



CHAPTER 11

Alternative Dispute Resolution¹

1. INTRODUCTION

Alternative Dispute Resolution (ADR) is the resolution of disputes by means other than traditional litigation, where a resolution is the result of negotiation between parties through their lawyers or imposed on them by a judge. ADR may help separated spouses achieve a resolution with less bitterness and expense than traditional litigation and may help them to have a more positive relationship, which will be especially important if they have children. It can also allow for more flexible and individualized resolutions than traditional litigation.

While different types of ADR have been in use for years, in family law ADR generally involves participation in one or more of the following: mediation, mediation-arbitration, arbitration and collaborative law. Each has its own set of advantages, disadvantages and special considerations - all the focus of this chapter with an emphasis on the lawyer's role in advising clients.

2. MEDIATION

2.1 Definition

Mediation is a method of dispute resolution whereby the parties retain a third-party professional to assist them in reaching an agreement. A more specific definition is as follows:

Family mediation is a co-operative dispute resolution process, in which an impartial person called a mediator, helps parties reach a mutually acceptable resolution of some or all of the issues of the disputes relating to the breakdown of their relationship. Participation is voluntary and agreement is consensual, based on each party obtaining sufficient information and advice.²

The purpose of mediation is to assist the parties to accept the realities of their respective situations, understand the underlying interests of the opposing party, and try to reach agreement about how to settle outstanding differences. Its overriding goal is to build consensus between litigious or potentially litigious spouses. It is not marriage counseling nor is it to be used as a tool to pressure a party into, or to debate the wisdom of, reconciliation. The mediator's role is to listen to both parties and try to help them reach their own agreement.

A mediator does not, should not and cannot impose an agreement, decide an issue or provide legal advice. A mediator is also not an assessor, namely, a person retained to provide observations, opinions and make recommendations that could be detrimental to one side. At

best, a mediator takes two diametrically opposed views and through discussion, questioning, prodding and often direct challenging of the parties' underlying motives, seeks to expose the real interests that lie behind their positions, helping them create new options for settlement that neither had previously considered and paving the way for an agreement that meets both their needs. Even if the parties do not reach an agreement, mediation allows for a focused process in which the parties identify the issues and canvass potential solutions. It can provide a form of catharsis enabling the parties to acknowledge the destructiveness of blaming and importance of accepting responsibility for their behaviour, which can, it is hoped, put them in a better mindset for a negotiated settlement with the assistance of their counsel.

In practice, it is common for lawyers not to be present with their clients when the issues are being mediated, especially where parenting issues are concerned. While the lawyers are usually involved in the selection of the mediator, deciding whether it will be "open" or "closed" (see below), the number of sessions and how the fees shall be paid, the actual sessions usually occur solely between the parties and the mediator. Clients can and often do report back to their counsel as they see fit after sessions for guidance and advice. When an agreement is reached, the mediator reports back to the lawyers, preferably in a memorandum of understanding, and the lawyers take over, draft and revise the separation agreement and ensure each party signs.

Because of the lawyer's limited role in the actual mediation sessions, one of the mediator's most crucial responsibilities is to ensure that the parties employ a fair, safe, and balanced process to negotiate their settlement. The mediator should not be in a position of power over the parties, for example, by also being the assessor - otherwise there would be concerns that the settlement was not a true reflection of the parties' views but rather something imposed by subtle pressure from the mediator. Throughout the process, the mediator must act fairly in structuring the negotiation, maintaining the channels of communication with each party and between them, articulating their needs, identifying the issues in dispute and making suggestions.³

2.2 Open vs. Closed Mediation

One of the most important considerations for lawyers is whether the mediation should be "open" or "closed". Open mediation means that at the conclusion of the mediation, the mediator files or prepares a full report and is free to include anything that he or she considers relevant to the matter. Evidence of anything said or of any admission or communication made in the course of the sessions is admissible in a proceeding whether the clients consent or not. Closed mediation means that at the conclusion of the mediation, the mediator files or prepares a report that either sets out the agreement reached by the clients or states only that they did not reach agreement on the matter. Here, evidence of anything said or any admission or communication made in the course of the mediation is not admissible in any proceeding except with the consent of both parties.⁴

It is extremely important that the lawyer canvass the difference between open and closed mediation with the client *before* signing the agreement to mediate. Whether mediation is open or closed is a decision to be made by the parties; usually, however, the mediator or the lawyers will have a preference which tends to influence the decision. Proponents of open mediation proffer that participants in closed sessions are prone to take unfair advantage of the fact that what is said cannot be revealed in court and are often less motivated to adopt reasonable attitudes and positions. Critics of open mediation, however, contend that knowing that each and

every utterance made in a session might be used in court does nothing inhibits the parties from negotiating in a full and frank manner.

The truth is that while neither method is perfect and each has its advantages and disadvantages, mediation cannot be effective unless both sides are genuinely open to the process. Spouses who are truly motivated to mediate in good faith should be equally able to resolve their dispute regardless of whether the mediation is open or closed. In reality, while the norm is that most mediation is closed, clients should be made aware of the differences in consequences between the two types before they start the process as there is no guarantee that there will be a resolution of their case by this method.

Lawyers should be aware of the recent decision in *C.A.M. v. D.M.*⁵ where the Ontario Court of Appeal refused to admit into evidence reports prepared by a clinical investigator for the Office of the Children's Lawyer where such reports were prepared as part of an attempt at a failed mediation of the appeal. The case is also significant in that it confirms the Court of Appeal's policy to abide by its Practice Direction for Pre-Hearing Settlement Conferences in Family Law Appeals Pilot Project, a pilot mediation project for family law appeals. The policy is that if there is a successful resolution arising from the mediation, the resulting agreement and draft order are disclosed to the panel when the appeal is to be heard. Otherwise, "the fact of the settlement conference, the memoranda filed and all deliberations in the process will remain strictly confidential and without prejudice to the parties' legal positions."⁶ Speaking for the Court, Rosenberg, J.A. held that the appellant's "proposed fresh evidence" consisting of the parties' subsequent involvement with the Office of the Children's Lawyer and the investigator's reports prepared after the trial were not in accordance with the Practice Direction and should not be accepted as fresh evidence. To allow such reports to be filed into evidence without the other party waiving the confidentiality and without prejudice conditions would be incompatible with, and undermine the legitimacy of the without prejudice nature of the settlement conference process.⁷

2.3 Optimal Conditions

It is important for the lawyer to be able to identify whether or not the client is a suitable candidate for mediation. While by no means exhaustive, and while the presence or absence of any of these factors does not necessarily predict for or against an eventual outcome that is satisfactory to the parties, in general the more the conditions listed below are present, the greater likelihood of a speedy agreement being amicably reached:⁸

- the parties are emotionally ready;
- they are evenly matched in terms of bargaining power;
- they are patient in temperament and flexible in attitude;
- they are good listeners;
- where parenting issues are concerned, they are child-focussed;
- they do not shy from fulfilling their financial disclosure obligations;
- they are motivated to reach a negotiated resolution;

- they trust each other or, if not, they trust the mediator to be the guardian of trust;
- there are genuine issues to negotiate;
- there is more than one way to shape or structure a settlement;
- a critical legal principle or governing regulation is not in issue;
- the timing and certainty of an early outcome are important to them;
- they want to control the degree of risk associated with a resolution;
- they want to craft their own resolution;
- cultural factors or considerations exist which would not or perhaps could not be addressed in any other process;
- a less formal, more caring atmosphere is needed to allow challenged or vulnerable persons to participate; and
- non-evidentiary issues are as important as, or more important than technical legal issues.

On the other hand, mediation may not be advisable if some or all of the following conditions are present:⁹

- there is a significant power imbalance between the parties which cannot be accommodated or addressed in a fair mediation process;
- there is any sign of bullying;
- there is a history of abuse;
- one party will not agree to make full and frank financial disclosure;
- the parties cannot or will not take responsibility for the outcome;
- one or both parties demonstrates extreme inflexibility on any issue; and
- there is a lack of commitment by one or both parties which manifests itself in failure to meet deadlines, last minute cancellations or general disdain of the process.

Recognizing whether the client is a suitable candidate for mediation is important for several reasons. First, the lawyer's skills may be called upon in different ways depending on the presence or absence of the above-noted factors. For example, the lawyer with a self-aware, resolution-oriented client will be kept informed by the mediator as to the progress of the sessions and may be consulted from time to time as to his or her suggestions; for the most part, however, the lawyer with this type of client is in the background until a resolution is achieved. On the

other hand, the difficult, impatient, revenge-oriented client will often require more involvement by the lawyer in the process. In these situations, the lawyers and mediator often collaborate more in order to resolve certain issues as they arise.¹⁰

2.4 Mediation and Domestic Violence

Domestic violence is the intent by a spouse to intimidate, either by threat or use of physical force, the other spouse's person or property.¹¹ A lawyer advising a client who has been a victim of domestic violence and is now contemplating mediation must proceed cautiously and with full awareness of the client's circumstances. Since the purpose of violence is to control someone's behaviour by the inducement of fear, the impact of violence may leave the client in fear of, and/or in fear of confronting or challenging her former partner even well after separation. This creates a power imbalance that may prevent meaningful negotiations, thus increasing the chance she will agree to an unjust or impractical settlement. This is particularly so if both parties are in the matrimonial home during the process. An abused spouse living under the same roof as her partner is far more susceptible to intimidation tactics, both emotional and physical, than spouses living in separate residences and thus lawyers should be very confident that mediation is suitable for the client when these circumstances exist. Even if the parties have separated and the incidents of domestic violence occurred some time in the past, the emotional effects of the violence may continue to have an impact and mediation may not be appropriate.

If the client already has a lawyer before deciding to mediate, he or she plays an integral role in advising the client. The lawyer should ask questions of the client which will hopefully establish whether domestic violence was present in the relationship, and if so, to what extent. The lawyer should inform the client that mediation requires both parties to be open and candid in expressing their views - even if they are strongly opposed by the other spouse - and that domestic violence may impair the client's ability to do so. The lawyer should advise the client not to mediate if there is anything to suggest that the client's ability to negotiate on an equal level with the other spouse is impaired by the history of domestic violence; in most cases of abuse, this will be the case and mediation will not be appropriate.¹²

The lawyer advising a client on this matter may wish to consult with any therapist that the abuse/violence victim is seeing to help him or her advise the client. Also, it is probably wise for the lawyer to speak to the mediator if the parties have already begun mediating at the time of the lawyer being retained, as the mediator is likely well-trained in this area. If the parties have not yet started mediation at the time the lawyer becomes involved, the lawyer might consider having the client screened by the mediator before advising the client on the pros and cons of mediation. The mediator might rule mediation out anyway or have other suggestions for the lawyer and clients on the issue. If the client insists on pursuing mediation despite a history of domestic violence, the mediator should engage in his or her own determination at the intake stage as to whether domestic violence was present in the relationship and whether mediation is feasible.

If the client has not previously seen a lawyer, this may be the first time that questions regarding domestic violence have been posed - or answered. The mediator must determine whether the abuse and/or violence renders the client in an unequal bargaining position that would prevent him or her from negotiating. Where a client has been identified as having experienced domestic violence and incapable of negotiating as a result, the mediation should not proceed and the client should be encouraged to obtain immediate independent legal advice and to consider applying for a restraining order as soon as possible. Where domestic violence has been disclosed and the mediator has determined that the client has not been rendered

incapable of negotiating, wants mediation and has independent legal advice, the mediator may still conduct the mediation in a manner that offers maximum protection for the spouse. For example, he may meet with clients in separate rooms or meet with them together but allow the spouse to have a counselor or friend present along with frequent contact with their separate lawyers.¹³

2.5 The Process

Although not all mediators employ the same process, the following constitute the customary steps in a typical family mediation where both clients already have lawyers:

Step #1: The lawyer discusses all aspects of mediation with his client and advises whether mediation would be feasible/advisable.

Step #2: If the parties agree to attempt mediation, the lawyers make recommendations and the clients eventually decide on a mediator and the sharing of cost. The decision is reached as to whether the mediation will be open or closed.

Step #3: The mediator is contacted by the lawyers, consulted as to his or her availability, and a referral is made.

Step #4: The mediator meets with the lawyers, usually by phone conference call, obtains the basic details of the case, establishes the terms of the assignment including payment and confirms whether the mediation will be open or closed.

Step #5: The clients (and sometimes the lawyers) sign an agreement to mediate. A precedent attached to these materials as Schedule "A" may be of assistance. Sometimes the mediator simply sends a confirming letter to the lawyers.

Step #6: The mediator meets the parties for an introductory meeting to obtain the basic details of the case, glean their expectations and assess the viability of mediation, including assessing for any domestic violence issues. This meeting is usually conducted separately.

Step #7: The mediator conducts one or more meetings with the parties, engaging in problem-solving, discussion and negotiation of the issues. If the parties are mediating financial issues, the mediators often work through the financial statements and discuss disclosure issues with the clients.

Step #8: The mediator liaises with counsel throughout the process as necessary apprising them of the progress or eliciting assistance on an issue. Usually, mediators generally do not contact the lawyers unless directed to do so by the clients. More common is that the clients seek the advice of their lawyers from time to time during the process or for the lawyers to call the mediator.

Step #9: The mediator assists the parties in reaching an agreement on one or more essential terms. He or she summarizes the details of the agreement and forwards it to the clients or lawyers for their comment and input. This may be in a

letter or basic outline called a “memorandum of understanding”. Some mediators prefer to draft the entire agreement itself. If not already prepared by the mediator, the lawyers draft the agreement.

Step #10: Each lawyer meets with his or her client and provides independent legal advice. The lawyers exchange comments, copying the mediator as necessary.

Step #11: If necessary, revisions to the agreement are discussed and, if necessary, mediated and resolved.

Step #12: Final revisions are made and the agreement is signed by the parties in the presence of their respective lawyers.

The process described above is that followed generally by privately-retained mediators who are not working through the family court mediation centers. The process used by mediators at courthouses which offer mediation is often considerably different and lawyers should be familiar with the procedure used at court if the parties are contemplating using such a service.

2.6 *Lawyer’s Role*

Of utmost importance is the lawyer’s responsibility to provide independent legal advice to the client. There is often a tendency on the lawyer’s part to refrain from fully advising a client in the context of a mediated settlement as one would in a traditional litigation setting. The tension arises when the lawyer feels the client would be better protected if a particular clause was removed from or added to the memorandum of understanding when the client has already agreed in principle to something different in mediation. The tension is heightened when the client very much wants to minimize legal and mediation costs and “just get it over with”. In the face of such pressure, the lawyer must be ever-mindful of the prime responsibility to advise the client fully of the legal aspects of the proposed agreement. The following extract captures the essence of what is required:

Although the mediator may prepare the agreement, the ultimate responsibility of advising the client on the legal implications rests with the lawyer who is providing independent legal advice to the client. The lawyer must ensure that the client is fully aware of the nature and consequences of the contract. If any difficulties arise out of the agreement, the lawyer, not the mediator, is legally responsible...Lawyers must be careful not to undo what the parties have achieved in mediation; however, the lawyer, as legal advisor, must be mindful of the role to ensure what the parties are entering is an agreement that is enforceable, legally binding and, most importantly, correctly expresses their intentions. At some future time the agreement itself may be the subject of dispute or even litigation and the professional liability is not the mediator’s but the lawyer’s. This is perhaps the most challenging and most difficult stage of the mediation process for the lawyer.¹⁴

While not purporting to be an exhaustive list, the following summary highlights the lawyer’s roles and responsibilities in advising a client engaged in the mediation process. The lawyer’s roles and responsibilities include, but are not limited to the following¹⁵:

- *Selecting the mediator:* The lawyer can help the client with such decisions as assessing the mediator’s qualifications, evaluating their professional experience,

checking out references, determining costs and method of payment, obtaining availability, finding out any pre-conceived ideas about custody or open vs. closed mediation.

- *Providing independent legal advice:* Each participant should understand his or her rights prior to negotiating the terms of an agreement. If this is done, clients are more likely to reach agreements which are reasonable as well as durable.
- *Preparing the client:* Ensure the client has a clear understanding of the goals of mediation and the process. Ensure the client understands the mediator is a facilitator, not a legal advisor and that the rules and goals in mediation differ from the adversarial process.
- *Demonstrating an ability to work in the mediation structure:* The mediator may seek out the lawyers' assistance with a particular problem, practical or legal, and the lawyer must be prepared to work with the other lawyer and the mediator to overcome it. Part of this process may involve the lawyers offering their interpretations to the (often non-lawyer) mediator of certain aspects of the law.
- *Demonstrating an ability to know what services to offer:* Understanding the dynamics of mediation and helping the client decide whether to enter mediation is key. The lawyer must understand that mediation is not appropriate in every case or for every issue and must avoid agreeing to the process when s/he believes it will not work.
- *Providing advice on selecting the mediator:* At a minimum, the lawyer should have some knowledge of the person to whom the client is being referred and an appreciation of their suitability for the assignment. At the highest, the lawyer should be actively involved in the selection of the mediator and advising the client not to participate if s/he feels the mediator is not right for the case.
- *Avoid interfering with the mediator and the mediation process:* Lawyers should deal with matters as they arise and let the mediation run its natural course. They should refrain from becoming emotionally involved with the client, abstain from seeking to preserve control over "their" client and exercise restraint so that the adversarial process is not perpetuated.

The above summary does not purport to be an exhaustive paper on all aspects of mediation. For more information about mediation in general, readers may wish to consult on one or more current texts and resources referred to at the end of this chapter.¹⁶

3. ARBITRATION AND MEDIATION-ARBITRATION

3.1 *Definition and Arbitrator's Role*

Arbitration is a legal procedure where the parties agree to appoint a person, who becomes the arbitrator, to review the evidence and arguments of the parties and render a decision, called an award, which is binding.¹⁷ The role of the arbitrator has been concisely summarized as follows:

In arbitration an independent person acts in a judicial way hearing evidence and making a decision, which is binding on the parties. This ends the dispute subject to limited rights to appeal to court. The arbitrator must give each party a right to be heard on all issues and fully respond to the other side's case. An arbitrator decides only at the end of the process after hearing all of the evidence and argument. The arbitrator must avoid contact with the parties outside of the formal process to prevent any apprehension of bias and the influence of what may be heard or seen outside of the process. The arbitrator may be any person selected by the parties or by the selection process for appointment of an arbitrator. Often lawyers are selected to arbitrate due to their knowledge of law and ability to convene over a hearing...One of the main benefits of arbitrator is the ability to choose who will decide the dispute rather than be at the mercy of the judge who happens to be appointed by the court.¹⁸

In addition to the benefit of being able to select an experienced decision-maker, arbitration offers three other advantages. First, the parties have the ability to decide which steps they will take (examinations, affidavit of documents, conferences, etc...), what documents they will exchange and the timelines, whereas in court no such freedom exists. Second, unlike in traditional litigation, parties to an arbitration can not only choose their hearing date but usually have the hearing much earlier than having to wait for a trial. Third, and perhaps most important, parties to an arbitration can and often do opt out of any appeal route. This promotes finality far more than in the court setting where a "final" decision can be appealed, leading to a new round of stressful and expensive litigation. Arbitration, like mediation, also has the advantage of allowing for a private resolution of a dispute and thus minimizing the risk of exposing the spouses and their children to public disclosure of highly intimate and personal matters.

3.2 Legislative Basis - Arbitration Act

An arbitrator's jurisdiction is limited by court order or the document signed by the parties in which they agree to arbitrate, often called the "submission to arbitration". The arbitrator has no inherent jurisdiction; however, pursuant to the *Arbitration Act*¹⁹ (the "Act"), the arbitrator has the following powers if not circumscribed by the parties or judge:

- to decide questions of law or refer such questions to court;²⁰
- to rule on its own jurisdiction or on the validity of the Act;²¹
- to make an order for the detention, preservation or inspection of property;²²
- to determine the procedure to be followed during the hearing and to determine when and where it will be conducted, having regard the parties' "convenience" and other circumstances of the case;²³
- to appoint an expert to provide evidence before the arbitrator;²⁴
- to administer an oath or affirmation²⁵;
- to require a witness to testify;²⁶
- to make interim decisions;²⁷

- to dismiss a claim where a party fails to cooperate or proceed without the party who is not cooperating and/or delaying;²⁸ and
- to award costs including the arbitrator's fees.²⁹

The clear intention of the Act is to require parties to use the dispute resolution mechanism that they agreed to when they contracted.³⁰ Thus, when crafting the terms of an arbitration, lawyers have the ability to participate in a process that is flexible and accommodating to the parties and counsel. This flexibility, however, is subject to sections 19(1) and (2) of the Act which require the parties to be treated "equally and fairly" and that each be given an opportunity to present their case and respond to the other side's case. Under section 3, an agreement to arbitrate may not vary or exclude, among other things, these two criteria which are commonly called the "rules of natural justice". The following principles relating to the rules of natural justice apply to the conduct of all arbitration hearings:

- adequate notice of the time and place of hearing must be given;
- each party must be allowed to lead evidence and to cross-examine;
- each party must be allowed to make submissions and to respond to the other party's submissions;
- the hearing must be conducted in the presence of both parties;
- the process must avoid evidentiary surprises for each party;
- the process must ensure each party knows clearly the case to be met; and
- each party must be allowed to make submissions if the arbitrator desires to consider evidence that has not been put into the record by either party.³¹

It has recently been held that the fact that an arbitrator does not, on his own initiative, offer an adjournment to an unrepresented participant is not a breach of section 19: *R.L. v. J.M.*³²

3.3 The Process

As in mediation, there is no one correct way of setting up an arbitration. The following, however, is an outline of how a common family law arbitration usually proceeds.

Step #1: Lawyers discuss the feasibility of arbitration with their clients.

Step #2: Lawyers propose and agree upon an arbitrator and, ideally, the sharing of cost.

Step #3: Lawyers prepare and clients execute a Submission to Arbitration which contains a list of the issues to be decided, the name of the arbitrator, the time and place of the arbitration, information on the procedure to be employed, whether or not the parties waive their right to appeal, a waiver of the parties' right to litigate the issues in court, a waiver of the arbitrator's liability and details of the arbitrator's

fees. A precedent attached to these materials as Schedule “B” may be of assistance.

Step #4: Lawyers have a preliminary meeting with the arbitrator.

Step #5: Lawyers prepare and file briefs.

Step #6: The hearing is conducted.

Step #7 : The arbitrator makes his/her award.

3.3.1 The Preliminary Meeting

Other than preparing for and presenting the actual case during the arbitral hearing, the lawyer must devote significant time and attention to the preliminary meeting. The preliminary meeting is where the arbitrator and lawyers decide the precise manner in which the hearing will proceed. During the meeting, which is usually but not always held by conference call, questions are posed and decisions are made on the following issues:³³

- *Identification of the Parties:* Who is the applicant? Who is the respondent? Who will go first in terms of presenting evidence?
- *Definition of the Issues:* If not already contained in the Submission to Arbitration or court order, what issues will the arbitrator decide?
- *Details of Hearing:* Principally, the exact time, date and location of the hearing.
- *Pleadings:* If litigation has commenced, are the pleadings sufficient? If not, the arbitrator may require the parties to submit a statement on the points in issue, their position on each and the relief sought. Any documents relevant to the statement may be attached.³⁴
- *Financial Statements/Net Family Property Statements:* Are the existing statements sufficient or are fresh statements required? If so, timelines for their exchange should be established.
- *Disclosure:* Is additional disclosure required? If so, timelines for its exchange should be established.
- *Sanctions for Non-Compliance:* How will the arbitrator deal with a party who does not comply with timelines or is uncooperative in some other manner?
- *Temporary Proceedings:* Is there a need for a temporary step or order to be conducted or made before the main hearing?
- *Witnesses:* Who will the witnesses be, what will the timelines be for the exchange of witness statements and will a Summons to Witness be required for any of them? Additionally, will their evidence be under oath, or other affirmation or not?³⁵

- *Expert Evidence:* Has any expert evidence been obtained? Should a joint or third expert be retained?
- *Settlement Meeting:* Should a settlement meeting be held prior to the hearing and if so, will it be conducted by the arbitrator or another third person unfamiliar with the case?
- *Final Nature of Award:* Will the award be final and binding or will the parties have a right to appeal? This should already be determined and included in the Submission to Arbitration. If the right of appeal is to be preserved, a court reporter is required so that a transcript can be prepared.
- *Format of Evidence:* Who will go first and when will the arbitrator be able to ask questions? The common practice is that the arbitrator allows the evidence-in-chief, the cross-examination and reply all to be completed before asking any questions and then allows each party to ask any questions which arise out of the arbitrator's questions.
- *Rules of Procedure and Evidence:* What rules of procedure and rules of evidence will be used at the hearing? Will they agree that certain types of hearsay evidence may be admissible?
- *Costs:* If not already covered in the Submission to Arbitration, what is the arbitrator's hourly rate and retainer? Will the parties grant the arbitrator the ability to allocate costs depending on the award? In addition, the provisions of section 54(5) of the Act, which deals with offers to settle, should be discussed.

The arbitrator will then commit everything that was agreed upon to writing and send a copy to counsel. Any errors or clarifications should be immediately brought to the opposing side's attention. If all of the above are sufficiently completed, the parties, counsel and arbitrator will benefit from a well-organized and efficient arbitration.

3.4 Mediation-Arbitration

A popular variation on the strict arbitration model is "mediation/arbitration", commonly known as "med/arb". Mediation-arbitration is a two-step process whereby the parties retain one person to assist them in reaching a negotiated agreement, failing which they imbue that person with the ability to make a binding decision. The process has been explained as follows:

In the mediation/arbitration process the mediator first sets aside a specific time for mediation and it is only when the mediator/arbitrator determines that the mediation has failed that the process then becomes an arbitration. The arbitrator, at that point, ignores all that has taken place in the mediation and hears the matter afresh as in an arbitration. The arbitrator cannot mediate while he or she is arbitrating and cannot arbitrate while he or she is mediating. They are separate processes and they must be kept distinct.³⁶

As with an arbitration, the parties exchange briefs which contain their version of the facts, the legal bases for their request and any supporting caselaw. These briefs are exchanged and filed with the mediator/arbitrator before the first mediation session. The mediation component usually lasts between half a day and several sessions. At some point, either an agreement is reached or it is clear no resolution will be achieved without moving to the next phase, the arbitration. A separate date is scheduled, witnesses are prepared, a hearing room is booked and the arbitration proceeds with the former mediator now acting as decision-maker.

The mediation/arbitration process has advantages and disadvantages of which lawyers need to be keenly aware. Like pure mediation, the process is private, confidential and offers parties the option of selecting an experienced person to help them reach an agreement in a setting and manner entirely of their own choosing. The arbitration component is designed to allow for a relatively quick and final decision to be made by the same person in the event an agreement is not achieved, thus saving time and, hopefully, money. Proponents also assert that since at the end of the mediation, the parties usually know the mediator's stance on an outstanding issue, it is more likely they will save themselves the time and expense of a hearing and promptly settle.

Critics, however, point out that any mediation which has a built-in dispute resolution mechanism is not really mediation at all. Instead, they argue that when negotiating the issues the parties will inevitably have their eye towards what the mediator thinks and believes in order to persuade him/her to a particular point of view owing to the fact that at the end of the day the decision will not be theirs to make. An additional critique is that the mediator may glean information from one side during a caucus which may not be shared with the other side. If the mediation is not successful and the case is arbitrated, there is a risk the arbitrator may rely on that information in reaching his/her decision. Proponents of the process counter that in this regard they are bound to make an award based solely on the evidence presented and are not unlike a judge in a *voir dire* trained to exclude that which was heard during the *voir dire*.

Counsel who do decide to proceed with mediation/arbitration must be aware of section 35 of the Act which specifically prohibits arbitrators from conducting any part of the arbitration as a mediation or "conciliation process". This provision, however, can be waived in the Submission to Arbitration.

3.5 Rights of Appeal

The Submission to Arbitration will almost always deal with the extent to which a party can appeal an arbitral award. Usually it will confirm there is no right to appeal the arbitrator's award whatsoever. If, however, the agreement does not deal with appeals, the Act provides that a party may appeal an award to the court on a question of law only with leave which the court shall grant only if it is satisfied that the importance to the parties of the matters at stake in the arbitration justifies an appeal and determination of the question of law will significantly affect the parties' rights.³⁷ The court may confirm, vary or set aside the award or remit it back to the arbitrator with the court's opinion and give directions about the conduct of the arbitration.³⁸ This is to be contrasted with the right to appeal an award on a question of fact or a question of mixed fact and law which exists only if the arbitration agreement allows for it.³⁹

With respect to the standard that should be applied on a review of an award by an arbitrator, it is established law that the court should not interfere with an arbitrator's award unless it is satisfied that s/he acted on the basis of a wrong principle, disregarded material evidence or

misapprehended the evidence.⁴⁰ A party may also apply to have an award set aside on any one of the following grounds, all of which are enumerated in section 46 of the Act:

1. If a party enters into the arbitration agreement while under a legal incapacity;
2. the arbitration agreement is invalid or has ceased to exist;
3. the award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter beyond the scope of the agreement;
4. the composition of the arbitral tribunal was not in accordance with the arbitration agreement or if the agreement did not deal with the matter it was not in accordance with the Act;
5. the subject matter of the dispute is not capable of being the subject of arbitration in Ontario; or
6. the applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case or was not given proper notice of the arbitration or of the appointment of the arbitrator.

There have been two reported cases where an arbitrator's award made in a family law case was set aside pursuant to 46(6): *Duguay v. Thompson-Duguay*⁴¹ and *Hercus v. Hercus*.⁴²

In *Duguay*, the parties had previously entered into an agreement in which they agreed to arbitrate any access disputes. The agreement also provided the father would pay child support of \$600.00 per month. The issue of access transfer arrangements was submitted to arbitration by the father. The arbitration was conducted by a social worker. It began with open mediation and ended with arbitration after no agreement was reached. The mother refused to take part in the arbitration because she lost confidence in the social worker's impartiality and fairness. The arbitration went ahead and an award was made in favour of the father. The mother refused to follow award and the father brought an application to enforce. The mother then brought an application to set the award aside and change the settlement agreement provisions for access and child support.

Perkins J. ruled in favour of the mother. He found the arbitrator appeared to compromise his ability to decide impartially by proceeding in the mother's absence and that instead it was "incumbent" on him to help the parties reach a "new agreement" before proceeding to arbitrate. Even though the parties agreed to (but did not sign) a "dispute resolution agreement" drafted by the mediator-arbitrator which stated that the mediator-arbitrator will determine when the mediation will be concluded and that the fact that the mediator-arbitrator has mediated may not serve as the basis for a challenge to the arbitration, the court found that the arbitrator should not have proceeded to arbitrate absent express agreement from both parties.

A similar decision was reached in *Hercus* although there were clear findings in that case that the mediator-arbitrator failed to treat the mother "fairly and equally" as required in section 6 of the Act by not giving her sufficient notice and requiring her to state her position on certain issues before informing her of the father's proposed changes to the parenting plan. Nonetheless, Templeton J. agreed with Perkins J.'s reasoning in *Duguay* in finding that where the mediator-

arbitrator declares the mediation at an end, it is incumbent on him/her to reach a new agreement between the parties.

To many, both decisions seem at odds with the fundamental essence of mediation/arbitration for they seem to suggest that one party can avoid the arbitration portion of the “mediation/arbitration” by simply withdrawing before it begins. Commentators have voiced their concern about the practical impact of requiring parties to sign a new agreement on appointing an arbitrator when one of them has lost confidence in that person to arbitrate.⁴³ Others have sought to explain the decision by pointing to the fact that in *Duguay* the parties did not sign the dispute resolution agreement and observing that the social worker’s position (it was the same arbitrator in both cases) was not represented before the court.⁴⁴ Nonetheless, most troubling is that the court’s obiter in *Duguay*, followed in *Hercus*, that the Act’s enforcement clauses “are not framed particularly for family law, and still less are they drawn for custody and access matters.”⁴⁵ has left many with the impression that arbitral awards are not as “final” in custody/access cases as other kinds of cases.

A recent case where the court varied an arbitral award was *Likins v. MacKenzie*⁴⁶. Following an arbitration on custody, access and child support, full recovery costs were ordered to the wife. The husband’s appeal was allowed in part on the grounds that the arbitrator should not have awarded full recovery costs when success was divided on custody and access issues. The court found the arbitrator erred in considering the husband’s unreasonable conduct where such conduct was unrelated to the issues where success was divided. The award was thus varied to grant the wife full recovery costs only on the child support and income determination aspects of the process.

3.6 Conclusion

The mediation-arbitration process has advantages and disadvantages of which lawyers need to be keenly aware. Like regular mediation, the process is private, confidential and offers parties the option of selecting an experienced person to help them reach an agreement in a setting and manner entirely of their own choosing. The arbitration component, however, is designed to allow for a relatively quick and final decision to be made by the same person in the event an agreement is not achieved, thus saving time and, hopefully, money.

Lawyers also need to be very clear and careful when drafting ADR clauses in their separation agreements. In *Seguin v. Masterson*⁴⁷, the parties included a clause in their agreement stating that if no agreement was reached thirty days after a notice of a desire to change child support had been given, the issue “may be determined at the instance of either under The Arbitrations Act” (*sic*). Aitken J. said this language was not sufficiently clear and unambiguous to oust the jurisdiction of the court and indicated that use of wording like “shall” or “will proceed to arbitration” would have led to a different result.

Finally, lawyers should only use a very experienced mediator-arbitrator who requires the parties to sign a Mediation-Arbitration Agreement. Attached to these materials as Schedule “C” is a precedent which may be of use.

4. COLLABORATIVE FAMILY LAW

4.1 *Definition*

Collaborative family law (CFL) can be most easily described as a way of practicing law where the lawyers for both clients agree to assist them in resolving conflict using cooperative strategies rather than adversarial techniques and litigation. Above all, the commitment to work collaboratively is reflected in an agreement between both lawyers and their respective clients which stipulates that should settlement fail the lawyers will withdraw and not participate in litigation.⁴⁸ A comprehensive Ontario-crafted definition is as follows:

Collaborative family law is a dispute resolution process in which the parties and their lawyers commit themselves to the realization of a negotiated outcome. They agree that litigation will not be commenced while they are negotiating and that, in the event they are unable to negotiate a resolution of their dispute, neither lawyer will be eligible to represent his or her client in any subsequent litigation. In the process itself, the participants communicate to promote the maximum exchange of information, to reveal all concerns of the parties, to generate an array of creative ideas, and, ultimately, to agree upon the terms and conditions of a mutually acceptable settlement that satisfies the interests of both parties.⁴⁹

CFL is not mediation. In mediation, the neutrality of the mediator is an essential element. The CFL lawyer is not neutral. He or she is an educator, a legal resource, a watchdog for her or his client that any agreement is within community norms as well as a guardian of the integrity of the process.⁵⁰

4.2 *Key Principles & Process Goals*

The principles and process goals of CFL present new and markedly different ways of practising family law:⁵¹

1. *Proactive Participation:* In CFL, the clients are responsible for and intimately involved in the resolution of their separation issues. As opposed to counsel fiercely advocating on behalf of clients, clients in CFL voluntarily work with their lawyers to understand the legal consequences of their separation for themselves, the other party and their family;
2. *Interest-Based Understanding:* Unlike the adversarial process, the CFL model promotes understanding of the other person's interests and concerns, the rationale being that when parties understand each other, trust is fostered and hostility thereby reduced. The underlying principle is that when each person fully acknowledges what is important to the other, tries to understand the other and is understood by the other, creative solutions often result;
3. *Cooperative Resolution:* In CFL, the clients and the lawyers all commit to a cooperative resolution to ensure an enduring agreement. A key component is they agree that litigation is not an option for resolution. Instead, participants strive for common ground instead of focusing on differences. Negotiations are resolved by problem-solving and cooperative strategies rather than adversarial techniques. The clients and lawyers encourage each other to think "outside the box" and create

solutions which, although at times may be beyond the law, maximize solutions for both sides; and

4. *Multi-Disciplinary Team Effort:* Central to CFL is the idea that the clients and their lawyers work as a team. The team may also include neutral experts for any issue that requires specific expertise, *e.g.*, child specialist, coaches, mental health professionals or financial specialists/counsellors. The lawyers work with these individuals, modeling an atmosphere of cooperation and respect that allows the clients to gain from their knowledge, skills and resources and helps them solve complicated issues.

The agreement by all parties that the lawyers' retainer is limited to settlement negotiations and that neither lawyer may represent either party in court is crucial to the commitment that both clients and their counsel are strongly motivated to reach a settlement. Once the option of litigation has been removed, counsel can be freed from noting how a particular document can be used at trial or how a client would fare as a witness, thus liberating him/her to focus on the goal at hand. The phenomenon has been described by one CFL expert as follows:

If the lawyers can still consider unilateral resort to the courts as a fallback option, their thought process does not become transformed; their creativity is actually crippled by the availability of court and conventional trials. Only when everyone knows that it is up to the four of them and only the four of them to "think their way" to a solution, or else the process fails and the lawyers are out of the picture, does the special "hyper creativity" of the collaborative law [process] get triggered. At the moment when each person realizes that solving both clients' problems is the responsibility of all four participants that is the moment when the "magic" can happen.⁵²

4.2.1 Good Faith Negotiations

The most important feature of the CFL lawyer's code of conduct is the requirement of utmost personal integrity and to negotiate at all times in good faith. Specifically, each side agrees that:

1. neither will take advantage of the other's mistakes;
2. neither will threaten the other;
3. neither will insult the other or dwell on the negative aspects of the other's character;
4. each will make full disclosure of financial and other relevant information;
5. neither will intentionally delay the process in order to obtain some perceived benefit;
6. each will encourage the highest good faith problem-solving behaviour in themselves and in the other side;
7. each will behave with, and demand the highest integrity from themselves and the other; and

8. their lawyer must withdraw in the event one's client withholds pertinent information, financial or otherwise, or persistently demonstrates bad faith in the process.⁵³

Bad faith behaviour includes refusals to provide full disclosure, unreasonable delays, breach of any temporary agreements, unilateral action to the detriment of the other party, persistent disrespect toward the other participants and withholding of necessary funds to a dependant party required to meet living expenses or to pay legal fees during the process. Such behaviour should automatically warrant the lawyer's withdrawal from, and termination of, the CFL process.⁵⁴

4.3. The Participation Agreement

Before the negotiations begin the principles discussed above are reduced to writing and signed by both clients and their lawyers in a document called a "Participation Agreement". This document is important because it sets out the steps in simple language along with a list of the commitments made. The lawyer will usually give a copy of the Participation Agreement to the client when CFL is first discussed, review it again before the process begins and at the outset of the first settlement meeting. It is always signed by both clients and their lawyers and may be attached to the separation agreement to confirm the ground rules utilized in reaching agreement. Generally, it contains the following provisions:

- the clients and lawyers agree to settle the outstanding issues in a non-adversarial manner using interest-based negotiation;
- the clients will rely on their lawyers to assist them in reaching a mutually agreeable settlement;
- the clients and lawyers will act in their children's best interests to promote a positive, caring relationship between the children and both parents and use their best efforts to minimize any emotional damage to the children as a result of the separation, including refraining from discussing separation issues in their presence unless both parties agree;
- that all written and verbal communications between the participants during the settlement meetings and elsewhere will be respectful and constructive and neither will take advantage of any errors made by the other;
- that full and voluntary disclosure will be made throughout;
- that any neutral experts will be retained if needed;
- that any temporary agreements will be reduced to writing and executed, which agreements may then be converted into court orders in the event of withdrawal from or termination of the CFL process;
- the grounds and procedures for withdrawing from or terminating the CFL process;
- that neither client will incur any debts or liabilities for which the other may be held responsible; and

- that the parties will maintain the status quo on issues relating to children (e.g., that their ordinary residence will not be changed nor will they be removed from the province), that neither will dispose of any assets, alter their life or health insurance coverage, or make any other unilateral change during the process without the consent of the other.⁵⁵

A precedent attached to these materials as Schedule “D” may be helpful.

4.4. The Process

Lawyers who practise CFL are strongly committed to creating a safe process which does no further harm to separating families. The CFL process moves by carefully managed four-way meetings, preceded by considerable groundwork between lawyer and client and between lawyer and lawyer. The lawyer’s job is demanding: in addition to the usual identification, investigation and development of issues and proposals for settlement, s/he must work with the client and the other lawyer to anticipate and manage conflict and guide the negotiation process. At the same time, while ensuring the client is aware of his or her legal rights and obligations, the lawyer must also encourage the client to take a considered and broad view in setting goals and priorities and must teach the client how to use interest-based, rather than positional, bargaining.⁵⁶

Before any negotiating session, the lawyers usually meet and share information that will assist them both in managing conflict and in setting the agendas for the four-way meetings. The skill here is to manage agendas in such a way that the clients experience success during the early meetings, thereby building in the clients a sense of confidence, safety and competency that will serve them as more difficult issues are tackled.⁵⁷ One central difference between four-way meetings in CFL and those in traditional four-way meetings is the dominant role the clients play in the former. As opposed to traditional negotiations where the clients offer little input and the discussion is largely driven by the lawyers, in CFL the clients are the prime authors of the shape and direction of the meeting. The lawyers, while still the legal advisors to the clients, can be more aptly described as “negotiation exemplars” as opposed to actual negotiators and further, when they do negotiate, they stop short of taking control away from the clients.⁵⁸

A second difference is that unlike traditional four-way meetings, in CFL the lawyer is expected to and even encouraged to discuss the issues directly with the opposing client. While this often strikes the uninitiated lawyer as something to resist, its success is pivotal to the creation of a smooth flow of communication between both clients and lawyers and to the full use of the dynamics of four-way communication.⁵⁹

Lawyers have found the following six steps helpful in finalizing a separation agreement negotiated through CFL:⁶⁰

Step #1: Initial consultation with the client. Listen to his/her concerns, review the process options, talk about the client’s goals, screen for potential barriers (i.e., safety issues, mental health concerns, abuse, substance abuse, etc.), explain the law as one option, sign the CFL retainer, provide copy of draft participation agreement and provide client with resources for information on CFL;

Step #2: Initial contact with the other CFL lawyer. By phone or in person meeting the lawyers begin the team approach to collaborative problem-solving, identify any

immediate concerns, agree to exchange disclosure necessary to solve the immediate issues, discuss what will happen at the first settlement meeting, confirm which Participation Agreement will be used (discussed more fully below), who will prepare it and set the date and place for the first settlement meeting;

Step #3: Preparing the client for the first collaborative meeting. The lawyer explains the tasks and roles of lawyers and clients, teaches the client appropriate communication and negotiation skills, reviews the protocol and ground rules for settlement meetings, discovers the client's interests and helps prioritize them. The lawyer also explains the client's legal rights and obligations as one of many settlement options;

Step #4: The first collaborative meeting. Introduction of the clients and lawyers. The key aspects of the Participation Agreement are reviewed and it is confirmed who will record the minutes. The clients deal with any immediate substantive and procedural concerns and their objectives, interests and concerns are addressed. Decisions may be made as to what financial disclosure is to be shared and the timeframes for its exchange, issues are prioritized and the date and place of the next meeting are set. After the meeting the lawyers debrief with their clients and each other;

Step #5: Continuing the process toward agreement. Further meetings are arranged and conducted to resolve all issues on the agenda, homework is assigned between sessions and reviewed at the next session, all required information is exchanged, neutral experts are retained if necessary, draft outline agreements are sometimes prepared to move the process forward, impasses are dealt with, either by negotiation, expert opinion, mediation or arbitration, notes of meetings are exchanged, and the process is continued until all issues have been resolved; and

Step #6: Document and sign the separation agreement. The lawyers jointly prepare the separation agreement collaboratively using language chosen by the clients wherever possible. They ensure the agreement addresses the clients' identified needs ensuring it will work in practice and be legally enforceable.

4.5 Lawyers' Roles and Responsibilities

An important element of CFL is that the lawyers commit to manage conflict, emotional issues and relationship issues creatively. To do so effectively, the lawyer needs a whole new array of understandings and skills and needs to learn to work with non-lawyer professionals. Without this new "toolbox" the lawyer runs the risk of promising more than can be delivered and disappointing clients. The "retooling" needed to become excellent at collaborative law can be described in four stages: retooling how one thinks, speaks and behaves; retooling how one relates to the client; retooling how one relates to the other lawyer, the other party and other professionals; and retooling how one conducts settlement meetings.⁶¹ This retooling requires ongoing professional training and often involves dramatic changes in how lawyers typically interact with one another and manage their files. Increasingly, special CFL training programs are available for lawyers who want to be able to deal with some or all of their cases this way.

Guidelines set out in a paper presented at the 1998 Annual Conference of the Academy of Family Mediators summarized how collaborative lawyers should discharge their responsibilities⁶². Above all, lawyers involved in CFL should:

- advise their respective clients of the law which applies to their circumstances. The process of giving legal advice, analyzing legal problems and suggesting solutions serves the purpose of collaborative practice as well but is carried out in a different context, namely, by the way negotiations are conducted;⁶³
- model honesty, mutual respect and dignified behaviour;
- guide clients through a process of cooperative conflict by using disagreement as a way to find creative solutions to problems;
- get to know your own client as well as the other client and establish a rapport with both;
- model listening skills for each party so that the interests of both are promoted and in so doing represent the client's interests while mediating the other party's interests as well;
- help identify the issues and concerns of each party;
- bring stability and reason to emotionally charged situations and serve as agents of reality for unreasonable clients;
- cooperate fully with each other to provide all necessary disclosure and discovery;
- assist the client in organizing disclosure documentation and in understanding the disclosure from the other spouse;
- assist the parties to analyze consequences of possible choices and competing values. This includes coaching the client in "debriefing" meetings, working with them to understand any barriers they may be experiencing and referring them to outside resources that can assist them to move forward in the process;
- respect choices made by a client even if different from what the law may provide or offer;
- use clear and neutral language when drafting and speaking;
- understand that court is not an option and refrain from using adversarial techniques or tactics; and
- remain committed to finding effective ways to assist the parties in reaching agreement and overcoming impasses by using mediation or neutral experts to provide a third opinion.

4.6 *Advantages and Disadvantages*

Lawyers should assess each situation and provide each client with information about all the processes available to resolve their issues. CFL is not for every client or for all situations. Some clients want others to make their decisions for them; others choose to use their financial resources and energy to use court to achieve their goals. There are also clients who do not want to compromise and are stuck in the traditional “win/lose” mindset. There are also clients who maintain that their spouse is not trustworthy and determined to hide assets and income at any cost. Others suffer from clinical issues or serious drug and alcohol abuse. In these situations, CFL may not be appropriate and traditional litigation, with all the rules and court sanctions, may be recommended to ensure their rights are better protected.

Lawyers must determine whether the prospective client has, or can develop, the capacity to participate effectively in the CFL process. Clients must share a similar, if not mutual, commitment to work *with* rather than *against* each other. They must demonstrate an acceptance of their separation, a willingness to manage or at least try to learn to manage their emotions, an interest in the well-being of the other side and a commitment to an honourable divorce process. They must value the benefits of maintaining their relationship, of taking a long-term view of the issues and of retaining control over their own solutions. Clients must also understand that although designed to be successful, not every collaborative effort produces a settlement and that the time and expense required to rehire a new lawyer and take the matter to court must be considered.

For those clients truly committed to open and honest negotiation, full and frank financial disclosure and a strong desire to be flexible and creative in problem-solving, CFL is becoming, for many, the choice method of dispute resolution in the 21st century. The upsides are obvious: a negotiated agreement reached with less cost and none of the traditional conflict, lawyers for both clients working in an atmosphere of respect and cordiality and the absence of the stress and uncertainty of litigation. Clients also have the benefit of confidentiality in that anything said in a CFL negotiated session cannot be disclosed without the consent of both parties. In this sense CFL resembles closed mediation in that it provides the parties with the freedom to openly discuss options they may not otherwise be prepared to voice - with a lawyer by their side at all times. Finally, while critics would say that clients should never waive their right to litigate, clients should be reminded that participation in CFL does not mean that clients forfeit their right to go to court - only to do so using their CFL lawyer.

Notes:

¹ Brahm D. Siegel, Nathens, Siegel LLP, Toronto. March 2005. The author is grateful to the following individuals for their input and comments: Shari Slonim, Phil Epstein, Stephen Grant, James MacDonald, Hillary Linton and Marion Korn.

² C. Noble, *Family Mediation: A Guide For Lawyers* (Canada Law Book: Aurora, 1999), p. 2.

³ T.W. Caskie, “Alternative Dispute Resolution” *Pre-Trial Strategies for Family Lawyers: Creating the Right Foundation For Settlement* (Continuing Legal Education: Law Society Of Upper Canada, 2003).

⁴ *Report of the Attorney General’s Advisory Committee on Mediation in Family Law* (Toronto: Ministry of the Attorney General, Policy Development Division, 1989) p. 10.

⁵ *C.A.M. v. D.M.*, [2003] O.J. No. 3707 (C.A.), p. 2.

⁶ *Ibid.*, p. 7.

⁷ *Ibid.*, p. 8.

⁸ Some of the above are cited in K.J. Kelly’s excellent article “Effective Advocacy in Mediation” *ADR: Principles, Process, Practice* (Ontario Bar Association: Continuing Legal Education, 2002).

⁹ Some of the above are cited in T.W. Caskie’s article, *supra* note 4 at p. 2.

¹⁰ For an excellent summary of the different personality types and the challenges they pose for lawyers in mediation, see R. Eisen's article "Identifying the Client for Whom Mediation Is Appropriate" in *Family Law Mediation: How to Use It/Whether To Do It* (Department of Education, Law Society of Upper Canada, 1987).

¹¹ *Report of the Attorney General's Advisory Committee on Mediation in Family Law*, *supra* note 15 at p. 8.

¹² K. D'Artois, "Representing Clients Who Have Been Exposed To Violence", *46th Bar Admission Course Materials*. The Law Society of Upper Canada, 2003, p. 14-14.

¹³ *Ibid.*, p. 9.

¹⁴ E.R. Kruzick, "The Role of the Lawyer in Family Mediation", *Family Law Mediation: How to Use It/Whether To Do It* (Department of Education, Law Society of Upper Canada, 1987).

¹⁵ *Ibid.*, pp. D7-D9.

¹⁶ D. Ellis and N. Stuckless, *Mediating and Negotiating Marital Conflicts* (Sage Publications: 1996), D.T. Saposnek, *Mediating Child Custody Disputes, Revised Edition* (Jossey-Bass Publications: 1998); B. Landau, L. Wolfson, N. Landau, M. Bartoletti and R. Mesbur, *Family Mediation Handbook Third Edition* (Butterworths: 2000); M. Silver, *Mediation and Negotiation: Representing Your Clients* (Butterworths: 2001). In addition, Family Mediation Canada (www.fmc.ca), the Ontario Association for Family Mediation (www.oafm.on.ca) and The Conflict Resolution Network (www.crnetwork.ca) are all good resources.

¹⁷ ADR Institute of Canada, Inc. – Principles, Criteria, Protocol, Competencies for the Designation C.Arb, July 2001.

¹⁸ M. Miskin, "ADR – A Wide Range of Choices", *ADR: Principles, Process and Practice* (Department of Education: The Law Society of Upper Canada, 2002).

¹⁹ *Arbitration Act*, S.O. 1991, c. 17.

²⁰ Section 8(2).

²¹ Section 17(1).

²² Section 18(1).

²³ Sections 20(1) and 22(1).

²⁴ Section 28(1).

²⁵ Section 29(1).

²⁶ Section 29(3).

²⁷ Section 41.

²⁸ Sections 27(3) and 27(4).

²⁹ Section 54(1).

³⁰ *Novak v. Rodak* (1990), 94 A.C.W.S. (3d) 12 (Ont. S.C.J.).

³¹ T.W. Caskie, *supra* note 4 at p. 8.

³² *R.L. v. J.M.* [2003] O.J. No. 3058 (S.C.J.).

³³ *Ibid.*, pp. 9-14.

³⁴ Section 25(1).

³⁵ Although the Act is silent as to how parties' evidence is to be taken, section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, which is incorporated by reference into any Ontario arbitration, provides that evidence is to be taken orally with no requirement that such evidence be under oath. However, Mr. Caskie submits, and the author concurs, that good practice dictates that all evidence be under oath.

³⁶ P. Epstein, "Jurisdictional and Procedural Issues" *Effective Use of ADR in Family Law Practice* (The Law Society of Upper Canada: Toronto, 2001), p. 4.

³⁷ Section 45(1).

³⁸ Section 45(5).

³⁹ Section 45(3).

⁴⁰ *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.); *Robinson v. Robinson*, [2000] O.J. No. 3299 (S.C.J.); *Hunter v. Hunter*, [2001] O.J. No. 4582 (S.C.J.).

⁴¹ *Duguay v. Thompson-Duguay* (2000), 7 R.F.L. (5th) 301 (Ont. S.C.J.), [2000] O.J. No. 1541.

⁴² *Hercus v. Hercus* (2001), 103 A.C.W.S. (3d) 340, [2001] O.T.C. 108, [2001] O.J. No. 534, 2001 CarswellOnt 452 (S.C.J.).

⁴³ G. Cooper, "Arbitration: When is a Final Award Not So Final?" *The Six-Minute Family Lawyer 2002* (The Law Society of Upper Canada: Toronto, 2002),

⁴⁴ P. Epstein, *supra* note 48 at p. 11.

⁴⁵ At p. 9.

⁴⁶ *Likins v. MacKenzie* (2003), 2003 CarswellOnt 3007 (Ont. S.C.J.).

⁴⁷ *Seguin v. Masterson* (2004), 2004 CarswellOnt 2098 (Ont. S.C.J.).

⁴⁸ S.G. Webb, "Collaborative law – a conversation: why aren't those divorce lawyers going to court?" *The Hennepin Lawyer*. August 1996, p. 26.

⁴⁹ R.W. Shields, J.P. Ryan and V.L. Smith, *Collaborative Family Law: Another Way to Resolve Family Disputes* (Thomson Carswell: Scarborough, 2003), p. 32.

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- ⁵⁰ For an excellent article on whether collaborative family law is a threat to mediation, see M. Korn's article, "Collaborative Family Law: My Position", *Solutions* (Ontario Association For Family Mediation Newsletter) Winter 2003.
- ⁵¹ B. Landau, "Collaborative Law: The Lawyer as Counsellor" *ADR Principles, Process, Practice & Process* (Ontario Bar Association: Law Society of Upper Canada, 2002).
- ⁵² J.C. MacDonald, "Collaborative Family Law" *Pre-Trial Strategies for Family Lawyers: Creating the Right Foundation for Settlement or Trial* (Continuing Legal Education: Law Society of Upper Canada, 2003), p. 28, quoting Pauline H. Tessler, Collaborative Law FAQ's, divorcenet.com/ca/cafaq10.html.
- ⁵³ J.C. MacDonald, "Collaborative Family Law: The 180 Degree Turn" *Collaborative Family Law: A Legal Revolution* (The Law Society of Upper Canada: 2000), p. 8.
- ⁵⁴ Shields, Ryan, Smith, *supra* note 68, p. 63.
- ⁵⁵ *Ibid.*, pp. 61-62.
- ⁵⁶ P.H. Tesler, "Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It" *American Journal of Family Law*, Vol 13 215-225 (1999), reprinted in full in *Collaborative Family Law: A Legal Revolution* (The Law Society of Upper Canada: 2000), p. 220.
- ⁵⁷ *Ibid.*
- ⁵⁸ J.C. MacDonald, *supra* note 71 at p. 11.
- ⁵⁹ For more on this topic of settlement meetings and "transparency", see J.C. MacDonald's "Collaborative Family Law", *supra* note 70 at pp. 35-36.
- ⁶⁰ V.L. Smith, "Collaborative Family Law Role Plan" *Collaborative Family Law: A Legal Revolution* (The Law Society of Upper Canada: 2000); S. Cohen "Maintaining the Collaborative Environment: Protocols for Discussion" Presentation at Ontario Collaborative Law Federation: Conference – November 21/22, 2003.
- ⁶¹ P. Tessler, *supra* note 74 at p. 220.
- ⁶² Reprinted in J.C. MacDonald's "Collaborative Family Law: The 180 Degree Turn", *supra* note 71 , p. 11-12; see also V.L. Smith, "Collaborative Family Law Role Plan", *supra* note 78.
- ⁶³ J.C. MacDonald, *supra* note 71 at p. 1.