

# Alternative Dispute Resolution

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

### Resolving Complaints at the Ontario Human Rights Commission: A Study in System Design

*Daryl Landau\**

Every year the Ontario Human Rights Commission handles about two thousand complaints, and conducts several hundred mediations and investigations. It has over twenty mediators and twenty investigators to process this huge volume. As one might imagine, the Commission has adopted an interesting ADR system to manage the caseload, a system that employs screening, mediation, conciliation, investigation, and other methods. The Commission also has to wrestle with important ethical and procedural issues involved in trying to resolve allegations of discrimination.

the goal of the Mediation Office is to reduce the caseload that moves on to the Investigation Office. The Mediation Office, which has existed for only six years, has successfully closed over half of the files it receives.

There are two types of mediations at the Commission, and each is treated very differently. "Informal" mediations are conducted over the phone in shuttle fashion. The mediator asks each party in turn "what do you want" or "what are you prepared to do to settle this?" Settlement rates for informal mediations vary greatly from officer to officer, as do their settlement methods. Little is known about those methods, since they occur behind closed doors, and the successful officers only rarely share their secrets.

If, however, a mediator and the parties prefer face-to-face mediation, then the file is sent for "formal" mediation. A scheduler sets a date with the parties and assigns the file to a mediator who has not yet seen the file. The parties come to the Commission and are greeted for the first time by their assigned mediator. Only counsel, if they are present, may have dealt with the officer in the past. The mediator leads them to a room and begins the session. They have the full day, if necessary, to reach agreement. If no



The life of a complaint begins when it is formally filed with an Intake Officer, a process that can take many months. The complaint is then assigned to a Mediation Officer. That mediator has the task of either (a) assessing if the complaint should be dismissed under section 34 of the Ontario Human Rights Code, or (b) trying to mediate a resolution. Overall,

Volume 12, No. 1  
October / octobre  
2003

#### In this Issue:

Message from the Chair

From the Editor

Court Provides Direction to Roster Mediators with Respect to Scheduling Mandatory Mediations

Practice Tips for Roster Mediators and Mediation Representatives Attending a Rule 24.1 Mandatory Mediation

Challenges in the Field of Healthcare Dispute Resolution

The Effective Use of Caucus in a Mediation

Toronto Psychologist/Lawyer/Mediator Receives International Award

Programming for 2003-2004

Call for Seminar Ideas



---

agreement is reached, the file is either sent to investigation, or if there are section 34 issues, it is re-assigned to another mediator.

The style of mediation at the Commission is called “interests/rights mediation.” The “rights” aspect is clear — Mediation Officers share the responsibility of applying the Code, exercising the Commission’s discretion under section 34, and ensuring that the public interest is served. Mediators generally adopt an evaluative style in their mediations, considering whether a given complaint would hold up in investigation. However, within the framework of the Code, mediators help parties reach agreements that cater to their own particular interests. Despite a general lack of mediation training (though some officers are highly trained), the overall success rate for formal mediation is about 70%.

Files are sent to the Investigation Office when all other efforts to close them have been unsuccessful. Even then, the assigned Investigation Officer will make efforts to “conciliate” before and after an investigation. Conciliation is similar to mediation, but usually the investigator has more muscle, particularly after the investigation has been completed. Once an investigation is conducted, the investigator discusses the results with the Policy and Legal branches, and then sends his/her recommendation to the Commissioners, who then decide if the complaint should be referred to a Tribunal. That is the end of the Commission’s role, often several years after the filing of the complaint.

So, what are the key ethical and procedural dilemmas in this process? Here are some of them:

- How is the public interest in justice upheld, particularly in mediation?
- Is the Commission, and in particular the Intake and Mediation offices, too keen to screen out complaints?
- Is the mediation process as effective as it could be (and how is “effective” defined)?

A full answer to these questions is not possible in this article. However, in brief, the public interest is difficult to enforce in mediation, before an investigation has clarified whether discrimination actually occurred. Yet mediators are expected to push for public interest remedies. However, if

pushing for the public interest would interfere with closing a file, many mediators would opt for the latter, given that they are evaluated by their file closing numbers. As a whole, the Commission is exploring how to evaluate by measurements other than file closings, but as an overburdened and under-resourced institution, the Commission needs to reduce caseload.

This need affects all its processes, including how mediations are conducted. Mediators are under pressure to settle cases quickly. They are not provided the training or the encouragement to run a transformative process that might actually change stereotypes. Investigators, without much training, are expected to close forty investigation files per year. Some investigators worry about the corners that must be cut to achieve such a goal.

As a government institution, the Commission receives more than its share of criticism. Yet overall it does succeed in its mission to promote human rights and to process the high volume of complaints. Its success is due in part to an ADR system that has evolved over time. The recent addition of mediation, in fact two kinds of mediation, has greatly aided its functioning. The system is far from perfect, but it manages, eventually, to get the job done.

*\* Daryl Landau is a mediator of employment and human rights disputes, and was formerly a Mediation Officer with the Ontario Human Rights Commission. He can be reached at [Landaudaryl@aol.com](mailto:Landaudaryl@aol.com).*

---

# Message from the Chair

*Paul M. Iacono, Q.C.\**

As the Chair of the ADR Section for the coming term, I would like to begin by thanking the Past Chair, Ann Gottlieb and the entire Executive for their devotion, dedication and hard work. We face some significant challenges in the coming year as a section of the Ontario Bar Association. Although there are 3 Sections of the OBA that have non-lawyer members, our Section has the largest contingent. The existence of non-lawyer members in a Bar Association last year surfaced as a topic that got a great deal of attention. I anticipate that debate will continue. I have expressed my views publicly on many occasions that to be a good mediator, it is not necessary to be a lawyer. It is my belief that non-lawyer mediators make a significant contribution to alternative dispute resolution.

We made a decision last year not to participate in the Annual Institute. Our reason for so doing is that ADR does not represent a separate body of law, as does for instance criminal law or family law. It is a skill however, which lawyers must acquire. They must have knowledge of the process and be able to use it everyday of their working lives. There are many Sections of the Ontario Bar Association with whom we can interact. It was a theme that I began last year as Vice Chair of the Section, where we attempted to reach out particularly to the Civil Litigation Section and the Canadian Corporate Counsel Association, which culminated in a CLE event in May. This presentation proved to be very successful. It is because of the fact that we interact with so many Sections of the Bar Association, that we cannot compete with them in staging an Annual Institute program, and that it is why we decided to opt out last year. For the 2004 year, we will continue that policy.

At the planning sessions in June and July, I made it clear to the Executive, that if any of the other Sections wanted an ADR component in their Institute presentations, we would provide it. To this date we have had "no takers".

I recognize the importance of CLE, and our Program Co-ordinator for the coming term will be Barry Fisher. Barry is someone who in the past has germinated many and wonderful ideas for programs that not only interested the profession, but challenged them. In that vain, we will be presenting

a series of seven breakfast presentations, where we will be doing joint presentations with the following Sections:

Family Law;  
Trusts and Estates;  
Insurance Law;  
Civil Litigation;  
Labour Relations;  
Construction Law; and  
Health Law.

As an Executive, it is our feeling that this is the best way in which our Section can communicate with the various other groups in the Bar Association.

In addition, Barry will be coordinating a program that will be a joint presentation of the ADR Section, and the Arbitration and Mediation Institute of Ontario. It will coincide with the annual meeting of the Institute, which is scheduled for May 27, 2004, at the OBA Conference Centre.

Another goal that I would like to accomplish this year relates to our affiliate members. As an Executive, we want our affiliate members to participate in the ADR Section to the maximum allowed by our Organization's by-laws. As an Executive, we will attempt to define the role of the affiliate members, particularly those who sit on the Executive. There are many excellent ADR practitioners, from whose knowledge and experience we can benefit, even though they are not lawyers.

I want to compliment our Newsletter Editor, Deborah C. Anschell, for a job that has exceeded what was expected, and I am sure she will be happy to hear from you if you have any comments or articles of interest. I personally would like to thank her for agreeing to stay on as editor.

The way I see things for the coming year is that we will focus on our goal of "all inclusiveness" in terms of the legal profession and the ADR community. We will strive to bring as many of the sections and interest groups within our purview as is possible. When necessary, we will make our best efforts to fine-tune the mandatory mediation process so that it will become as productive as possible.

Hopefully our CLE projects will assist our members to become better mediators and better counsel when they attend mediations.

Please feel free to contact me at any time, with regard to comments, suggestions or proposals.

Until then, keep in mind that the best dispute is a resolved dispute.

\* *Paul M. Iacono, Q.C., Beard Winter LLP, (416) 306-1810, [piacono@beardwinter.com](mailto:piacono@beardwinter.com).*

## From the Editor

*Deborah C. Anshell\**

Greetings from the Editor's desk. I'm excited to back for my second term as Editor of the Alternative Dispute Resolution Section Newsletter. I want to welcome our new Executive, and particularly our new Chair, Paul Iacono, Q.C.

We have a tremendous year ahead in the ADR Section. In this newsletter you will find information on our new programming strategy, together with a report on past programming.

In this issue, I have also included a number of substantive pieces on dispute resolution. The first is an excellent article by Daryl Landau on resolving complaints at the Ontario Human Rights Commission. You will also find a very useful piece by Lawrence Herman on practice tips for roster mediators. Dr. Robert Robson, new to our executive this year, has contributed an article on mediation of health care disputes. Finally, you will find a synopsis of a recent decision by Master Albert which deals with scheduling mandatory mediations.

I hope that you enjoy this first edition of the 2003-2004 newsletter. I would be very grateful for any contributions or suggestions for future issues.

\* *Deborah C. Anshell, Mediator, (416) 322-8066, [Deborah@anshell.com](mailto:Deborah@anshell.com).*

---

# Court Provides Direction to Roster Mediators with Respect to Scheduling Mandatory Mediations

*Deborah C. Anshell\**

*This article originally appeared in the September 5th, 2003 issue of The Lawyers Weekly.*

Roster mediators are often faced with an inherent tension when provided with a mediation assignment pursuant to Rule 24.1.09 which governs mandatory mediations. The Rule provides that assigned mediators must immediately fix a date for the mediation session, and provide at least twenty days notice of the date to all counsel. In attempting to schedule the mediation, mediators are often informed by counsel that they are seeking an order for an extension, or a substitution of a different mediator to handle the matter. Roster mediators have been advised by the Local Mediation Coordinator of the Ontario Mandatory Mediation Program that parties may not change mediators without a court order. Further, parties requesting an extension or a change in timelines must obtain an order. Mediators may not schedule outside of the existing timelines. Mediators can thus find themselves having to balance their duties to the court, with their attempts to oblige recalcitrant counsel.

Some relief has been provided in the recent decision *B & M Handelman v. Landau Realty*, (2003) O.J. No. 2679, Ont. S.C.J., Albert (Master), May 14/03. This case arose from a mortgage transaction. In April, 2003 the parties selected a retired judge as their non-roster mediator and booked an appointment for June 11<sup>th</sup>, 2003 subject to court approval. However, as often happens, at the same time as the parties were arranging for an extension of time and booking the non-roster mediator, the court assigned a roster mediator to mediate one of the two related actions. Rule 24.1 requires the mediation co-ordinator to assign a mediator from the roster if the parties fail to select a mediator within 30 days after the first defence is filed. The notice appointing the roster mediator was issued by the court on April 2<sup>nd</sup>, 2003. According to the practice of the Ontario Mandatory Mediation Program, the notice of appointment was sent only to the assigned mediator, not to counsel.

Plaintiff's counsel had a discussion with the assigned mediator in which he advised him of the related action, the selection of an off-roster mediator, and the need to extend time so that the two actions could be mediated together. Notwithstanding this discussion, the assigned mediator issued a notice to counsel on or about April 27<sup>th</sup>, 2003 appointing May 23<sup>rd</sup>, 2003 as the designated date to mediate the case assigned to him.

Counsel advised the court in this case that the roster mediator made no effort to coordinate dates with them. When counsel advised the roster mediator that the mediation would not be proceeding on May 23, 2003 as indicated in the notice, the mediator issued an account for a \$300.00 cancellation fee. This was within the permissible amounts as prescribed by Regulation 451/98. Counsel then requested a case conference pursuant to Rule 77 to deal with issues arising from the aborted mediation.

Master Albert in her decision noted that the appropriate route for counsel to have taken in this case would have been to ask for an extension of time to select the mediator before the deadline referred to above. Under Rule 77 procedure orders may be made at a case conference or by way of motion. In this case, counsel asked for a case conference to address procedural issues, after the deadline to select a mediator had already passed.

Master Albert made reference to Rule 24.1.08 and Rule 24.1.09 and noted that mediators in Toronto generally interpret these provisions as requiring them to fix the mediation date even where parties have initiated steps to obtain a court order extending time but have not yet received the order. Further, she noted that the practice of some roster mediators in Toronto is to unilaterally fix a mediation date, where counsel are uncooperative with respect to scheduling a date before the expiration of the 90-day deadline. In such cases, further difficulties often arise such as the failure of counsel to file mediation briefs, or to attend the mediation as scheduled.

---

Master Albert noted in her decision that this practice of Toronto roster mediators of unilaterally fixing the mediation date is contrary to Rule 77.02 where counsel have taken steps to extend the deadline for mediation and bring related cases together.

Master Albert held that in cases under Rule 24.2 where counsel have taken steps to extend the time for mediation, bring related cases together for mediation or replace the roster mediator with a private mediator, either by way of case conference or motion, then the mediator should take no steps to schedule the mediation session until the court has disposed of the request by order. Master Albert noted that “mediators need to know that the court does not expect them to unilaterally fix a date for mediation when counsel have taken steps to obtain relief from the court”. Master Albert further cautioned that mediators should not fix dates knowing the mediation will not proceed and then expect a significant cancellation fee.

Master Albert noted that where a mediator receives evidence demonstrating that counsel have taken steps to appear before a case management master to extend the mediation deadline, or to substitute a different mediator, a roster mediator can refrain from scheduling the mediation before the court’s disposition is known. Presumably, such evidence would include motion material filed in support of this type of relief, or a scheduled case conference.

In the case at bar, Master Albert held that given that the assigned mediator was made aware that counsel were seeking an order substituting an off-roster mediator, as well as an extension of time, it would have been reasonable to refrain from booking the mediation appointment. She further found that it was unlikely that the assigned mediator had spent a great deal of time in an effort to schedule a mutually convenient date for the mediation. In fact, the mediator knew or ought reasonable to have known when he fixed the date that the mediation would not proceed as scheduled.

Master Albert thus reduced the cancellation fee from \$300.00 to \$100.00. Master Albert made reference to Regulation 451/98 which permits a mediator to charge a cancellation fee up to the prescribed amount to compensate a mediator for administrative efforts and time wasted when a mediation is cancelled so late that the time cannot be rebooked. However, she noted that “the cancellation fee is not supposed to be a penalty

to the parties or a windfall for mediators”. Master Albert made her decision to interfere with the mediator’s cancellation fee with specific reference to the minimal efforts of the mediator to schedule an agreeable date, and noted that the cancellation fee charged was out of proportion to the services provided.

The dicta in Master Albert’s decision will undoubtedly provide relief to roster mediators faced with the conundrum of having to follow the directives of the Ontario Mandatory Mediation Program with regard to scheduling mediations. It now appears clear that where there is an indication from counsel that steps are being taken to obtain an extension of the time deadlines, or to substitute another mediator, roster mediators will be relieved of their strict obligations with respect to setting dates for mediations.

Further modifications to the OMMP are also in order. It would certainly make sense for the Program to provide counsel with the Notice of Assignment of Roster Mediator simultaneously with delivery of the Notice to the assigned mediator. This would eliminate many of the scheduling difficulties currently encountered. Counsel could then take the initiative if desired to pre-empt unnecessary wrangling, by contacting the assigned mediator and advise of the steps being taken to obtain an extension or to substitute another mediator.

The Ontario Mandatory Mediation Program is progressing into its third year of operation. Hopefully, further common sense decisions like this one from Master Albert will facilitate the smooth operation of the roster program and ease the strict requirements currently placed upon roster mediators.

*\* Deborah C. Anshell practices as a full-time mediator, and is a Roster Mediator for the Ontario Mandatory Mediation Program in Toronto. Deborah can be reached at (416) 322-8066, [deborah@anshell.com](mailto:deborah@anshell.com).*

---

# Practice Tips for Roster Mediators and Mediation Representatives Attending a Rule 24.1 Mandatory Mediation

*Lawrence Herman\**

As a Roster Mediator in the Ontario Superior Court of Justice Mandatory Mediation Program, I have discovered that the rules and guidelines mediators often employ for scheduling and conducting “roster” mediations apply quite differently in practice than for private and even non-roster mandatory mediations. In this brief article, I shall set forth some of these differences and how to effectively address them. I hope this article shall provide useful information not only for mediators, but also for lawyers and party representatives who more usually attend non-roster mediations but will invariably from time to time be required to attend a roster mediation.

## **(i) Who is the Roster Mediator?**

Rule 24.1.09(6) of the Rules of Civil Procedure requires the Local Mediation Coordinator to assign a roster mediator to the action where the parties have not filed their own selection of mediator (Form 24.1A) within thirty (30) days of the filing of the first defence. This short time requirement often results in counsel missing the deadline, filing their Form 24.1A outside the delay in the belief that they can proceed with their own mediator. The roster mediator, immediately upon his appointment has exclusive jurisdiction as mediator in the court action.

## **(ii) Replacing the Roster Mediator with The Parties’ Private Mediator**

While Rule 24.1.09(1) gives the court the power to extend or abridge the delay to mediate and Rule 24.1.13 to establish non-compliance consequences, there is no specific reference to the replacement of the roster mediator with a mediator chosen by the parties. Yet the Local Mediation Coordinator requires the parties to obtain a court order for these purposes. It is not clear whether or not a Mediation Report from a mediator without jurisdiction will be

recognized as valid. Therefore, it is important that counsel address the question of selection of their own mediator if that is important to them to avoid the time and expense of bringing a motion and the embarrassment of informing the roster mediator that he is not wanted! Also, in the event that the roster mediator is only informed of his desired replacement after he issues a mandatory scheduling notice (Rule 24.1.09(7)), the Master may award him cancellation fees being the fee owing under the Mediators’ Fees Regulation. One can assume such an outcome if the parties act under the belief they have selected their own mediator and ignore the roster mediator’s scheduling attempts, the roster mediator being required to schedule the mediation as late as twenty (20) days before the deadline to mediate. Mediators selected under Rule 24.1A, whether roster or not, should call the Local Mediation Coordinator to ensure that a roster mediator has not already been appointed. While all mediators are grateful at being privately selected to conduct a mandatory mediation, the aggravation of being seen as “bumping” the roster mediator is not worth incurring.

When scheduling the mediation, the roster mediator should identify the Notice of Assignment of Roster Mediator form issued by the Local Mediation Coordinator in speaking to the party or scheduling assistant to clarify any misunderstanding, the parties assuming they filed their own mediator selection (Form 24.1A) on time. This mediator indicates that the roster mediator does not have jurisdiction to agree to his replacement. I indicate that I shall consent to and waive service on the motion for a Master’s order for my replacement. I will, however, insist on my fees if I have to go through the trouble of issuing a Form 24.1B scheduling the mediation at the “cut-off” date, the parties/counsel ignoring my repeated scheduling requests. If counsel/parties insist they have filed a proper, timely Form 24.1A, I ask that they fax to me a fax transmission sheet identifying the Form 24.1A filing with reference to time and date. My experience is that the Local Mediation Coordinator will withdraw the Notice

---

of Assignment of Roster Mediator where the transmission sheet shows timely compliance with Rule 24.1.09(4).

### **(iii) Practice Differences Between Roster and Non-Roster Mediations**

While Rules 24.1.10 (documentary requirements for the mediation session), 24.1.11 (attendance and participants' conduct at the mediation session), 24.1.12(non-compliance) and 24.1.15 (Mediator Report) apply to both roster and non-roster mandatory mediations, the roster mediator will likely have the greater challenges in scheduling and conducting the mediation as well as to collect fees for his services. Unlike a non-roster mediator who has a client relationship with one or more of the counsel/parties, the roster mediator is often a complete stranger to all other persons in the mediation process. Their not having any familiarity with this mediator often results in some reluctance to work openly with him, not a solid foundation to build a good working relationship conducive to an effective mediation.

When I am appointed roster mediator, I first contact the lawyers or parties (if unrepresented), not their assistants, to introduce myself as a mediator who practiced law for over 20 years and, if I have a practice expertise in the mediation subject area, I will provide reference names of lawyers in the field who attended my mediations. I find this not only eases their initial suspicion, but on occasion has resulted in my retaining an "unwanted" assignment. The parties filed a late Form 24.1A and they then decided not to incur the time and expense of bringing a motion to replace me with their privately selected mediator.

Rule 24.1.09 requires the court to issue an order to extend the tight timeline for the mandatory mediation to be held within ninety (90) days of the filing of the first defence. The parties, however, may agree to extend the final date to mediate a further sixty (60) for standard track actions. As the date starts to run from the filing of the first defence, in multiparty actions pleadings may still not have closed when the mediation must be held. Roster mediators should encourage the parties to consider an extension in such circumstances, or where a counsel informs the mediator that he is within the time to third party claim a party not yet named

in the action. The Local Mediation Coordinator may split related actions, assigning them to two different mediators. All participants, lawyers and both mediators should agree to have one mediator assigned to all related actions. Prematurely mediating where there are related actions not being mediated together will likely result in confusion, unrealized settlement opportunities and counsel's frustration with both mediators!

In general, counsel will be more inclined to leave the mediator appointment to court selection rather than choose their own in one of two circumstances. They may have no intention to settle, at least at the time for mediation and the foreseeable future, and therefore may use the mandatory mediation simply to obtain the mediator report and then advance the action. Some counsel are not on speaking terms or are unacquainted with, even ignorant of the mediation process. They fail to address the mediation requirement. A privately selected mediator operates in a more hospitable environment, the parties/counsel more open minded to settle at mediation, having gone through the trouble of choosing a specific mediator. Some roster mediators, in their good faith wish to adhere to the true spirit of mediation may not be adequately sensitive to this distinction.

Where the parties do not wish to settle because there is a real obstacle, for instance, the need for clarification of the law, or counsel are in agreement on the law but require factual clarification attainable through productions or discoveries, they will likely not come to mediation with settlement expectations. They will negotiate any settlement opportunities directly, or with the assistance of a private mediator at the appropriate time, and any good faith effort by the roster mediator to conduct a full and open mediation will be resented. Many experienced counsel have difficulties with roster mediators who attempt to interfere with their wishes to delay settlement negotiations. An effective mediator should identify a dispute not ready for settlement and encourage counsel to use the mediation process as an opportunity to either hold an informal off the record pre-discovery of the parties, discuss process, settle smaller issues or simply have a relaxed face to face "chat" with the other side.

Roster mediators are more likely to encounter postponements than other mediators. This phenomenon is understandable for the reasons discussed above and goes with the territory of

being a roster mediator. I remind the parties of the one time sixty (60) days extension on consent opportunity. I inform them that I must schedule within the extended time unless I am served with an on consent motion for an order or an endorsed Master's order further extending the delay no later than twenty (20) days prior to the final mediation date, the "cut off" date when I am required to schedule the mediation under Rule 24.1.09(7). By being respectful of counsel's need for postponement to properly prepare for the mediation, I usually have their cooperation. Where, however, counsel intend to hold discoveries well into the future and move for an order extending the mediation deadline for several months or longer, I ask them if they are seeking my replacement with their own mediator. I do not wish to create a self-fulfilling prophecy and talk myself out of being the mediator! Still, my experience is that this often happens in this situation. By learning about my intended replacement, I can then obtain a replacement mediation from the court rather than wait several months until the issuance of the order.

At the mediation session, the roster mediator should be especially attentive to process requirements. There is a greater likelihood of unrepresented parties, especially adversarial counsel and, in general, a greater suspicion of the roster mediator. Therefore, my opening statement tends to be longer than for a private mediation with my mediation "clients". I will generally move at a slower pace, outlining and setting the issues agenda, reframing regularly, caucusing more judiciously and later in the session than for a non-roster mediation. In general, I play a more active role in a roster mediation, taking the view that the participants are more likely to require direction from the mediator than for non-roster mediations where they are usually more experienced with and comfortable with the process.

#### **(iv) Roster Mediator's Fees**

The roster mediator's fees are fixed by tariff pursuant to the Mediators' Fees Regulation under Rule 24.1. Parties choosing their own mediator frequently expect his fees to be capped in accordance with this regulation, although he is free to negotiate his own private rate. A privately selected mediator can ask for a retainer or even require payment at the mediation as a condition to providing mediation services. One assumes that a mediator having

a client relationship with counsel/parties who selected him would not require security for payment of his fees. The roster mediator, however, is usually a complete stranger to the parties/counsel, and frequently will only be their mediator on a one off basis. As well, and as mentioned above, parties are often unrepresented or counsel unsophisticated about the mediation process. Therefore, the roster mediator may wish to obtain fees or at least retainer payment prior to the mediation. Unfortunately, the Mediators' Fees Regulation does not entitle the roster mediator to claim his fees as a pre-condition to mediate, the only reasons excusing an assigned roster mediator to mediate are conflict of interest (Rule 24.1.02) and non-compliance (Rules 24.1.12, 24.1.13).

In the event the mediator cannot collect his fees upon completion of the mediation and issuance and filing of his Mediator Report, normal civil collection proceedings are available to him. Alternatively, he may seek a Master's costs payable forthwith order, thus preventing the defaulting party from further acting in the action until the mediator's fees are paid. I indicate my fees in my covering "introduction" fax to my Form 24.1.B., enclose my standard mediation agreement highlighting the fees section ("tracking" the Mediators' Fees Regulation and disclosing my private fees rate for services rendered beyond the time allotted for the mandatory session). In addition, I send an invoice to the parties upon completion of the mediation together with a copy of my Mediator Report. Where I feel particularly insecure about collecting my fees from the nature of the communications with the parties/counsel when scheduling the mediation, I am more inclined to issue a non-compliance certificate if I do not receive the Statement of Issues and pleadings within the time requirement. The Rules Committee (Rule 24.1.07) should consider recommending a Rules amendment entitling the roster mediator to issue a certificate of non-compliance against a party in default of paying his share of the mediator's fees ten (10) days after the mediation session when the Mediator Report is due (Rule 24.1.15).

*\* Lawrence Herman, LL.M. (ADR) of the Ontario Bar is a Toronto mediator. He is on the Toronto, Ottawa and Windsor rosters. He may be contacted at (416) 781-6442 or [lherman@the-wire.com](mailto:lherman@the-wire.com).*

---

# Challenges in the Field of Healthcare Dispute Resolution

*Dr. Robert J. Robson and Pam Marshall\**

When I agreed to share some thoughts on this subject one of the first questions from another member of the Executive of the ADR Section was “What exactly is a healthcare mediator?” That is probably a good subject for another short piece.

Suffice it to say that there is a broad spectrum of problems and conflict situations within healthcare that are amenable to resolution using traditional dispute resolution techniques. Typically these situations are outside the usual litigation pathway, although it is not unusual for there to have been significant involvement of legal counsel prior to trying mediation and other forms of ADR. The disputes tend to be complex and multi-partied and certainly involve significant expense and potential disruption for facilities, healthcare providers and consumers alike.

From a systems analysis viewpoint, healthcare represents a classic complex adaptive system and this means that it is prone to both generating errors as well as originating significant innovations. The most blatant of the errors are those leading to death or significant morbidity for patients, but there is an incredible range of problems that arise without such extreme outcomes and yet with major potential for conflict.

So what should a conflict resolution practitioner know prior to venturing into the field of healthcare dispute resolution? What are the special characteristics that generate challenges for mediators? The following points should be considered:

## 1. The system is complex

This means that most disputes occur at multiple levels with many players, some of whom wear many hats. This leads to the adage “There is virtually no such thing as a two-party conflict in healthcare”. At all times, the mediator must question whether all the significant players are present. In the absence of some, the outcome is inevitably less durable and less than satisfactory.

## 2. The healthcare system institutionalizes inequality

This leads to the concept of the “uneven table” reflecting the fact that imbalances of power, knowledge and control are an inherent element of how healthcare is provided. Beginning a mediation without reflecting on this characteristic is an almost virtual guarantee of frustration for the parties and the mediator alike.

## 3. Healthcare today is a cultural minefield

We are used to thinking of this in the traditional way, in terms of language, gender, religion, race, ethnicity, or national background. Most experienced mediators will factor these issues into the approach they will adopt in any given case. But more important than the traditional cultural issues noted above is the significant clash of *professional cultures* which will frequently be an important conceptual stumbling block for a mediator. Many incidents will be framed and processed differently by all involved, physicians (be they specialists or generalists), nurses, allied healthcare workers, hospital administrators, risk managers (and don’t forget the insurers), hospital counsel, and, while vitally important and often the last considered, the patient and/or family members. It is not surprising that this makes the popular dilemma of “I’m from Venus, You’re from Mars” seem simple in contrast.

## 4. Prevention is good

Most parties to a healthcare dispute want to see it resolved, in part because they are enmeshed in ongoing relationships with other providers and consumers. But more importantly, most parties also want to see solutions that are durable. This leads directly to the need for prevention — people want to know what can be done to change the system that generated the problem so that it is less likely to recur. A major cultural shift is occurring in

---

healthcare today, reflecting a move away from the traditional approach of naming, blaming and shaming and the search for the proverbial “bad apple”, There is more recognition of the multifactorial nature of error generation, sometimes referred to as the “Swiss cheese theory of human error”. The desire to prevent future recurrences is a strong factor that must be considered by mediators as they help the parties craft agreements.

*\* Rob Robson is a healthcare mediator, emergency physician and founding director of mediate.calm. He can be reached at [rrobson@mediatecalm.ca](mailto:rrobson@mediatecalm.ca). Pam Marshall is a senior associate at mediate.calm.*

## **5. Where’s the patient?**

This is really an extension of all the other points but it is so fundamental that it deserves repeating. It is a common situation that parties to a healthcare dispute feel more comfortable excluding patients from the process of resolution. It goes without saying that this most unfortunate approach is merely a prescription for perpetuating problems.

I have highlighted a few of the unique characteristics of the healthcare system that will generate special challenges to all (lawyers and non-lawyers alike) who try to assist in the resolution of healthcare disputes. Proceeding without an awareness of these factors is like tying both your hands behind your back before starting an appendectomy.

---

# The Effective Use of Caucus in a Mediation

*Barry B Fisher\**

On June 11<sup>th</sup> 2003 the Section held its final program for this season. The practice talk was led by Barry B. Fisher and Paul Iacono Q.C. and was attended by 18 members of the Section.

The discussion focused on the use of the separate caucus in mediations; that is the part of the mediation where the mediator meets with only one of the parties at a time. There was a general consensus that most mediators start off the mediation with a joint caucus and then move to a separate caucus, although there were differing views on what is done in each caucus. Some participants indicated that they used the joint session only for the purpose of information exchange and issue identification, while others expressed the view that the joint session could be used more extensively to develop the interests of the parties and joint solutions.

When the issue of which confidentiality rule applied to the separate caucus, the vast majority of the mediators indicated that they used the model that the mediator was free to use all information obtained in the separate caucus unless the party told them otherwise, as opposed to the opposite rule that everything was confidential and could only be conveyed to the other party with the express consent of the party in the separate caucus.

Next was the discussion as to when to switch from joint to separate caucus. There was a general agreement with the idea that it made sense to switch when there either a lull in the discussion or when the emotional flare-ups were getting out of hand. When asked which party they would meet with first, it seems that the general practice in the personal injury world is for the mediator to meet with the plaintiff first. There was no similar consensus among non-personal injury mediators.

Most mediators indicated that they thought it was a good idea to always show the parties that you are working, even when you are waiting for one party to respond. Some mediators worked on the paperwork in the case, other chose this downtime to hang-out with the other group while waiting for the first group to respond, which often provided useful information later on in the mediation.

When asked what mediators hoped to accomplish in the first separate caucus, some mediators indicated that they expect to leave the caucus with an offer, while others indicated that they were only seeking to establish the parameters of the settlement discussions and did not even ask for offers at this early stage. Again the personal injury mediators said that they generally expected the plaintiff to make the first offer, whereas non-personal injury mediators had no such expectation.

There was a lively discussion about what to do when the mediator is asked to convey what the mediator thinks is a ridiculous offer or response. Most mediators indicated that they would first try to counsel the party from making the ridiculous offer, explaining to the party that making such an offer is likely to derail the process. Failing that, some mediators indicated that they would simply refuse to convey such an offer, or at least suggest that the party make the offer directly to the other side.

\* *Barry B. Fisher, Barry B. Fisher, Barrister, Arbitrator & Mediator, (416) 585-2330, [barryfisher@rogers.com](mailto:barryfisher@rogers.com).*

---

# Toronto Psychologist/Lawyer/Mediator Receives International Award for Her Outstanding Contributions to the Field of Mediation

Barbara Landau, Ph.D., LL.M., a Toronto-based mediator, psychologist and lawyer, recently received the John M. Haynes Distinguished Mediator Award for her far-reaching academic, professional and humanistic contributions to the field of mediation. The award was presented on October 16<sup>th</sup> at the annual conference of the Association for Conflict Resolution (ACR) in Orlando, Florida. ACR is a nonprofit organization representing more than 6000 mediators, arbitrators, educators and other conflict resolution professionals. The award is named for the late John M. Haynes, a prominent U.S. mediator who exemplified innovation and creativity in his efforts to resolve challenging family conflicts.

political activism, Dr. Landau is an inspiring leader, trainer, and role model for the next generation of conflict resolvers.

Dr. Landau co-authored the *Family Mediation Handbook* (Butterworths), *From Conflict to Creativity* (Jossey-Bass), edited *Children's Rights in the Practice of Family Law* (Carswell) and has published extensively about mediation in professional journals. She is a former president of the Ontario Association for Family Mediation, a former executive board member of the Academy of Family Mediators and previous chair of its International Committee and its Domestic Violence Committee. She was an executive member of the OBA Alternative Dispute Resolution Section, a past Vice President of the Feminist Legal Analysis Section, and a Vice President of the ADR Institute of Ontario. She was also an executive member of the first Ontario Status of Women Council. The Council was very influential in bringing about reforms in family law in Ontario in the 1970s, promoting educational opportunities for female offenders and advocating for workplace rights for women.

Dr. Landau has also spearheaded and facilitated Dialogue Groups for Jews and Palestinians and for Jews and Muslims. She organized High Holy Days dinners for members of multi-faith groups, contributing greatly to the mutual understanding of very disparate peoples and generating warm feelings and friendships among them. With her deep and abiding personal commitment to social change through mediation methods and professional and

---

## Programming for 2003-2004

The ADR Section has announced its programming theme for the year. We will be working with litigation lawyers in different practice areas to promote and expand ADR. To implement this theme, we will be hosting a series of seven morning discussion groups focusing on seven different practice areas. The format will consist of a representative from the ADR Section representing the neutral community and one or two lawyers from the subject practice area. Both the mediators and the lawyers will have significant experience in mediations in that practice area. The format will be a facilitated discussion between panel members and the participants. Watch for breakfast seminars in the following practice subjects: family law (see box on the right), insurance litigation, business disputes, estates, construction litigation, health law, and employment litigation. Dates for future breakfast seminars will be announced shortly. These promise to be informative and practical, for both dispute resolution professionals and litigators.

### Upcoming Program

#### Practice Talk

Mark your calendar for the first practice talk of the season. On November 19, 2003, Hilary Linton, Tami D. Moscoe, and Sheila Kirsh will be leading a discussion on "Family Mediation: How to Make it Work for Lawyers and Mediators". Join representatives from both the ADR and Family Law Sections to review how to maximize the success of family mediation, from the perspective of the lawyer, the mediator and the clients. The presenters have significant experience mediating and/or being counsel to clients in mediation. Come hear them share their secrets of success ... and share your own!

## Call for Seminar Ideas

Having recently been named as Program Co-ordinator for the ADR Section for the 2003-2004 season, I now have the daunting responsibility of organizing the programs for the new year, starting in the fall of 2003.

I am asking all of you to think up ideas for programs that you would like to see the Section put on this year. They can be morning practice sessions, after work wine and cheese type topics or dinner meetings. Anyone putting forth an idea can, if they wish, be a speaker at the program. This is an excellent way to enhance your visibility among your peers and clients.

I have already received two ideas; one about what every ADR practitioner needs to know about copyright, and the other on the subject of mediation in statutory tribunals where the public interest plays a part.

Keep those great ideas coming!

You can contact me at (416) 585-2330 or [baryfisher@rogers.com](mailto:baryfisher@rogers.com).

*Barry B. Fisher*

*The articles, which appear in this publication, represent the opinions of the authors. They do not represent or embody any official position of, or statement by the OBA except where this may be specifically indicated; nor do they attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein are intended to be used thoughtfully, as nothing in the work relieves readers of their responsibility to consider it in the light of their own professional skill and judgment.*

**Editor:**  
Deborah C. Anshell  
**Copy Editor:**  
Vickie Rose

## Section Executive 2002 - 2003

Chair: **Paul M. Iacono, Q.C.**  
Beard Winter LLP (416) 306-1810  
piacono@beardwinter.com

Past Chair: **Anne I. Gottlieb**  
Mediation at Work Ltd (416) 921-5179  
cdcanneg@aol.com

Vice-Chair:  
**Paul Jacobs, Q.C., C.Med., C.Arb.**  
Elkind, Lipton & Jacobs LLP  
(416) 367-0871  
pjacobs@eljlaw.com

Newsletter Editor:  
**Deborah C. Anshell**  
(416) 322-8066  
deborah@anschell.com

Program Coordinator: **Barry B. Fisher**  
Barry B. Fisher, Barrister, Arbitrator &  
Mediator (416) 585-2330  
barryfisher@rogers.com

AGR Liaison: **Wendy Moro**  
Mind Your Matters, Inc. (905) 471-4358  
wendy.moro@sympatico.ca

CLE Liaison: **Anne I. Gottlieb**  
Mediation at Work Ltd (416) 921-5179  
cdcanneg@aol.com

Section Development Coordinator:  
**Jamie K. Trimble**  
Hughes, Amys LLP (416) 367-1608  
jtrimble@hughesamys.com

Member-At-Large:  
**Harvey M. Haber, Q.C.**  
Goldman, Sloan, Nash & Haber LLP  
(416) 597-3392  
haber@gsnh.com

Member-At-Large: **Alan D. Levy**  
A.D. Levy Consulting (416) 482-4321  
alanlevy90@hotmail.com

Member-At-Large: **Hilary A. Linton**  
Riverdale Mediation (416) 466-6264 x4  
hilary@riverdalemediation.com

Member-At-Large: **Eva E. Marszewski**  
(416) 927-1820  
marszewski@aol.com

Member-At-Large: **M. Gaylanne Phelan**  
The Centre for Estates Mediation  
(416) 865-0295  
phelan-law@sympatico.ca

Member-At-Large: **Bruce R. Robinson**  
(416) 487-4888  
bruce.robinson4@sympatico.ca

Member-At-Large: **Robert J. Robson**  
Mediate.Calm (613) 590-7197  
rrobson@mediatecalm.ca

Member-At-Large: **Richard Sadowski**  
Sadowski Allen & Associates  
(416) 208-3388  
rsadowski@sadowskiallen.com

Member-At-Large: **Mary T. Satterfield**  
(416) 763-5251  
mts@on.aibn.com

Staff Liaison: **Robert Falconer**  
Ontario Bar Association  
(416) 869-1047 x319  
rfalconer@oba.org