ARE WE COUNSEL *or* COUNSELLORS?

Alternative Dispute Resolution & the Evolving Role of Family Law Lawyers in Canada

By
Esther L. Lenkinski and Maneesha Mehra*

Is alternative dispute resolution (ADR) really the panacea some claim it is? While every family law lawyer has experienced those clients that simply cannot stay out of the courtroom, even after the "final" determination of the issues, the fact remains that the vast majority of cases do ultimately settle.[1] The process of getting there by ADR has and is being promoted as a more 'client friendly' approach to conflict resolution. Family law lawyers in many jurisdictions have been embracing ADR, in part, as a "reaction to increasing complaints that the traditional litigation model is too costly, too slow and too emotionally draining to serve the needs of clients embroiled in disputes…[ADR] has been billed as the…more affordable, timely and empowering solution in a wide range of disputes that otherwise would end up in court or remain unresolved and festering."[2]

There are a variety of different ADR methods available to assist parties but sadly there is little real evidence or statistics about the efficacy of any particular method and indeed each ADR method seems to have its own inherent problems. Lawyers working in this milieu must take into account various considerations that may be similar, but not

* Esther L. Lenkinski is a family law attorney in private practice in Toronto, Ontario, Canada. Ms. Lenkinski may be contacted at elenkinski@lenkinskilaw.com. Ms. Mehra may be contacted at mmehra@lenkinskilaw.com.
[1] Only 4% of family law disputes in Canada end in contested adjudication. Julien D. Payne & Marily A. Payne, *Canadian Family Law*, 2nd ed. (Toronto: Irwin Law, 2006) at 137, 143.
[2] J-P Boyd, "Arbitration May Defray Some of the Costs of Argumentative Parents" (2005) Vol. 25, No. 26, *The Lawyer's Weekly*.

identical, to issues contemplated in traditional litigation and negotiation models. Additionally, lawyers must learn and develop an expanded skill set that may require more awareness of social issues, interpersonal relationships and mental health issues. In this paper we will explore various methods of ADR and the problems inherent in each.

LITIGATION v. ADR

In Ontario, and indeed throughout Canada, ADR has been used increasingly as both a front line and back end tool to manage family law matters. In other words, ADR may be chosen to address the initial stages of a family law conflict and/or utilized to address variations or issues that arise once the primary conflict has been resolved. We have not found any statistics or empirical studies that answer the question of whether or not the use of ADR methods, or whether or not any one particular ADR method is more efficient, more cost effective and/or more satisfactory for clients than traditional litigation.

The general appeal of ADR methods is that such methods are said to allow parties to design a process that is less cumbersome and more personalized than the standardized litigation model. In addition, subject to the specifications of the particular ADR mechanism chosen, the parties themselves have the ability to craft specific procedures in order to enhance the efficacy of the process. For example, parties may agree to resolve issues by way of summary proceedings, or, in the case of arbitrations, parties

may agree to resolve issues via written submissions and/or admit evidence in chief by way affidavit. In effect, the use of ADR allows its participants to mould the process to match the complexity of their specific issues and their unique circumstances.

Lawyers should not start from the assumption that all family law disputes are appropriate for ADR. Rather, there are several considerations and important factors that family law lawyers must turn their minds to before embarking upon any means of conflict resolution – whether it be the traditional litigation model or one of the various methods of ADR. Where confidentiality and privacy are of up most importance and significance in the family law dispute, ADR must be considered. ADR offers clients the privacy that would otherwise be lost if the matter were to proceed via the public forum of the traditional litigation model.

PUBLIC v. PRIVATE DISPUTE RESOLUTION

In Canada and most common law jurisdictions the litigation process requires the filing of public documents that contain not only information about family dynamics, which necessarily underlie the conflict between the parties, but also details of the parties' finances. In the provinces of British Columbia, Manitoba and Ontario, it is a legal requirement that detailed financial statements be filed with the Court by both parties in order to commence or respond to any proceeding in which custody, child or spousal support or division of property are claimed. This rule applies to common law as well as

married spouses.[3] Thus, the use of ADR is a valuable tool to shield clients who desire privacy and also wish to avoid exposing their financial information to public bodies such as revenue or other tax authorities or for those who do not wish to expose the financial affairs of business partners. For some, the motivation to keep matters private may be pure; however, the deceitful individual may attempt to subvert the private nature of the process in order to further illegal activity, unnecessarily delay the process, or engage in offshore activity that is cumbersome (or potentially impossible) to address through the any ADR process.

In light of these concerns, family law counsel must be cautious in applying ADR mechanisms as 'one size fits all' processes. Rather, counsel must remain alert and alive to their clients' and the opposing parties' motivations for choosing a means of ADR over traditional litigation – any hint of fraud and/or deceit should be sufficient to rule out the use of ADR all together.

Much has been said and written about the astronomical cost of litigation in the family law context. ADR has been both criticized and praised in regards to its provision of a cost effective means of resolving family law disputes. As set out above, parties using ADR can make agreements about procedural matters in order to provide themselves with efficiency. It is imperative that counsel recommending the use of ADR have a clear understanding of the particular ADR method chosen prior to commencement of the process so that they may strategically develop the process to meet the specific needs of

[3] *Provincial Court (Family) Rules*, B.C. Reg. 417/98 at Rule 4*; Manitoba Regulation,* 553/88 at Rule 70.05; *Family Law Rules*, Ont. Reg. 114/99 at Rule 13.

the client and the issues in dispute and thus be as efficient and streamlined as possible. ADR offers more individualized service to clients, which should, in theory, reduce the cost of obtaining a final resolution. For example, instead of having lawyers attend in court and wait to be heard at some point during the day, when utilizing arbitration as the ADR method of choice, counsel can make appointments and efficiently schedule matters to be heard without delay during specified periods of time. The "waiting time" – which is charged to clients – is effectively eliminated. However, on the other hand, parties must pay for the ADR professional to assist them in the resolution of the dispute on an hourly basis and, in the case of arbitration, also must pay for the writing of arbitral awards. As arbitral awards are not automatically court orders, there are some costs associated with ensuring the enforceability of those awards.

In many Canadian jurisdictions, quasi-ADR methods are now publicly funded as they have become part of the litigation process. In British Columbia, Manitoba, Ontario, Nova Scotia and Newfoundland, although, there are mandatory or optional steps in family law proceedings to encourage settlement, such as case conferences and settlement conferences. However, judges simply do not have the same amount of time to familiarize themselves with the specifics of any case in the same way that a private mediator or arbitrator would in advance of the hearing date. As such, adjudication (even partial resolution) by a judge at the early stages of litigation, during either a case or settlement conference, is rare, if not unheard of.[4] To complicate matters further, across

[4] *Provincial Court (Family) Rules*, B.C. Reg. 417/98 at Rule 7; *Manitoba Regulation,* 553/88 at Rule 70.24(10) to 70.24(13); *Family Law Rules*, Ont. Reg. 114/99 at Rule 17; *Family Court Rules*, N.S. Reg. 20/93, made under Sections 11 and 12 of the *Family Court Act* , R.S.N.S. 1989, c. 159 at Rule 11.01; *Provincial Court Family Rules*, 2007 N.L.R. 28/07, made under the *Provincial Court Act*, 1991 at Rule 11.

Canada, and even within the same provincial jurisdiction, there is a lack of consistency in the application of administrative and procedural court rules. Counsel and clients may be required to make numerous court attendances before the matter is heard due to the cumbersome and unwieldy processes that have been adopted by some jurisdictions. At times, the determination of whether or not ADR will be useful and more cost effective may in fact be driven by the particular jurisdiction in which a matter would be heard and the administrative court rules of that jurisdiction.

In addition, while provincial legislation has some summary processes available, such as motions for summary judgment and the use of telephone and/or video conferencing[5], it is in the discretion of the individual judge whether or not the use of such processes will be permitted. As such, litigants are often forced to bring several costly motions before various judges in order to obtain, sometimes, even the most basic procedural and/or financial disclosure orders. Since ADR processes are intended to be moulded to meet the participants' needs, summary processes are available and used more frequently to get down to the main issues quickly. Like all other processes however, ADR (particularly mediation and arbitration) mechanisms are also open to misuse by a party who seeks to either obfuscate or delay matters. The onus is then upon the seasoned and well-chosen arbitrator to be cognisant of such tactics and, one would hope, quickly apply the tools at his/her means to address roadblocks.

[5] Ontario and Newfoundland have legislated electronic conferencing options and Ontario has a specific rule under the rules of procedure devoted to summary judgment.

Notwithstanding the foregoing, arguably, the issue of costs and efficiency are less tied to the administration of the process, but rather, inextricably bound with the ability of counsel to filter the *right client* into the *right ADR process*. Summary processes may be appropriately applied to streamline the procedure, but, in the end, the relative success and cost of any ADR process is highly dependant on whether or not counsel have appropriately matched the issues and client with the ADR process that will be most effective in dealing with the dynamics in play and disputes to be resolved.

LACK OF REGULATION *of* ADR PROFESSIONALS

ADR professionals are not currently regulated in Canada. The ADR Institute of Canada Inc. (the "Institute") is a national non-profit organization that provides national leadership in the development and promotion of dispute resolution services in Canada and internationally. The Institute has adopted a Model Code of Conduct for mediators, as well as a Code of Ethics which applies to both mediators and arbitrators. The Code of Conduct applies to every mediator who is a member of the Institute or who accepts appointments from the Institute. The Code of Conduct deals with the issues of, *inter alia*, self-determination of the parties, independence and impartiality of the mediator, conflicts of interest, confidentiality and the quality of the mediation process. In imposing the Code of Conduct on member mediators, the objective of the Institute is to:

(a) provide guiding principles for mediator's conduct;

(b) provide a means of protection for the public; and

(c) promote confidence in mediation as a process for resolving disputes.[6]

Similar to the Code of Conduct, the Code of Ethics provides mediators and arbitrators with guiding principles by which they should govern their ADR practice, including but not limited to, rules governing communication with the parties and the conduct of the proceedings.[7]

Despite the implementation of the Codes of Conduct and Ethics, the lack of regulation of mediators and arbitrators remains an on-debate among family law practitioners. Lawyers in each province continue to be self-governed by their provincial law society and, if in violation of the *Rules of Professional Conduct*, counsel face a variety of disciplinary measures. Given that, by and large, the mediators and arbitrators used for family law disputes are senior members of the family law bar, it is a contradiction within the profession that the ADR portion of a family lawyer's practice can effectively be excluded and thus remain immune from public and/or professional scrutiny, while the balance remains subject to the governing provincial law society.

TYPES *of* ADR *in* CANADA

There are several means of ADR available throughout Canada – the popularity and availability of different methods varies from one province to another. It may be useful to characterize the forms of ADR as if they exist on a continuum:

[6] Model Code of Conduct for Mediators – attached as Schedule **A**
[7] Code of Ethics – attached as Schedule **B**

Informal *Formal*

Collaborative Law | Cooperative Law | Mediation | Mediation/Arbitration | Arbitration

The onus falls squarely on the shoulders of family law practitioners to assess the parties, the issues in the case, the relative costs consequences, as well as the anticipated degree of 'push back' from the opposing party and then recommend the most appropriate path to resolution. In some cases, ADR may not be an option at all, but that must be assessed by counsel with significant and considered care. The following is a review of the different methods of ADR available and in use in Canada (to varying degrees), commencing with the least formal, and arguably the least adversarial, and moving towards the method most akin with formal litigation.

Collaborative Law

Collaborative law has gained acceptance throughout Canada, particularly in British Columbia and Ontario, as an effective means of conflict resolution for family law disputes. The approach of this method is to take the 4-way meeting, between the parties and their respective counsel, and transform it from an exchange of proposals

into what can best be characterized as a brainstorming session with an inter-professional think tank. In effect, as opposed to coming to the table armed with duelling settlement proposals and negotiating at a without prejudice meeting, the parties and their lawyers, in theory, direct their efforts towards finding solutions to problems by consulting with jointly retained professionals and an approach to conflict resolution that will meet both parties' needs and objectives. The intention is for the parties to refocus their attention on preparing creative resolutions together, which may not necessarily fall within a strict interpretation of the law, but still resolve the issues between the parties. In effect, the parties, their respective counsel, and jointly retained third parties (i.e. accountants, mental health professionals such as parenting coordinators, etc.) work together on the 'same team' to collectively develop a resolution strategy befitting the parties' specific circumstances. The focus is on the use of cooperative strategies to *encourage* resolution as opposed to traditional adversarial techniques that arguably *manipulate* resolution. The process was once described to us as being on a dragon boat team: the parties, their independent counsel and any third parties retained to assist, paddle a boat together to get to the other side of a lake, which is where the resolution lays waiting to be implemented.

There are a number of lawyers whose practice is essentially restricted to Collaborative law; however, most lawyers in Ontario and throughout Canada would say that this method of conflict resolution has inherent difficulties and, while it may be one of a series of tools of ADR, there are inherent dangers in participating in this process, such as a lack of rigour in applying the law and a failure to demand the kind and nature of

disclosure required in more traditional methods of conflict resolution. As such, this relatively new and continually evolving method of ADR has yet to be widely embraced by the family law bar in Canada. Clearly, it involves the use of a particular and specialized skill set, which differs significantly from the skills taught in law school and those counsel develop for use within the traditional litigation and/or adversarial models of conflict resolution.

Proponents of the Collaborative law process argue that it has tremendous potential to both reduce the strain on the court system and, most importantly, permit the parties to craft appropriate resolutions in an expeditious and just fashion. While that may be the case, it also requires lawyers to embrace and adopt an augmented role within the settlement process. The key distinguishing characteristic of Collaborative law is the role played by counsel in the process. Lawyers must effectively shed the traditional role of "adversary" and embrace their role as facilitator in an interest-based negotiation process. The lawyer acts not only as legal counsel, but plays a duel role as an emotional counsellor while working with the parties to facilitate conflict resolution.

As with other forms of ADR, the collaborative process commences with the parties, and their respective counsel, signing an Agreement that defines the rules of engagement. Specifically, the signatories to the Agreement commit to negotiation only. The parties agree not to commence litigation while the collaborative process is on-going and further agree that, in the event litigation must be commenced, the lawyers who acted for them during the collaborative process will not represent them in the subsequent litigation.

This is an important distinction from Mediation Agreements and the Agreements signed when choosing Cooperative Law (described below), because the lawyers retained to assist during the collaborative process are disqualified from representing the participants in any court proceeding if the collaborative process is unsuccessful. The "disqualification clause" is generally drafted using broad language, and thus, may be triggered by any number of events leading up to a court proceeding:

- failure by the parties to reach an agreement;
- the need for a restraining order to protect the substantive rights of one of the parties;
- reliance upon formal discovery methods in order to obtain full financial disclosure;
- the need for a court order to prohibit the disposition of family property; and/or
- compelling enforcement after reaching an agreement and/or one party seeking to vary the terms of settlement.

The disqualification clause clearly changes the nature of the legal representation provided by lawyers during this ADR process. This clause is viewed as both a positive and negative feature of Collaborative law. The proponents of Collaborative law assert that the disqualification clause encourages parties to negotiate in good faith without using the threat of litigation as part of the strategy to manipulate the other party into accepting a less than just settlement proposal. In effect, by removing litigation from the equation, some Collaborative lawyers argue that this method of dispute resolution effectively reduces the adversarial tone of the engagement between the parties by encouraging them to refocus attention away from the win/loss dynamic of litigation and

towards the idea that there is no "loss" but rather only a "win" in the form of a resolution crafted by the parties.

On the other hand, the sceptics argue that the disqualification clause acts as a deterrent to *just* and cost-effective resolution. Specifically, since the collaborative process requires the parties to be significantly financially invested (through the use of counsel and jointly retained third parties), by the time it is apparent that it is not working, one (if not both) of the parties cannot afford to pursue his or her legal rights through the court system. Recall, in the event that the collaborative process fails, both parties are then required to retain fresh counsel if they wish to commence a court proceeding. New counsel will undoubtedly duplicate much of the work already billed to the client by their collaborative lawyer while getting up to speed on the file. Additionally, since the negotiations and disclosure obtained during the collaborative process are all without prejudice and cannot be used in litigation, this also duplicates billable work that will be charged to the client – again. To that end, a recent survey of collaborative law suggests that it is, in fact, more expensive than mediation.[8] Thus, if ADR processes are intended to be more expeditious and cost-effective, the disqualification clause (a key feature of collaborative law) is somewhat counter-productive to these goals.

It is also a concern that the new role of the family law lawyer to act as counsellor and facilitator not only dilutes the lawyer's arsenal of tools to advocate for their clients' rights and entitlement, but also changes the lawyer's relationship to the client. In effect, the

[8] W. Weigers & M. Keet, "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (Winter 2008) 46 OSGHLJ 733.

problem that is created is that the *interest* in resolution becomes more important that a *just* resolution that accords with full legal entitlement. For example, studies have shown that women disproportionately fear protracted litigation, and thus, their "interest" in *early* resolution often overshadows their interest in a *just* resolution.[9] More specifically, gender role socialization suggests that women prefer cooperation to conflict or strategic negotiation – which ultimately results in compromising their rights and interests – in order to obtain a better interpersonal relationship with their ex-partner in the long run. This situation is often even more pronounced when children are involved, as women are more likely to focus on a good co-parenting relationship for their children's best interests, even if that "good" relationship is obtained via loss of their rights.[10] Additionally, the concern also exists that, in their vigilance to "get to yes", those practicing collaborative law will erode the standards and sound legal precedent that have developed through academic advocacy and reasoned decisions in the courts. There are no safeguards or regulations in place to avoid these pitfalls in the Collaborative process.

While engaged in the Collaborative process, lawyers are effectively being asked to act as both "power enhancers and equalizers" of the power imbalances that exist between the parties. As opposed to mediation and/or mediation/arbitration, where a third party is available and should assist to both screen for and neutralize these imbalances, in the collaborative law process, this onerous task falls squarely on the shoulder of the lawyers. Arguably, lawyers are being asked to act beyond their scope of expertise in

[9] *Supra* note 8.
[10] *Supra* note 8.

this regard, by requiring that they not only advise their clients about the prevailing law and their relative obligations and rights pursuant to same, but also to act has properly trained mental health professionals in accounting for and being sensitive to gendered and/or financially-related power imbalances as well as understand how to properly screen for a history of abuse.

Cooperative Law

A relatively new phenomenon within the ADR tool shed, cooperative law attempts to marry the traditional scope of family law practice with some of the fundamentals of collaborative law. In effect, operating as a variation on "collaborative law", the cooperative law approach is best described as *negotiation first – litigation if necessary*. If viewed on an ADR spectrum, cooperative law falls somewhere between mediation and collaborative law, because while the possibility of creative solutions remain available and there is a focused agreement between the parties and their counsel to work collaboratively and retain joint professionals where required the cooperative practice model permits the use traditional legal remedies, if and as required.

In addition, cooperative law reduces the stress on family law counsel to act as facilitators/counsellors for their clients, because mental health professionals (ie. social workers) are also often jointly retained by the parties to assist both counsel and the parties to understand the respective parties' interests, needs and methods of communication, in order to effectively and efficiently negotiate a resolution. The mental

health professionals act as the facilitators/counsellors and address the participants' emotional needs during the process; thus, lawyers can focus their attention on an appropriate legal remedy. This feature of cooperative law is not unique and is also utilized in other methods of ADR, specifically collaborative law.

While the intention is to be less adversarial than litigation and/or arbitration, and as an answer to the opponents of collaborative law, the contracts signed by the participants do not include a "disqualification clause"; rather, all processes, including court intervention, remain open to the participants at all times. As such, since the threat of litigation remains during the negotiations, the nature of the negotiation process is naturally influenced to the extent that the parties are not so financially invested and therefore, arguably, the likelihood that parties will feel pressured to accept unreasonable proposals is reduced.

As with all other forms of ADR, the process begins with the participants signing an Agreement to engage in cooperative law. In doing so, the parties must submit to the cooperative law process and also specifically acknowledge that their counsel are independent and have been retained to assist the parties to negotiate and prepare a comprehensive Domestic Contract. The acknowledgement that parties wish to use the cooperative model is crucial for counsel working within the cooperative law process, since their role, while purposefully less adversarial, may be inappropriately viewed and judged by clients as lacking vigilance. In particular, since experts, such as mental health professionals and/or financial valuators, are generally *jointly* retained in the cooperative

process, it is important that clients understand that this is the nature of the process and not a failure by their counsel to strongly advocate for their rights. As such, counsel must be careful to explain the nature of the cooperative process and their specific role as legal counsel, ***before*** clients agree to use this process to resolve their matrimonial dispute.

As with collaborative law, and as noted above, the parties endeavour to jointly retain third party experts, as required, to assist with the negotiation of their disputes, including but not limited to, accountants (ie. for income and business valuations) and social workers (ie. parenting coordinators). Although the process is designed to create a "team" of professionals working "cooperatively" to assist the parties to negotiate a resolution, the parties are not precluded from retaining their own third party professionals to provide an independent opinion regarding the issues. However, this is arguably counter-intuitive to the cooperative process and perhaps an indicator that the issues at hand and the dynamic between the parties may be such that it is not an appropriate case for the cooperative process. Accordingly, before engaging in this method of conflict resolution, lawyers must assess and analyze their client and the nature of the conflict to determine whether there is sufficient motivation and sophisticated to make proper and effective use of this process, which necessarily includes the use of jointly retained third party experts.

Obviously, lawyers are not mental health professionals and, as such, the role that they are being required to fulfill within any ADR processes, and particularly so within the

collaborative or cooperative law process, imposes an inappropriate onus upon them to account for issues that properly fall within the scope of specially trained mental health professionals. We query - should lawyers be retaining mental health professionals to assist them when screening clients to pair them with the most appropriate method of dispute resolution?

Mediation

Moving along the spectrum from cooperative law, mediation involves the use of a third party, the "mediator", who is independent of the participants, to facilitate negotiation and also encourage and assist the participants to understand the issues of their dispute and craft their own resolutions to accommodate their interests and needs as a family. Mediation may take place before the involvement of independent counsel representing the parties, in which case any agreements will be reviewed by counsel for each party before final execution. In other situations, a mediator may be retained to assist both parties and their independent counsel in resolving a dispute. Both types of mediation are widely used in Ontario and throughout in Canada.

"Philosophically, family mediation begins from a presumption that it is the parties themselves who are in the best position to determine and anticipate their interests."[11] Senior family law lawyers traditionally act as mediators for family law disputes and, in assuming this role, the traditional role of the family law lawyer is expanded. A mediator is charged with the duty of facilitating the parties' negotiation to find creative resolutions

[11] R. Langer, "The Juridification and Technicisation of Alternative Dispute Resolution Practices" (1998) 13 Can. J.L. & Soc'y 169.

for their current issues, and in some cases, those likely to arise in the future. However, although the parties are most apt to articulate their *interests*, they are not always alive to what is actually *reasonable*. Accordingly, mediators and counsel alike must implement and inject *rights-based* negotiation techniques to ensure that the resolution not only meets the interests of the parties, but is also reasonable and just when viewed objectively in the context of the legal framework of the conflict. Accordingly, mediators must not only understand the legal framework of the dispute, but also have a capacity to analyze and ferret out the goals and needs of the parties while moving towards final resolution.

As with other forms of ADR, the parties commence the process by signing a Mediation Agreement that details the process and sets out the rules of engagement. Unlike collaborative law, the parties' lawyers are not signatories to the mediation agreement; rather, the commitment to mediation is made only by the parties themselves, whether or not counsel will be involved in the process.

Types of Mediation

Mediation of family law disputes takes many forms – as noted above, in some cases, each party retains independent counsel to attend and assist at the mediation sessions, while, in other cases, the parties attend only with the mediator for the purposes of negotiating a resolution. In addition, mediators each ascribe to their own type of mediation techniques, which may include but are not limited to, transformative, facilitative, narrative, problem-solving, humanistic, evaluative, therapeutic, bureaucratic,

open, closed rights-based and/or interest-based.[12] Most mediators who are also family law lawyers utilize the problem solving and evaluative approaches. The other methods are not as frequently applied by counsel, but may be implemented by mental health professionals to resolve custody and access issues.

Rights and interest-based mediation/negotiation are the most commonly applied techniques in Ontario and throughout Canada. Interest-based negotiations involve each party clearly and explicitly setting out the tangible resolution that meets their *interests*/needs; it deals with what is of specific importance to them. While, on the other hand, rights-based negotiations focus more on the intangible principles of "legitimacy" and "fairness" in crafting a resolution for the parties in the context of the legal framework

[12] P. Hughes, "Mandatory Mediation: Opportunity or Subversion?" (2001) 19 Windsor Y.B. Access to Just. 161.
Transformative: First articulated by Robert A. Baruch Bush and Joseph P. Folger in 1994 in "The Promise of Mediation", transformative mediation does not seek resolution of the immediate problem, but rather seeks the empowerment and mutual recognition of the parties involved so as to enable the parties to define their own issues and seek solutions on their own.
Facilitative: the process is structured by the mediator to assist the parties in reaching a mutually agreeable resolution without making recommendations or giving advice regarding the outcome. The mediator is in charge of the process, but the parties are in charge of the outcome.
Narrative: based on the social constructionist theory that people organize their experiences in story form in order to make sense of their lives. The focus for narrative mediators is to draw out how the conflict story impacts the parties lives more than whether their stories are factual so that they can work on diffusing the tension and anger and help separate the parties from the conflict itself. This approach is the opposite of the problem-solving approach, which focuses on the overt problem(s), as opposed to the emotions that arise from same.
Problem-solving: the focus is on solving the immediate and present dispute between the parties, which is the polar opposite of the approach taking by transformative mediators.
Humanistic: a dialogue-driven model of mediation that routinely involves the mediator meeting separately with the parties in conflict prior to the mediation session. The process focuses on healing the parties and is closely tied with transformative mediation techniques.
Evaluative: mediation that is modeled after the format taken by judges in court-mandated settlement conferences. An evaluative mediator assist the parties in reaching resolution by pointing out the weaknesses in each party's case and by offering predicts about how a judge would likely rule. The evaluative mediator provides some formal and informal recommendations to the parties as to the outcome of the issues through an analysis of their respective positions regarding the issues.
Therapeutic: an assessment and treatment style approach to mediation and is often considered effective for high-conflict families during separation to assist in the development of effective communication, cooperation and co-parenting skills.
Bureaucratic: these generally occur in court or other institutional settings, because the processes that may be used and the outcomes available are limited. The process is often much more rigid and formal. The setting is the key feature of bureaucratic mediations as opposed to the technique applied by the mediator.

of the dispute; that is, comparing the possible resolutions to what might happen if the parties were in a courtroom. Each has its own relative merits, but again, the onus is on counsel to assess the issues and determine which process will assist the parties to come to a resolution both in a just and expeditious fashion. For example, where the parties suffer from subtle and/or overt power imbalances, interest-based negotiations would likely be inappropriate, because the "weaker" or more "vulnerable" party is unlikely to articulate their *interests* without trepidation and/or fear of reprisal. Rights-based negotiation would assist the same vulnerable party by disregarding unreasonable and unjust positions taken by the opposing party. On the other hand, rights-based negotiation may be more expensive for that same vulnerable party and there may be certain compromises of entitlement that are appropriate in the context of a combination of these two approaches.

Most skilled mediators thus should combine approaches and shift between different techniques as required, effectively tailoring their approach to the needs of the parties and their particular dispute. Given the varying approaches and techniques available, the choice of mediator is a very important and strategic aspect of the lawyer's role. Again, this involves proper and explicit screening by counsel and mediators for power imbalances, so that the most appropriate negotiation techniques and power neutralizers are applied throughout the mediation. The choice of mediator is especially important if power imbalances exist between the parties. In effect, it becomes incumbent upon family law counsel to understand the nature and intricacies of these various mediation techniques in order to properly match their clients and the dispute with the most

appropriate mediator. While we argue that counsel is not adequately trained to make such determinations and/or account for mental health issues, assessing the relative skill-set and expertise of the professional who will act as mediator is rightfully within the scope of our abilities, and, quite frankly, professional responsibilities.

Mediation may also be "open" or "closed" – usually the choice is left up to the parties, but they must agree before the commencement of the mediation. In the case of open mediation, if the mediation is unsuccessful, disclosure (ie. facts and evidence) obtained during mediation may be presented in court documents in the event that a court proceeding is commenced by either party. It is important to note that, while disclosure is admissible in the court proceeding, "discussions, offers, or alternatives that were discussed during the course of the mediation, whether in caucus or with all participants present" are not.[13] Closed mediation, on the other hand, is more closely akin to collaborative law in that the parties are prohibited from using any information and/or disclosure obtained during mediation during a subsequent court proceeding. Again, family law counsel must be careful to advise their clients wisely as to which structure of mediation to embark upon in order to properly prepare for what is most likely to arise from the mediation. For example, if there is a history and/or pattern of the opposing party making "deals" and then reneging on same, it would be beneficial to advise clients to choose open mediation so that this pattern (ie. failure to negotiate in good faith) may be disclosed in pleadings.

[13] *Cold Lake Fibromyalgia Support Group v. Alberta (Director, Northern Region, Regional Services, Alberta Environment)* 2009 CarswellAlta 90 (Alta. Environment Board).

A unique feature of mediation, which is not exercised in other forms of ADR, involves the use of a "caucus". A "caucus" or "break out" session, which may be requested by either party or the mediator, enables one party to meet with the mediator without the other party's presence. In Canada, mediators are not bound by any particular rules and, as such, there is no "hard and fast" rule about whether information obtained during a caucus session may or may not be shared with the other party. Accordingly, the use of a caucus or break out session is necessarily strategic – mediators and participants alike are able to utilize this tool to further their goals in the process. Mediators, for example, may call for a caucus in order to defuse tension that is building between the parties which the mediator sees as a barrier to resolving the dispute. While participants, on the other hand, may seek to caucus to glean the mediator's point of view regarding a particular disputed issue and accordingly press the mediator to support their position.

Private v. Public Mediation

Family law mediation currently remains a voluntary process and is not mandatory in most Canadian provinces. Arguably, however, mediation by judges has, in effect, become mandatory within the family law division of the court systems in British Columbia, Manitoba, Ontario, Nova Scotia and Newfoundland.[14] Pursuant to the applicable provincial legislation, family law proceedings necessarily involve settlement conferences at some stage of the process – these are generally referred to as "case" or "settlement" conferences. Case and/or settlements conferences allow the parties and

[14] *Provincial Court (Family) Rules*, B.C. Reg. 417/98 at Rule 7; *Manitoba Regulation,* 553/88 at Rule 70.24(10) to 70.24(13); *Family Law Rules*, Ont. Reg. 114/99 at Rule 17; *Family Court Rules*, N.S. Reg. 20/93, made under Sections 11 and 12 of the *Family Court Act* , R.S.N.S. 1989, c. 159 at Rule 11.01; *Provincial Court Family Rules*, 2007 N.L.R. 28/07, made under the *Provincial Court Act*, 1991 at Rule 11.

counsel to meet with a judge and discuss, on a without prejudice basis, their respective positions regarding the disputed issues. The case conference judge will never preside over a motion or the trial in the same matter, but may be seized of the matter for further case conferences. Accordingly, parties are encouraged to openly discuss their settlement positions or, at least, their disclosure requests at a very early stage in the proceedings.

While judges are empowered by the relevant provincial rules of procedure to make any court order at a case conference that is appropriate, it is no secret among the family law bar, especially in Ontario, that judges are loath to and hardly ever make any orders at a case conference unless made on consent of the parties, and generally, any orders that are procedural in nature or related to the provision of disclosure. This is likely the result of their limited involvement with the case and the parties. Accordingly, rather than being an opportunity to have a judge resolve some issues in the case, the use of mediation has been institutionalized. Case conferences (and settlement conferences, which are also mandatory) are effectively mediation sessions masquerading as adjudicative processes, albeit with a judge as the mediator. Accordingly, we argue that, as opposed to mandating case conferences, private mediation should become a mandatory step in the family law litigation process as is the case with estate and some civil proceedings in Ontario. This would essentially ensure that the person mandated to conduct the mediation is given sufficient time and access to the parties to conduct a useful mediation and, hopefully, resolve the disputes at an earlier stage of the litigation. The public forum in Ontario, and generally speaking throughout Canada, simply lacks the

resources to provide this kind of case-by-case involvement, which is and would be available to parties in a private setting.

It is important to note, however, that some parties are only motivated to resolve disputes when faced with the involvement of judicial authority. For those parties, public mediation by a judge, via the case and/or settlement conference process, may be the only way to encourage appropriate resolutions and the provision of reasonable offers to settle prior to a trial. Once again, it is imperative that counsel properly "interview" their clients, so that they understand the dynamics that exist between the parties as well as the overt and covert motivations of their client and the client's former partner/spouse so that the proper conflict resolution tool is applied from the beginning. Some situations may not initially be designed for ADR, but may become so after a stern encounter with a judge at a case and/or settlement conference.

Mediation/Arbitration

Generally speaking, throughout Canada, although mediations may be conducted without triggering an arbitration, an arbitration rarely occurs without a mediation having already been conducted, albeit an unsuccessful one. Many family law disputants in Canada are submitting their issues for resolution by the mediation/arbitration process. The term "Mediation/Arbitration is well recognized as a legal term of art referring to a hybrid dispute resolution process in which a named individual acts first as mediator, and, failing an agreement, then proceeds to conduct an arbitration."[15] Parties may

[15] *Marchese v. Marchese* 2007 CarswellOnt 248 (Ont.C.A.) at para 4.

choose to utilize two separate individuals for the mediation and subsequent arbitration; however, parties are commonly utilizing the same professional for mediation/arbitration.

An agreement to submit the dispute to mediation/arbitration is binding and once the parties have entered into such agreement, neither may resile from it. The arbitration itself is conducted more like a formal hearing than any other form of ADR. Specifically, witnesses may be called to give live evidence and the parties must adhere to the prevailing rules of evidence throughout the arbitration. In addition, as with formal litigation, rules regarding awards for costs also apply so that parties are encouraged to make reasonable and timely offers to settle.

Although parties are free to use one ADR professional for the mediation and another for the arbitration, in Ontario and in British Columbia, most parties using this method of ADR are submitting their matters for mediation/arbitration with the same professional.[16] In Ontario, there is a provision of the *Arbitration Act* that prohibits the use of the same professional for mediation and arbitration; however, family law disputants are waiving this provision and pursing this form of ADR in high volume.[17] The waivers must be in writing, generally incorporated into the Mediation/Arbitration Agreement, and the parties must obtain independent legal advice in regard to this issue beforehand.[18]

[16] Ministry of the Attorney General of British Columbia. (2004). *Arbitration of Family Law Disputes*. C. Morris at p.3.
[17] *Arbitration Act,* R.S.O. 1991, c.17.
[18] *Ibid* at s.35.

Clearly, when viewed objectively, it seems counter-intuitive and a disincentive for parties to openly discuss settlement positions with a mediator who may then put on their "hat" as arbitrator if the mediation is unsuccessful. However, use of the same professional to both mediate and arbitrate a dispute gives the ADR professional increasing authority in the normative-based mediation sessions to voice an opinion regarding the ultimate and likely resolution of a dispute if arbitrated. This works to encourage parties to resolve the dispute during mediation, as opposed to potentially facing cost-consequences following the arbitral award. Anecdotally, this type of ADR process is frequently used in Ontario and indeed, senior family law counsel have stated that the success rate of such mediations is very high. We would query, however, if the success rate of such mediations is actually higher than properly conducted negotiations?

This pattern of success for mediators is likely the result of family law disputants seeking continuity in the process and minimized costs by avoiding repetition. In a sense, the mediation/arbitration process is similar to the current process in place in the family law courts in various provinces (as outlined above): the parties are required to attend for "mediation" (the case and/or settlement conference) with a judge and then, if unsuccessful, the litigation may continue as a formal adjudicated process. The main distinction between public and private mediations is that continuity is lacking in the public sphere for two reasons: (1) parties in the public process are not guaranteed that the same case conference judge will be available for the next case conference, because even though judges can seize themselves of matters, they move in and out of family law

and may not be available when the matter returns, and (2) case conference judges are specifically precluded from adjudicating any further in the same proceeding (other than at a further case conference), because they have heard settlement and compromise positions. If case and/or settlement conference judges were not prohibited from adjudicating subsequent motions and/or the trial, there would be substantial backlash from the family law bar on the basis that "justice would not be seen to be done" because the judge was aware of the parties' respective settlement positions prior to making a formal determination of the issue(s). Accordingly, and arguably, use of the same professional for both mediation and arbitration should also be prohibited for the same, rational, reasons.

However, the standard rationale for agreement to the same mediator/arbitrator is that the ADR process is more likely to be successful and, thus, more cost effective than litigation, so this offsets the possible bias that results from knowing the parties' respective settlement positions. Parties choose experienced family law lawyers or other experienced professionals as their mediator/arbitrators, and the prevailing wisdom is that the mediator/arbitrator is able to turn his/her mind to evidence in the arbitration without being influenced by what transpired during the preceding mediation. Since appeal rights are also limited, the mediation has more chance of success when the mediator has the ability to express an opinion regarding the normative resolution of the dispute if arbitrated.

Although this method of ADR has been widely adopted by the family law bar in Ontario and British Columbia, it is of concern that no comparative statistics or analyses have been conducted to determine the use and relative success of the same professional for mediation and arbitration against the use of two separate and independent individuals. Nor has any research and/or statistical analysis been collected to compare the public versus private processes of mediation. Rather, it seems that counsel are using their own case-by-case experience to advise clients to use mediation/arbitration with the same professional without having the guidance of objective analysis and/or empirical research. We argue that the anecdotal legal recommendations regarding any mechanism of ADR, and especially one that contradicts a legal norm (ie. independent decision-making), must be based on objective evidence and, at this time, it is not clear that it is. Certainly, it is more convenient for lawyers to attend before arbitrators – scheduling, time and choice of arbitrators who are knowledgeable about the law and pleasant to counsel – but that is not an appropriate test of the relative merits of this method of ADR. Is ADR truly more effective or have counsel become lax in attempting to resolve matters by negotiation? Or, are mediators/arbitrators being used to bludgeon more flexible parties towards resolutions that may not be in line with legal principles but yet serve primarily to resolve disputes?

As is the issue with mediators, collaborative and cooperative lawyers, family law arbitrators are not formally regulated. Accordingly, even though it has been widely accepted as a valuable form of ADR for family law matters, the arbitration process has yet to be tested against any standard, and as such, aggrieved parties have no form of

recourse other than an appeal of the arbitral award. Although not formal regulation, the Institute has adopted a set of National Arbitration Rules, and additionally, arbitrations across Canada are governed by provincial legislation. Arbitrations in Ontario are also governed by the *Family Statute Law Amendment Act*.[19] As noted above, family law arbitrators are primarily drawn from the senior family law bar and thus remain insulated from complaints and/or professional discipline when wearing their mediator or arbitrator hats.

In Canada, the use of mediation/arbitration to resolve disputes is occurring as both a front line dispute resolution tool as well as a means to resolve future disputes following the execution of a final Separation Agreement. In Ontario, prior to the enactment of the *Family Statute Law Amendment Act,* parties were also able to agree to submit future disputes to mediation/arbitration in marriage contracts; however, now, by virtue of this new legislation, a Mediation/Arbitration Agreement is not enforceable unless it is executed *after* the dispute arose. This would appear to also prohibit disputes arising after the execution of a separation agreement, but there is an exception for 'secondary' disputes (ie. future disputes arising from terms of a negotiated agreement or arbitral award or court order which deal with on-going management or implementation of terms).[20]

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[19] *Family Statute Law Amendment Act,* R.S.O. 2006, c-1.

[20] The *Family Law Statute Amendment Act* requires that all Mediation/Arbitration Agreements meet the following formal requirements:

- Be signed, witnessed and in writing;
- Must be entered into following the dispute arising (exception for secondary disputes as defined herein);
- The parties must have received independent legal advice prior to signing the Agreement'
- Parties cannot contract out of appellate review on questions of law;
- Agreement must clearly state the right of appellate review (ie. question of law only or questions of law and fact) and the process to be followed;

In addition, the *Family Statute Law Amendment Act* now also makes faith-based or religious arbitrations unenforceable in Ontario, because arbitrations must be conducted exclusively in accordance with the laws of Ontario or other Canadian jurisdiction.[21] Previously, arbitrations conducted by Rabbinical councils or by the Aga Khan Ismaili Council for Canada, as well as those conducted pursuant to Sharia Law, were given the same authority as those conducted in accordance with family or labour legislation. Now, however, any awards arising from a faith-based arbitration will no longer be enforceable by way of an Ontario court order. As with all arbitral awards, enforcement of an arbitral award cannot occur until the award is turned into a court order. Given that the *Family Statute Law Amendment Act* prohibits the enforcement of any faith-based arbitral award through the Ontario court system, it will be interesting to see if the use of faith-based arbitrations is reduced or if the desire to have family disputes settled pursuant to one's faith and by their respective religious leaders prevails over the need for access to formal enforcement mechanisms.

Outside of the religious sphere, family mediators/arbitrators are primarily drawn from the family law bar and, as such, are highly specialized in their training and legal expertise. In addition, in Ontario, they are required to undergo training in how to screen for power imbalances and domestic violence.[22] Prior to the commencement of an arbitration, the arbitrator must screen for violence and/or power imbalances and assess/consider the

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- Financial disclosure must be exchanged before entering into the Agreement (Note: this requirement will likely have little effect on the process of Arbitrations in Ontario, since most arbitrations are preceded by mediations for which the parties would have exchanged financial disclosure.); and
- The Arbitrator must certify that he/she screened for domestic violence or power imbalances.

[21] *Supra* note 19.

[22] The training involves an approved and comprehensive two-day course, which is taught by family law lawyers and mental health professionals.

results of the screening process both prior to and during the arbitration.[23] In effect, there is a legislative directive that arbitrators fulfill the role of "power imbalance neutralizers" while conducting arbitrations of family disputes.

This is an important and significant legislative change for family law lawyers in Ontario, because the issue of power imbalances, whether as a result of a history of violence in the relationship or a history/pattern of financial manipulation, is of significant concern when acting for parties in any ADR process. Specifically, when advising clients about the ADR options available, the onus is now effectively falling on lawyers to screen clients for domestic violence and/or other forms of power imbalances that may exist between the parties. Without an understanding of these sensitive and extremely relevant dynamics, it is near impossible to determine what, if any, ADR mechanism may be appropriate for any given client. Since arbitrators in Ontario are required to receive specialized training in how to screen for these issues, some of the stress on lawyers is necessarily relieved. Accordingly, it is not at all surprising that when choosing not to commence litigation family law counsel have been more inclined to submit matters to mediation/arbitration than any other form of ADR.

To that end, family law practitioners in Ontario and British Columbia also recognize the value of having greater control over the process. Specifically, if a matter is going to be submitted to a third party to make a final decision, family law practitioners are better able to advise their clients about the anticipated outcome, and somewhat control the spectrum of outcomes, when they are able to choose a decision-maker with the specific

[23] *Supra* note 19 at s.1.

dynamics of the parties in mind. Although this sounds like a legitimized and rationalized form of judge-shopping, the use of arbitration and the careful choice of an arbitrator is an effective tool in reaching a just and often times more expeditious resolution in complex disputes. There is no doubt that judges preside over matters with diligence and care; however, there is often a steep leaning curve, at least in the beginning, for those judges who did not practice family law before being appointed to the bench. On the other hand, since arbitrators are primarily senior and seasoned members of the family law bar, they are more likely to be alive to the prevailing issues and recent case law in family law.

Arbitration was also previously celebrated among family lawyers because it offered clients the privacy and finality that they could not obtain through litigation and/or any other form of ADR. However, these features of arbitration have been substantially curtailed by the implementation of the *Family Statute Law Amendment Act* in Ontario. Previously, parties could ensure their privacy by choosing to resolve their family law dispute by way of arbitration and contract out of any right of appeal. The terms of the *Family Statute Law Amendment Act* now prohibit parties from contracting out of appellate review on questions of law.[24] Accordingly, if the door to litigation can never be closed, parties may be subject to not only a review of the arbitral decision, but additionally, the airing of all "dirty laundry" that they had sought to keep hidden.

Nonetheless, it is unlikely that this legislative change will reduce the volume of family law disputes being submitted to arbitration, since, historically, there are very few cases

[24] *Supra* note 19 at s.1.

in Ontario that are submitted for appellate review pursuant to the section 45 of the *Arbitration Act*.[25] And, in fact, the door to litigation was never in fact closed, because arbitrators have always been prohibited from deciding any and all matters related to family status (ie. granting divorce, annulment of a marriage, declaration of parentage) and the courts always retained inherent jurisdiction pursuant to their *parens patriae* power with respect to any and all childrens' issues. By virtue of the *parens patriae* jurisdiction, the courts effectively have the power to disregard any provision of an arbitral agreement respecting the education, moral training, support of or custody of or access to a child where, in the opinion of the court, to do so would be in the best interests of the children.[26]

Whether the issues are child-related or financial in nature, courts are generally loath to interfere with the decision of an arbitrator and consistently provide arbitral awards a high degree of deference. The courts of Ontario have repeatedly stated that, even in cases where courts have been asked to exercise the *parens patraie* power, "the standard that should be applied on a review of an award by an arbitrator….is that the court should not interfere….unless it is satisfied that the arbitrator acted on the basis of wrong principle, disregarded material evidence or misapprehended the evidence."[27] In effect, unless the court makes a material finding that the arbitrator made an "error in law" (which, coincidentally, is the only remaining right of appeal in Ontario), the arbitral award will not

[25] *Supra* note 17 at s.45.
[26] P. Epstein, "Family Law Arbitration: Choice and Finality Under the Amended *Arbitration Act, 1991* and *Family Law Act*" (2010) 25 C.F.L.Q. 199.
[27] *Robinson v. Robinson* 2000 CarswellOnt 3264 (Ont.S.C.J.) at para 5.

be set aside.[28] In any regard, arbitrators are also required to make child-related decisions in light of the guiding principle that the best interests of the child are the paramount concern, and, as such, the application of the *parens patriae* power is effectively limited since the courts will give deference to arbitrators' decisions so long as the decisions were made with that guiding principle in mind.

However, the existence of this inherent jurisdiction of the court does create an important onus on lawyers to advise their clients, in advance of signing of the Arbitration Agreement, that appellate review of arbitral decisions is not limited only to questions of law with respect to child-related issues. Rather, irrespective of the nature of the review sought, if the matter deals with the best interests of the children, a court may intervene and impose its own decision at any time.

Enforcement of Negotiated Agreements following ADR

Following the successful conclusion of a mediation and/or the collaborative or cooperative law process, the parties will ultimately have defined and detailed the resolution of their dispute by way of a comprehensive separation agreement. Following an arbitration, the disputants will have obtained an arbitral award that duly addresses the various issues raised during the arbitration. If the parties comply with the terms of their agreements and/or awards, there is rarely a need to seek formal enforcement through the court system; however, if a party refuses to comply, the other party may need to invoke the enforcement mechanisms that are only available through the judicial process.

[28] *Lalonde v. Lalonde* (1994), 9 R.F.L. (4th) 27.

The protocol to enforce negotiated and fully executed Separation Agreements and/or arbitral awards via the court system varies by jurisdiction. Separation agreements and arbitral awards must be converted into formal court orders in order to exercise any means of enforcement, including but not limited to, contempt. Court orders must be approved by both parties as to *form* and *content* before a court will permit the order to be issued and entered. Accordingly, the issue that arises for the compliant disputant, who is generally the party seeking to turn the agreement or award into order, is that the non-compliant disputant can use this opportunity to re-open negotiation of the terms via a dispute of the form and/or content of the order.

In effect, the process to turn an agreement or award into a court order is an opportunity to appeal the terms of the parties' agreement and/or the arbitral award without having to launch an official judicial review. This is completely unfair to the compliant disputant who expended time and legal fees in order to properly negotiate an agreement and/or go through an arbitration. Thus, compliant parties have no means of pressuring the rogue party to conduct themselves in accordance with the terms of the agreement and/or award without first exposing themselves to a review of those terms. This is one of the fundamental flaws with the administration of ADR in Canada at this time. Legislation has failed to maintain pace with the use of ADR mechanism by failing to incorporate streamlined means to enforce the negotiated agreements and/or arbitral awards via the court system.

CONCLUSION

Issue of Suitability

The old adage that the fastest way to resolve a dispute is to race to the courtroom door is being reassessed and lawyers must balance and thoughtfully determine which conflict resolution process best suits each client and each set of facts. With the rise of so many permeations of dispute resolution, the onus on lawyers to screen and direct their clients down a particular path, whether it be litigation or some form of ADR, is becoming greater and more challenging. How are lawyers – trained as legal thinkers – to properly funnel their clients into the ADR process for which they are best suited and which will most likely yield an expeditious and just resolution? And, perhaps even more importantly, how are lawyers – trained legal thinkers – to identify and comprehend the layers of mental health issues that may be looming beneath the surface and which will necessarily affect the relative success rate of any method of conflict resolution? In order to do so, should all family law lawyers be required to obtain training in how to screen for power imbalances and identify mental health issues?

The traditional role of family law counsel to provide advice to clients regarding their rights and obligations pursuant to the relevant statutes and common law has effectively become the second step in the process. Now, as a necessary first step, family law counsel must assess the compatibility of their client's unique set of circumstances with the various means available to resolve their dispute, which include the various forms of ADR as well as old fashioned negotiation and/or traditional litigation.

One of the difficulties in making this judgment is the fact that there are virtually no meaningful comparative statistics available for guidance. So while certain members of the family law bar might say that mediation or mediation/arbitration are less expensive than engaging the court process, the fact remains that there are no published empirical studies to prove it one way or the other.

Clearly, the ADR processes available run the gamut of the spectrum. Lawyers must play duelling roles as advocates and facilitators of conflict resolution. The question of how to best strike a balance between the two roles is a subject about which very little professional legal education is available. These duelling roles are particularly important in the context of family law disputes, because they inherently contain both power imbalances and very high financial stakes of to reach resolution whether it be by way of litigation or ADR.

In addition, the ability to correctly identify and account for psychological and/or other mental health issues that may or may not affect the structure and/or outcome of the ADR process is simply beyond the scope of the family law lawyer's role as legal counsel. Most lawyers simply do not have the expertise to identify mental health issues or the subtleties of power imbalances to determine if those issues will ultimately have a prejudicial effect during litigation or an ADR process. It is therefore incumbent upon counsel to recognize these issues and to seek appropriate assistance if and as required. It may be interesting and an important research proposal to survey whether

the rise of ADR mechanisms will result in a growth of multi-disciplinary practices and, particularly, increased professional partnerships between family law counsel and mental health professionals who specialize in marital counselling and/or childrens' issues?

Costs – Does ADR make *Cents*?

The issue of costs must also be considered both prior to and while engaged in litigation and/or any form of ADR. The truism that ADR is necessarily a cost saving mechanism is anecdotal and has not been given careful study in Canada, but it should be. Although, traditionally, the role of counsel is to provide sound legal advice and assist clients to negotiate reasonable and practicable resolutions to their matrimonial dispute, the role of 'economic advisor' is also quickly becoming a part of the job description. With the rise of various forms of ADR, family law lawyers must ensure that they pre-screen clients to asses not only the complexity of the issues involved, but also the level of conflict that will be experienced on the road to resolution. For example, the ability of the parties to "work together" and trust one another is fundamental in any process that falls outside of the traditional forms of litigation and the most formalized processes of arbitration. Accordingly, if there is a lack of trust between the parties, cooperative and/or collaborative law should not be utilized since those processes involve the use of jointly retained experts. Counsel must remain alive to this dynamic between the parties and properly steer such disputants into another form of ADR or, alternatively, towards formal litigation.

Additionally, one must question whether the increased of use of ADR reflects a problem regarding equal access to justice? The cost of litigation has today become so prohibitive that only the very wealthy or those on legal aid gain access to the courts. However, again, without meaningful analysis, the question of the efficacy of ADR still remains an open question as does the question of which method of ADR is most effective for any particular type of dispute.

Just Resolution or *Just* Resolution?

In addition, the changing role of counsel resulting from the varying ADR processes begs the question - are lawyers fulfilling their obligation to advise their clients or selling them out for the ultimate goal of resolution? Effectively, ADR, and specifically the collaborative and cooperative law processes, "call for the reformulation of the lawyer-client relationship and a re-definition of lawyer advocacy."[29] Proponents of cooperative and collaborative law have specifically criticized counsel for "putting the chill" on resolution by disparaging creative solutions that do not necessarily fall within the standards and/or guideposts set by the courts through legal precedent and statutory interpretation. Arguably, this approach raises questions as to whether the fiduciary obligation of lawyers to provide specific advice to their clients is being met.

If counsel cannot compare the result negotiated during the ADR process against the outcome that would have likely been achieved had the matter been litigated, how else are we to measure the relative success and/or failure of the ADR process? "Creative

[29] W. Wiegers & M. Keet, "Collaborative Family Law & Gender Inequalities: Balancing Risks and Opportunities" (2008) 46 Osgoode Hall L.J. 733.

solutions" are all well and good, but that does not mean that clients should sell their rights up the river just to get a resolution – the resolution must still be *just* and fall within the accepted norm as set by duly litigated legal precedent. Unfortunately, due to the privacy of ADR processes, there are no studies or statistics available to measure the cost and outcome of these conflict resolution tools against simple negotiations and/or litigation through the courts.

The reality is, alternative dispute resolution offers just that – an *alternative* – but that does not mean that these processes will, can or should completely replace traditional forms of adversarial dispute resolution and/or the court system. Rather, we require the courts to continue to hear cases and set the standards by which ADR practitioners may help guide their participants towards a just result. Judicial precedent informs the boundaries of "just results", without which any ADR process would fall into disrepute. The only means available to assess the relative success and/or failure of an ADR process is to compare the negotiated result with what would have likely been achieved if the parties had litigated. Thus, we require both traditional litigation and alternative means of dispute resolution to continue to co-exist, but lawyers must properly push clients down the right stream. How we do that is a question that is yet to be answered. However, without proper analysis and study we still have only anecdotal evidence and the experience of seasoned legal professionals to support the widespread use of ADR. So, the question that remains – is ADR really more effective than meaningful negotiations and/or litigation?

To that end, in light of the growth of ADR within the practice of family law, we, as family law counsel, cannot lose sight of the fact that there are certain cases that are simply not suited for ADR, including and especially "those in which society has an interest in the outcome or which require a legal or authoritative decision with precedential value."[30] In that sense, the migration towards the use of ADR by family law lawyers is somewhat unfortunate, because there is no advancement and/or development of jurisprudence to correspond with social and political evolution, which, more so than in other areas of the law, is extremely relevant and imperative. In effect, the use of ADR for all family law disputes would "obliterate the essential guideposts and boundary markers [we, as a society] need in orienting [our] actions toward one another…"[31] We must consider the issues that come before us and determine if there is value to the matter being heard in the public form or for the purposes of the greater good, because the intellectual and creative solutions offered by ADR remain inaccessible to the general litigating public. To illustrate, try to imagine the face of Canadian family law without gay marriage rights? Had the provincial courts, and ultimately the Supreme Court of Canada, not heard and publicly adjudicated these socially relevant cases, would we, as Canadians, still be considered leaders in equality rights for gay and lesbian couples?

Counsel must analyze and inform clients of a wide variety of different ADR methods and then come to some recommendation about which method is most effective in any particular dispute. No one method is perfect, whether ADR or negotiation or litigation;

[30] P. Hughes, "Mandatory Mediation: Opportunity or Subversion" (2001) 19 Windsor Y.B. Access to Just. 161.
[31] *Ibid.*

thus, in providing guidance to clients about ADR, consideration must be given to the shortfalls of each method.