne Honickman as moderator. The provocative topic was "Are Judges Better Mediators?"

- In January, 2008, Peter Robinson organized a program with the Insurance Law Section on Mediating Insurance Disputes.
- In February, 2008, we had a triumphant return to the OBA Institute, with a comprehensive program organized by the Honourable Reuben Bromstein.
- On February 27, 2008, Marina Mussani presented a program together with the Family Law Section on Family Arbitration in Ontario.
- On March 6, 2008, we participated with the Young Lawyers' Division in a joint program dealing with Problems and Solutions at Mediations.
- In April, 2008, Barry Fisher organized a breakfast meeting on how to conduct an effective evaluative mediation
- On April 7, 2008, we were invited to participate with the Civil Litigation Section to spend an evening with The Honourable Chief Justice Warren Winkler as he delivered a presentation on the success of the Practice Direction.
- In May, 2008, together with ADRIO, we participated in ADRIO's Annual General Meeting and presented our ADR Award of Excellence to the Chief Justice.
- We also unrolled for the first time a trilogy of Breakfast Book Club meetings, hosted by Barbara Franklin.

I want to thank all of our Executive members who lent their time, planning, and creativity to these programs. It was truly a remarkable year of high-level, innovative programs.

Policy Initiatives

- Owen Gray spearheaded an initiative with AGR to remit to the Attorney General of Ontario a letter from the OBA endorsing a resolution urging the Ontario government to enact Apology legislation. We were successfully out in front of a Private Member's Bill introduced by a Liberal backbencher on April 15, 2008.
- Brian Williams participated on our behalf in the OBA Task Force on Civil Justice Reform.
- Paul Godin represented our Section on The Roots of Youth Violence Committee.
- Both Kathleen Kelly and Barbara Benoliel represented us on the McMurtry Victims Compensation Review Committee. ADR processes, specifically restorative/reconciliative conferencing will likely be incorporated into the processes for compensation to victims.

Again, I want to thank all those mentioned above who took the lead with respect to these policy initiatives.

It seems that our Section was really front and centre this year, especially with respect to dynamic joint programming initiatives with other Sections. This is a positive trend, and reflects the movement of ADR into the mainstream.

I hope that the excitement and energy that I felt this year on our Executive continues in the year ahead. I wish you all a reflective and rejuvenating summer, and look forward to our work together next year.

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Beyond Mars and Venus – Part 3

*Genevieve Chornenki**



This is the last in a three-part series about a conflict resolution tool called personality type. Type helps dispute resolution practitioners promote interpersonal understanding because it explains inborn personality differences, differences which get heightened or exaggerated when people are in conflict. Type organizes these inborn preferences into four major categories with two preferences per category. By way of review, these are:

1. How much (or how little) **organization** do you prefer in your life? Do you like to plan, for instance, or do you enjoy living from moment to moment?
2. What energizes you or depletes your **energy**? Do you like the stimulation of the outer world or do you prefer your inner thoughts and reflections?
3. What do you recognize as **information** and what do you pay attention to? Do you trust information from your five senses or are you comfortable with hunches and intuitions?
4. How do you **evaluate** information and make judgments? Do you favour logic and objectivity or are you more concerned about the impact on people?

The last article expanded on preferences for organization and sources of energy. This article explains the remaining categories – what people recognize as information and how they evaluate that information.

Recall that Type theory holds that we are each born with an inclination for one preference or the other, not both.¹ We can develop the skills associated with both preferences through upbringing, training or life circumstances, but Type starts with nature not nurture. It concerns what's naturally comfortable, like the way you spontaneously pick up a pen in your right or left hand before you write.

In the category for what people prefer to recognize as information, the opposites can be visually represented as follows:

SENSING <i>(literal & tangible)</i>	INTUITION <i>(conceptual & symbolic)</i>
⇐⇐⇐ strength of preference	strength of preference ⇒⇒⇒

People who more readily pay attention to the specific and concrete are said to prefer Sensing and in Type lingo are called “S’s”. S’s prefer information that can be verified at the present time through the senses or by knowledge learned in the past. They tend to organize information in a step by step manner and often tell stories sequentially, sometimes with a lot of collateral detail.

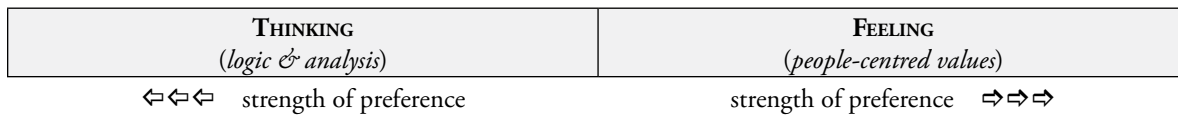
On the opposite side of the coin (not better or worse, just different) are those who pay more attention to inspiration and hunches without regard for past or present experience. These people are said to prefer Intuition and in Type lingo are called “N’s” (not I’s since the letter “I” was already assigned to Introversion.) N’s tend to be more interested in the meaning of information than in the raw information. They instinctively organize things in categories or themes. An N is more likely to tell you what a book meant to them or what associations it called forth. An S is more likely to explain the plot.

N’s tend to be future oriented. S’s tend to be oriented to the past or present. By way of example, I was once part of a group where the majority wanted to discuss “Future forces affecting our business”, a framing that should immediately cue you to the dominant presence of N’s. The minority S’s put up great resistance at the

front end of the meeting. One S said, “Why would I waste my time talking about such an airy fairy topic? I don’t care about what may or may not happen in the future. I care about now.” To this S, the present was what counted. To the N’s, the future was just as real (maybe more so) than the present. So what could they do? The group had to re-work the topic until both N’s and S’s saw its relevance. The revised topic was something like, “What is going on in the marketplace now that we should be concerned about?” The N’s were comfortable with this re-framing because they could still talk about presently emerging trends.

It is often possible to recognize N’s and S’s from the way they tell stories. N’s leap from topic to topic as they form associations. S’s put one foot in front of the other and go straight ahead. I once overheard two elevator conversations. The N began by talking about her in-laws’ church-going practices, remembered (by association with a phrase) an incident that made her brother-in-law angry and leapt from there into a critique of organized religion. By contrast, the S spoke about a trip to Nepal and stopped to carefully verify the exact season, year and elevation. While the S was speaking, the elevator stopped and she was interrupted by the movement of people. When the elevator resumed its movement, the S picked up her story exactly where she left off.

The final category concerns how people evaluate information and make judgments. These preferences can be represented visually as follows:



As with all of the other categories, there are two sides to this coin. On one side are those who make decisions using logic and objective analysis. When faced with a problem, they like to evaluate the pros and cons of each alternative. People who evaluate information and make decisions this way are said to prefer Thinking and in Type lingo are “T’s”. T’s like to find objective principles that apply equitably to all.

On the other side of the coin are those who evaluate things and come to decisions by applying people-centred values. They want decisions to take into account the needs of the people involved (the *actual* people, not some theoretical construct). When making decisions, they readily consider the impact on the people. They also tend to test solutions against their own internal value system. People who evaluate information and make decisions this way are said to prefer Feeling and in Type lingo are “F’s”. F’s are more likely to tailor a solution to individual needs and circumstances than T’s.

As with other categories, the established labels can be problematic if you take them too literally. For example, people with a preference for Feeling still think and people with a preference for Thinking still feel! You have to remember that this category speaks to mental processes for decision making, not stereotypical labels.

But, of course, T’s and F’s can have conflict.

T’s have a tendency to criticize spontaneously or ask challenging questions. This coupled with their reliance on objective analysis and principles can seem harsh to F’s. (F’s can be harsh too, but that usually emerges when they think that people aren’t treating others fairly.)

F’s are more likely to praise people openly or look for something good to say before delivering criticism – which can seem insincere to T’s who only expect commendation at the end if a job is well done. And when F’s insist on taking people’s individual circumstances into account, this can seem “touchy feely” and inefficient to T’s.

Of course, both vantage points are valid. I work with an organization where there is a pronounced T and an equally pronounced F. For any given task, the T first asks what needs to be done and what is the most logical and efficient way to do it. The T plans to sell the outcome with logic after the fact. But the F almost always begins by asking, “Who is involved? What do those people want? How can we find out?” The F knows that the idea will sell itself if it meets the needs of the people involved. At first these co-workers irritated each other, but as their working relationship evolved they integrated their approach to solving problems. How did this occur? Experience eventually convinced the T of the wisdom of the F’s approach. The T saw that while up front consultation seemed inefficient, it was actually more efficient than having to return to the drawing board when stakeholders put up resistance. So what the F does spontaneously, the T now does methodically “as a matter of principle”. And that’s the beauty of Type. People can get to the same place by their own individual paths.

This three-part series has very briefly touched upon the theory and application of Type. Properly understood and applied, Type provides neutral explanations for human behaviour and suggests ways to be truly respectful. But Type should not be used coercively or for the purposes of stereotyping. For example, in one workplace people were obliged to post their types on their office doors so that visitors could respond to them by category.

For Type to be beneficial, it must be used with a spirit of openness and curiosity. Like all conflict resolution tools, it can never provide a complete explanation or illustration for any human being. People are endlessly fascinating with many and changing facets and layers. Type is one window on that complexity. I invite you to open the window some time and look out. It’s quite a view.

* *Genevieve Chormenki* (www.genevievechormenki.com) was inaugural Chair of the OBA’s ADR Section. She has practised ADR since 1989 and is qualified to administer the Myers-Briggs Type Indicator.

¹ The components of Type are binary, but when combined into a personality type they form a dynamic system where all the preferences interact.

Recent Cases in ADR

*Nayla Mitha**



Court Orders Judgment in Accordance with Minutes of Settlement

Boyar v. Addressograph Bartizan G.P.

2008 CanLII 12489 (ON S.C.) – March 14, 2008

Interpretation of Minutes of Settlement – The plaintiff was dismissed from her employment by the defendant on March 13, 2007 – Upon her dismissal, she was given a letter that contained an offer of six weeks pay (as per her entitlement under the *Employment Standards Act*), plus an additional 20 weeks unless she obtained employment elsewhere within that additional period of time – The plaintiff rejected the offer and retained legal counsel – An action was commenced and the parties reached a settlement at a mandatory mediation on July 12, 2007 – The plaintiff continued to receive her salary until July 15, 2007, as this payment was processed on July 11, 2007 – The agreement reached at the mandatory mediation provided for the payment of \$23,000 to the plaintiff’s RRSP account and \$4,000 to her legal counsel – It also referred to the “Termination Agreement and General Release” clause set out in the March 13th letter – The defendant forwarded the payment of \$23,000 to the plaintiff’s RRSP account and \$4,000 to her legal counsel on July 19, 2007 – The plaintiff’s lawyer subsequently wrote to the

defendant's lawyer stating that his client had not received her bimonthly salary deposit for July 31, 2007 in accordance with the Minutes of Settlement – The letter also stated that according to the plaintiff's lawyer's calculations, payments were to continue up to and including Sept. 13, 2007 – The plaintiff argued that the reference to the March 13, 2007 letter in the Minutes of Settlement had the effect of incorporating the letter's terms into the Minutes of Settlement – According to the plaintiff, the doctrine of *contra proferentem* applied in that the Minutes of Settlement were prepared by the defendant's solicitor and any ambiguity must be resolved in favour of the plaintiff – The defendant argued that the reference to the March 13, 2007 letter was surplus and irrelevant – The Court rejected the plaintiff's *contra proferentem* argument as the Minutes of Settlement were arrived at during a meeting at which both parties were represented by counsel and the mere fact that they were recorded in the handwriting of one or the other solicitor does not give rise to the doctrine – The Court also found that the Minutes of Settlement were clear and unambiguous – The offer reflected in the March 13, 2007 letter had been rejected by the plaintiff – The requirement that she sign the "Termination Agreement and General Release" as set out in that letter did not have the effect of reopening the rejected offer to require additional payment of the amount originally offered – The effect of requiring the plaintiff to sign this document was so that she would release the defendant from further liability and be bound by the confidentiality provisions therein – The motion was dismissed without costs.

<http://www.canlii.org/en/on/onsc/doc/2008/2008canlii12489/2008canlii12489.html>

Parties Limited Their Own Right of Appeal from Arbitration Decision

Costa v. Costa

2008 CanLII 9609 (ON S.C.) – March 11, 2008

Dispute resolution agreement ("DRA") – Right of appeal – The parties entered into an agreement to resolve the issues involved in their divorce by mediation and arbitration – The parties and their counsel changed paragraph 8 of the DRA from "The parties agree that any decision of the arbitrator may be the [sic] subject to appeal or judicially reviewed" to "The parties agree that any decision of the arbitrator may be the subject of appeal or *review under the Arbitration Act*" – The arbitrator rendered a decision, which the appellant appealed – The appellant argued that section 8 of the DRA provided a general right of appeal or review – The respondent argued that the right of appeal was limited to subsection 45(1) of the *Arbitration Act*, which only allows appeals on questions of law with leave – The Court found that when the appellant and the respondent were drawing up their arbitration agreement, they turned their minds to the right to appeal the Arbitrator's decision, as they actually changed the wording of the original DRA to reference the *Arbitration Act* – When redrafting the appeal provisions, the parties were represented by counsel, who are presumably aware of the provisions of the *Arbitration Act* – The parties chose not to include a right of appeal on questions of fact and mixed fact and law in their arbitration agreement – The Court concluded that the parties intended to restrict their right of appeal to questions of law with leave pursuant to subsection 45(1) of the *Arbitration Act* – The appeal was dismissed as it involved questions of mixed fact and law.

<http://www.canlii.org/en/on/onsc/doc/2008/2008canlii9609/2008canlii9609.html>

Mediator Allegedly Signed an Affidavit in Support of a Client

Benmergui v. Bitton

2008 CanLII 11639 (ON S.C.) – March 11, 2008

Child Support – The parties separated in June of 1998 and signed a separation agreement that transferred the house and the parties' business to the wife – Shortly thereafter, the husband fell ill with colon cancer

and moved back into the house for one year – The parties' separated again in July of 1999 – Following this separation the parties entered into a year and a half of mediation – The mediation resulted in a second separation agreement, which was signed in January of 2001 – The second agreement provided that the wife would have custody of the parties' children and that the husband would pay \$350 per month in child support – In February of 2001, the parties appeared before the Rabbinical Council to obtain their Get, at which time the husband signed two handwritten agreements that had been prepared by the wife – These agreements provided that the husband would pay \$732 to the wife in child support each month, amongst other things – When the wife did not receive \$732 from the husband in March of 2001, she commenced an application for child support – One of the issues before that Court was which, if any, of the three separation agreements that the couple signed was valid – The wife claimed that the proper amount of support was \$732 per month, as per the parties' third agreement – She maintained that the husband did not want to put his actual income down on paper because he did not want to pay tax on it – She therefore agreed to \$350 per month for child support when she signed the second separation agreement, because her understanding was that the husband would provide her with additional support on top of that amount – In support of her position, the wife referred to an affidavit that was supposedly signed by the parties' mediator – The Court noted that the affidavit appeared to have been prepared by the wife, as it mirrored her tone and position exactly – The Court also noted that if the mediator did in fact sign the affidavit, she strayed from the traditional role of a mediator as an independent facilitator – The Court allowed the affidavit to be entered into evidence, but noted that it was treating it with great caution and would give it limited weight as the contents were untested by cross-examination – The husband argued that he had faithfully paid \$350 in child support since the date of the second agreement and that this was the appropriate amount for him to pay – He maintained that he signed the third agreement at the Rabbinical Council under duress – The wife had allegedly threatened to hold up the Get proceedings a second time if he did not sign the third agreement on the spot – The husband was a religious man and did not want to undergo any further embarrassment in front of the Rabbinical Council – The Court found that the third agreement was signed under duress and that the wife took advantage of the husband in a vulnerable situation – The Court noted that in addition to facing a public scene at the Rabbinical Council, the husband was also facing significant health issues and an uncertain financial situation at the time that he signed the third agreement – The Court found that the husband's income was \$30,000 per year and ordered him to pay \$598 per month in child support commencing March 8, 2008.

<http://www.canlii.org/en/on/onsc/doc/2008/2008canlii11639/2008canlii11639.html>

** Nayla Mitha is a mediator, facilitator and ADR system design specialist with the Stitt Feld Handy Group.*

Paralegals at FSCO

Rita Czarny*



A small red Smart Car had a Bumper Sticker which read: “When I grow up, I want to become a Rolls Royce”.... The good news is that the driver of the Smart Car will be able to keep the same licence when the Smart Car graduates to a Rolls. But if you are a Paralegal, starting on May 1, 2008, and pursuant to the *Law Society Act*, you will need a licence number [or an exemption, at best] to keep practicing in Ontario.

Community Colleges and Universities will provide the Paralegal Education Program Accreditation in accordance with the regulations set out by the Law Society of Upper Canada [LSUC]. LSUC will now oversee and regulate the licensed paralegals.

One can not talk about cars without thinking about accidents. And if one is talking about car accidents, one may think about the Financial Services Commission of Ontario [FSCO]. In fact, until now, Paralegals were only allowed to represent claimants under the *Statutory Accident Benefit Schedule* [SABS] after they had complied with FSCO’s requirements to become official SABS Representatives. There were more than 200 listed SABS Reps with FSCO. To continue representing claimants in mediation and arbitration, such individuals will now need the Law Society’s Paralegal Licence to keep practicing at FSCO. To put it into context, FSCO had about 14,000 mediations and 2,700 arbitrations over a one year period.

In anticipation of the said changes, FSCO extended an invitation to the Community Colleges which are, or which are considering teaching the new Paralegal Courses. The meeting, which took place on March 27, 2008, was a great success: Nine Colleges attended at FSCO in Toronto from places as far as Belleville, Sudbury, and Ottawa. The energy was really positive; everyone (there were about 30 people in the room) was excited about the upcoming changes for Paralegals.

As expected, this meeting of the minds was a perfect forum for sharing ideas, expressing concerns, and exploring solutions for a fulfilling future for Paralegals in Ontario in general, and at FSCO in particular. Linda Pasternak, Coordinator of the Law Society Accreditation Course, gave us an understanding of the process of licensing the Paralegals by the Law Society. The consensus was that Paralegals would benefit from having an understanding of the substantive law pertaining to FSCO in order to navigate the SABS in an efficient manner. With the SABS being explicitly incorporated into the curriculum, the licensed Paralegals will be better equipped to represent insured individuals.

FSCO’s message from David Draper, Director of Arbitrations [David resigned as of May 2, 2008, but rest assured that the timing was pure coincidence] was clear that FSCO strives to provide a respectful environment, to promote professional conduct, and is committed to reaching fair settlements. With this in mind, the teaching colleges can benefit from FSCO’s help to provide the potential Paralegals with pertinent information about expectations, obligations, and limitations to practicing at FSCO.

Under the coordination of David Leitch, Arbitrator at FSCO, 10 arbitrators and mediators provided the interested audience with five minute presentations, each dealing with one of the courses on the list of the Paralegal Education Program Accreditation. Each presentation examined how FSCO-related materials and examples could be integrated into an educational program for Paralegals. This would ensure that the licensed Paralegals have a Rolls Royce of a drive at FSCO.

And speaking about a Rolls Royce, no matter what car they are driving, Paralegals’ new licence will give them the resources, the confidence, and the status they need in their practice. In turn, the public will benefit from our collaboration to give Paralegals the best education available, and will be comforted knowing that all Paralegals are regulated by the Law Society.

* Rita Czarny, a full-time mediator at FSCO, is an Accredited Family Mediator [OAFM], a Chartered Mediator [ADR Institute], and she is Reality Therapy Certified.

Prominent Canadian Arbitrator Elected as President of the National Academy of Arbitrators

*Peter Chauvin**



Michel Picher has been elected as the President of the National Academy of Arbitrators (the NAA) for 2008/2009. Mr. Picher is one of Canada's most experienced and respected Arbitrators. He has been a law professor at the University of Ottawa, a Vice-Chair of the Ontario Labour Relations Board, and an Arbitrator since 1983. He has been the permanent Chief Arbitrator of the Canadian National Railway Office of Arbitration for over 20 years, and sits on numerous Arbitrator panels for Universities, Colleges, utilities, airlines, and Canada's postal service. He is also very experienced in sport Arbitration. Mr. Picher has acted as an Arbitrator for the Sport Dispute Resolution Center of Canada, arbitrates athlete appeals to the Canadian National Team, and has conducted numerous salary arbitrations for the NHL.

The NAA is the professional organization for North American Arbitrators. Its mandate is to establish and foster the highest standards of integrity, competence, honour and character among Arbitrators engaged in resolving labour-management disputes. In this regard, the NAA has a comprehensive Code of Conduct which NAA Arbitrator members are required to comply with.

The NAA annual meeting and conference, which was held in Ottawa from May 21 to 24, was an excellent opportunity for Arbitrators to network and exchange ideas to enhance the depth and breadth of their skills. In addition to this, there was a full complement of distinguished speakers and panels conducting programs on a broad range of topics, including the following.

In "Tough Calls in Arbitration", union and management advocates argued hypothetical scenarios. Thereafter, the Arbitrators in attendance discussed the scenarios and were required to come to a consensus upon how they would rule on the scenario. Once these rulings were collected, the Arbitrators on the panel, who were from both Canada and the United States, rendered their decisions on these scenarios, and compared their decisions to the rulings that had been rendered by the attendees. This proved to be most informative, and entertaining.

In "Impact of Supreme Court of Canada Cases on Arbitration", Denis Nadeau, Professor, University of Ottawa, reviewed several recent SCC cases and commented upon how they had effected the development of arbitration and labour relations. Thereafter, union and employer counsel added their insightful, and sometimes quite different, points of view on the cases.

The ever growing, and challenging, issue of accommodation in the workplace was discussed and debated in a number of sessions. Accommodation requirements for disabilities, religion, family status and race were examined. Of particular interest was the contrast in the approaches that are taken in Canada and the United States, and the differing outcomes that arise as a result of these differences.

Of particular interest regarding accommodation was a program entitled "Psychological Issues in Arbitration", which included an in-depth analysis of the psychological factors that come into play in cases dealing with harassment, stress, depression and drug addiction. Dr. Mark Ujjainwalla, an Ottawa physician who specializes in addiction treatment, discussed the biases, misunderstandings and prejudices that arise in the workplace regarding persons with addictions.

Class actions in employment arbitrations, which is an established area of practice in the United States, and just a developing field in Canada, was thoroughly reviewed by a panel of five Arbitrators and lawyers from the

United States. Their experiences provided great insight into what we may expect to see in Canada in the near future.

The most entertaining program contrasted the different arbitration models that have been adopted by Major League Baseball and the National Hockey League to resolve salary disputes. Major League Baseball uses final offer selection, with very little by way of any adjudication process. The Arbitrator must pick one of the offers within 24 hours, and cannot provide any reasons for the selection. The National Hockey League uses an interest arbitration model in which the player and the club provide each other with their salary proposal and with extensive statistics to support their proposal. Within only a few days of that they are granted only 90 minutes to present their case to an Arbitrator. Thereafter, the Arbitrator must render a decision, in writing, with reasons, within 48 hours of the end of the arbitration. The Arbitrator can choose either of the parties' salary proposal, or any salary between the proposals.

The MLB and the NHL representatives were proud to state that their processes have been in place for years and that the parties are very pleased with both the process and the results that flow from them. It was fascinating to see that these extremely expedited processes are used to resolve multi-million dollar salary disputes, when other disputes involving much less money commonly take several days to resolve.

Finally, Chief Justice Warren Winkler presented his concerns pertaining to access to the courts and stated that we must develop a more efficient and fair adjudication process. Mr. Justice Winkler stated that parties should not be forced into accepting an unfair settlement proposal only because going to court is too expensive and too prolonged. Chief Justice Winkler emphasized that access to justice is a fundamental tenet of a free and democratic society and urged the NAA to take an active role in helping to improve the legal process.

The NAA has regular education sessions and conferences. More information about the NAA can be obtained from naarb.org.

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Book Reviews

*Reviewed by Colm Brannigan**



Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes

By J. Anderson Little

Chicago: American Bar Association, 2007, 269 pages

With 400,000 plus members, and the resources which come from such a base, the American Bar Association consistently produces first rate materials and this book is no exception to the rule. It is a practice skills based work, which manages to synthesize the various mainstream mediation theories into a specific workable model for mediating money disputes. The author is a highly experienced mediator and he draws on his experience in court-connected mediation and as a former litigator in writing a readable and useful contribution to the ever growing literature on mediation.

Many of us have been trained to expect that an interest-based approach will be the most useful in bringing about a “better” resolution of all types of disputes. Then to our horror, we encounter, what can best be described as a “zero-sum” case.

This most often happens in personal injury, but also in some types of commercial cases. What do we do? We want to focus on “interests,” the parties are positional. We “expect” joint sessions, but the parties want private ones. Thoughtful analysis is replaced by back and forth incremental monetary offers. At best the mediator practises “shuttle” diplomacy, at worst, a “glorified messenger.” Plus, we all know that mediators are not really useful when it is just about money! Well, this book may not change your mind about this type of mediation, but it will help in dealing with it.

It fills a gap in the literature between what we think parties want, and what they really want and expect from a mediator. A fairly recent criticism of mediation is that it is not responsive to party needs especially if they do not fit into our neat models of how the process should work. As an example, many business clients are looking for hybrid services such as med-arb, but most mediators recoil from these “impure” processes. As a result, clients are not beating down the doors for ADR services.

Divided into nine chapters, the first outlines the “realities” of negotiations about money and confirms that the currency of settlement is “cash.” In the author’s view, one of the most important things a mediator can do is to help the parties move through their negotiating ranges when they want to give up in frustration. The second chapter is called “Making a Place for Traditional Bargaining among the Models of the Mediation Process” and is the core of the author’s approach. Indeed, chapters three through nine are really extensions of this core idea. In this model, the mediator plays a key role in helping parties overcome negative reactions to proposals from each other. By working with parties to close the “gap”, we can add value to the negotiation process even if it seems like a very narrow range of value. The problem-solving approach really incorporates the full continuum of mediation processes including interest-based concepts and, even in limited circumstances, transformative approaches, and it needs to be recognized as a valid and useful way of meeting client needs.

The book is clearly written, although the author’s use of the term “civil court mediations” as the umbrella for these types of cases does become a little repetitive. The many helpful tips on both negotiation and mediation can be put to immediate use. While some of the ideas in it may offend mediation “purists,” it is a very practical work and should be on your book shelf.

Making MEDIATION Your Day Job: How to Market Your ADR Business Using Mediation Principles You Already Know

By Tammy Lenski, Ed.D.

New York: iUniverse, Inc., 2008, 112 pages

This short book is a gem. It is quite different from the other relatively recent books on marketing mediation and clearly demonstrates that you do not need hundreds of pages to provide your reader with a comprehensive overview of a topic which bedevils many in our profession. Mention marketing to most mediators and they turn a “whiter shade of pale.” We know we have to market our practices, but most of us don’t like sales and marketing. How can we make mediation our day jobs without “selling” ourselves in the marketplace? Tammy Lenski an experienced mediator, trainer, consultant and blogger (www.mediatorstech.com/blog/) in the United States has an answer for us. It may or may not be quite the “definitive work” on the topic as claimed by its cover, but it is certainly the most practical and easy to apply.

When asked how to market a mediation practice, most of us fall back on the tried and tired ideas of joining rosters, volunteering, professional groups and directory advertising. Do these ideas work? Well, not really. Clients are not beating a path to most mediators’ doors nor are the phones ringing off the hook! Ironically, while we are really all about communication, we do not communicate very well with potential clients. While we might quibble over how you define “success” in mediation, most mediators would agree that by any objective criteria, mediation marketing is a dismal failure. We do not use online technology to maximize our message. In fact, many of us do not even have a message to maximize!

But what if you could market your practice using the same skills you use to mediate? That would certainly be easier to accept than “selling”, wouldn’t it? We might even be comfortable with marketing this way. Well, the author says you can. In eight clear and concise chapters, she shows us how to do something we are trained to do well! Asking good questions, and generating options. Starting with “Marketing like a Mediator” and progressing through “Uncovering Interests” to “Setting Your Practice-Marketing Agenda”, a blueprint for success is developed.

Basic ideas such as choosing a market that speaks to your passion sound simple, but how many of us actually do this? I have been struck by the fact that most mediators are passionate about what they do, but when it comes to marketing themselves, they hide their passion in a cloak of neutrality.

It makes good sense to meet your market’s needs and talk to potential clients. But too often we preach to the converted, which is, other practitioners and groups that have adopted mediation and fail to look beyond to the untapped mainstream. We really sell dispute management services and solutions, but often fail to ask our clients what they want from us. Why? We have built it, whatever it is, and they have not come!

We need to develop “niche” markets in our practice areas and one of the many strengths of this book is that it shows how we can use the Internet to reach out to our niche. The advent of blogs provides opportunities for us to brand ourselves as experts. Yet there are few mediation blogs or for that matter websites compared to the number of mediators out there.

While you can easily read the book in one sitting, it lends itself to a bite- sized approach where we return more than once to those parts that resonate with the reader. It is a resource worth having.

None of this is new, the author says “there’s not a single new idea” in the book. But there is. Her synthesis of existing marketing ideas into a “mediator friendly” process is more than just that. It opens up a new way of problem solving, and after all, isn’t that what mediators are supposed to do?

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Attendees have a Big Appetite for the Breakfast Book Club Series!

Barbara Franklin*



This year, for the first time, the ADR Section in conjunction with the Civil Litigation, Education Law and Insurance Law Sections and the Young Lawyers' Division (Central Region) offered a series of three breakfast book clubs, for ADR professionals, advocates and negotiators. People are encouraged to read the book for the first time, or dust it off their shelves if they had not referred to it lately, or to just come and find out what they would have learned if they had read the book! All the books are available online for under \$15.00.

The four books featured this year are:

1. *Getting to Yes: Negotiating Agreement Without Giving In*, by Roger Fisher and William Ury, paired with William Ury's: *The Power of Positive No*. These books were discussed on January 15th.
2. *Difficult Conversations: How to Discuss What Matters Most*, by Doug Stone, Bruce Patton and Sheila Heen, was the focus of an exchange of ideas and opinions on February 28th, highlights of which will be described below.
3. *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, by Robert Mnookin, Scott Peppet and Andrew Tulumello, was the very interesting and useful book that was the subject of discussion on Tuesday, June 3, 2008.

Beyond Winning is a book written by lawyers, for lawyers who negotiate deals and for lawyers who negotiate the resolution of disputes. The authors devote a chapter to the tensions between principals and agents and another chapter to professional and ethical dilemmas. Problem solving is at the heart of this book. The goal is to help lawyers and their clients work together and negotiate more effectively. This is a tremendous opportunity for lawyers to learn more about negotiation whether they are litigators or transactional lawyers.

Difficult Conversations: How to Discuss What Matters Most recognizes that every difficult conversation operates at three levels. The "What Happened?" conversation is about substance. Who said what? Who did what? What did each person contribute to the problem? The authors suggest that it is important to understand each other's stories, to sort out contributions and to disentangle intent from impact. There was great discussion amongst the book club participants about the latter concept: recognizing that good intentions can sometimes have the unintended consequence of hurting someone. How often have we heard in the course of a dispute: But that's not what I meant!

The second level of conversation is the Feelings Conversation. The ability to express feelings in a professional setting is much more difficult, and more questionable, than expressing them in our personal lives. However, if disputes are to be resolved, we need to have an appreciation of what the other party may be feeling and what interests may underlie those feelings.

The third and final level of conversation is the Identity Conversation. This is the conversation that people have with themselves that questions their self-image: whether they are competent, good or kind. In a difficult conversation, people may lose focus, start to panic or get angry as they start to doubt themselves. The authors suggest that people maintain their perspective and keep their balance.

There was no debate that difficult conversations will always be a part of everyone's life. However, the group was unanimous that there is merit in recognizing that a conversation may have a more positive outcome if the purpose is not to blame, but to learn and to work with the other person in joint problem solving.

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Family Arbitrations in Ontario – A New Genesis

*Marina Mussani**



On February 27, 2008, the ADR Section and the Family Law Section of the Ontario Bar Association jointly held a dinner program entitled "Family Arbitrations in Ontario – A New Genesis". It was very well attended by ADR practitioners and Family lawyers and was a huge success.

The program pertained to the *Family Statute Law Amendment Act* that the Ontario legislature passed in 2006, and the new regulation governing family arbitrations, which came into force on April 30, 2007. The Act amends the *Arbitration Act, 1991* and the *Family Law Act*.

Under the amendments, a family arbitration agreement is a 'domestic contract' as defined in the *Family Law Act*. This means that all the requirements of a 'domestic contract' now apply to family arbitration agreements. Furthermore, under the new legislation, family arbitrations must comply with Canadian laws and principles to be enforceable by the courts. The regulation, among other things, requires a family arbitrator to file a report to the Ministry of Attorney General of Ontario.

We had a distinguished panel of three speakers who were most enthusiastic to share their extensive knowledge and expertise regarding these amendments.

John D. Gregory, General Counsel in the Policy Division, Ministry of the Attorney General (Ontario), was involved in policy support for the *Arbitration Act, 1991* and the family arbitration amendments in 2006. John provided an insightful overview of the amendments and the governing regulation.

Hilary Linton, the Past Chair of our Section, and Lorne H. Wolfson, a Senior Partner in the Family Law Department at Torkin Manes Cohen Arbus LLP, provided an in-depth analysis of the amendments and the regulation and its requirements and implications with regard to both training and reporting. They also discussed the impact on Family Arbitrators and Family Arbitrations.

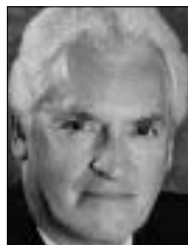
The general consensus, based on feedback from the attendees, was that the program was timely and that it provided much needed insight and information on the subject.

Thanks to the members of the panel for sharing their time and knowledge and to my co-chair of the program, Kelly Jordan from the Family Law Section, for working hand in hand with me to make it a memorable one. Thanks to Janet Green for coordinating our efforts and lending her wholehearted support.

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How to Conduct an Effective Evaluative Mediation

*Rick Mays**



On April 22, 2008, the ADR Section was pleased to present a program with three experienced mediators giving their perspective on what it takes to conduct an effective evaluative mediation.

Stephen Malach, Q. C. spoke about personal injury mediations. In his practice, he reviews the entire file, makes notes, and tries to determine the “value” of the case. Sometimes the parties don’t want to hear about this. The difficulty is in selling this to the parties. Often it is necessary to speak with one or both of the lawyers, privately, to gauge whether or not the clients are comfortable with the mediator giving them the straight goods. Stephen will often prepare up to three scenarios as to how he believes the case will play out.

In a facilitative mediation, you must show respect for every argument, whereas in an evaluative mediation, you can set aside the nonsense and tell it straight. A mediator should be careful in becoming too involved in helping the parties to structure an offer; and, finally, one should always encourage the parties to make a realistic offer even if one side starts with an extreme demand or offer. Simply ignore it!

Michael Silver spoke about the commercial side, which, Michael believes, lends itself quite nicely to evaluative mediations. Historically, facilitative mediations seemed to be the way to go, but, in his experience, do not appear to be as effective. When Michael conducts an evaluative mediation, he emphasizes the “risk” approach and what can be lost if you have a bad case. This tends to scare people somewhat as they are accustomed to only looking at their best case scenario. Perhaps, a reality check!

Barry Fisher, who chaired the event, described his practice in the labour and employment field. In the past, evaluative mediation was not really considered mediation. It was a dirty word. Now, it has become an important tool. Barry indicated that he doesn’t have parties give opening statements. Instead, he summarizes the essential components. That way, he saves a lot of time and the parties don’t waste time taking positions that everyone is already well aware of. He tries to zero in on the most important elements and to be as honest as possible.

In conclusion, all the panellists agreed that conducting an evaluative mediation carefully in the right case can be extremely effective, productive and rewarding for all parties including the mediator.

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OBA Award of Excellence 2008

*Deborah Anshell**



The ADR Award of Excellence for 2008 was presented to the Honourable Chief Justice Warren K. Winkler at the Annual General Meeting of the ADR Institute of Ontario on May 27, 2008. The award presentation concluded a half day program, entitled “New Issues for ADR Practitioners: Resolving Public Conflicts and Leading Issues in Commercial Arbitration”.

The program was a joint initiative of the ADR Section and ADRIO. The first panel of the program dealt with public conflict and the media’s message. Speakers were Dr. Deborah Sword, Dianne Saxe, Charles Harnick, and Dr. Allan Bonner. The second morning program was entitled “Leading Issues in Commercial Arbitration”. The speakers were William G. Horton, Brian Casey, Richard J. Weiler, and Gary Caplan. Prior to the Award presentation, the keynote address was given by The Honourable Kathleen Wynne, Minister of Education. This video presentation dealt with the role of ADR in education.

Deborah Anshell, Chair of the ADR Section presented the award to the Chief Justice. Paul Jacobs Q.C. delivered a brief biography of Chief Justice Winkler to the audience, complete with a travelogue of Pincher Creek, Alberta, the childhood home of the Chief Justice, a tiny town in Alberta. Both speakers emphasized the impact that the Chief Justice has made on the field and practice of ADR in Ontario. Chief Justice Winkler has truly been a consensus builder in this province.

The Chief Justice was a founding partner of Winkler, Filion and Wakely, and there specialized in management-side labour and employment law, as well as ADR. It was during his six month long stint as the mediator for the Ontario Hydro and Power Workers dispute, that the Chief Justice began his intense focus on ADR and mediation. In April, 2003, Chief Justice Winkler was appointed to mediate the Air Canada Restructuring. In 19 days, the Chief Justice was able to create a deal between two companies and nine unions to find billions of dollars of concessions. He is also well known as the mediator for victims of tainted Red Cross blood supplies, and the Walkerton water disaster.

In 2005, the Chief Justice was the author of the new Practice Direction, recently extended for a further three years, which enshrines mediation into the practice of civil litigation in Toronto. Chief Justice Winkler has consistently been a champion of ADR – in his practice, since his appointment to the Bench in 1993, as Regional Senior Justice for Toronto, and now as Chief Justice of Ontario.

In his acceptance remarks, the Chief Justice set aside his written notes. Instead, he charmed and regaled the audience with anecdotes from some high profile mediations he has conducted, including the Ontario Hydro dispute. The Chief Justice’s acceptance speech will be reproduced in the next edition of this newsletter.

The concluding portion of the full program was the presentation of the Roger Fisher Scholarship Award by Kathleen Kelly to D. Marie Marchand. Ms. Marchand has demonstrated a commitment to serving others.

Ms. Marchand identifies very strongly with her First Nations heritage. She plans to continue her work in both the First Nations and Aboriginal communities and the non-aboriginal community at large. Her background in anthropology, constitutional law and fine arts, provides a broad framework to bring to the study of negotiation.

The day was very well-attended and informative. Our thanks go out to ADRIO, especially Mary Anne Harnick and Barbara Benoliel for taking the lead in planning this well-orchestrated event.

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Upcoming Program

Online Dispute Resolution

September 25, 2008

Alternative Dispute Resolution

is published by the Alternative Dispute Resolution Section of the Ontario Bar Association. Members are encouraged to submit articles or suggest story ideas.

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