

## ALTERNATIVE DISPUTE RESOLUTION

# Should lawyers be recommending more mediation-arbitration?

By Genevieve A. Chornenki and Hilary Linton

The emergence of mediation-arbitration in employment, family and some civil disputes has lawyers taking a closer look. Is this a dispute resolution process they should recommend more frequently?

The answer is a qualified "yes". In mediation-arbitration, or



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med-arb, the parties hire a single neutral who acts as mediator *and* arbitrator in sequence. The neutral helps participants negotiate a settlement and, if they cannot, receives evidence and argument before making an enforceable arbitration award.

Med-arb offers timely and cost-effective dispute resolution while maintaining privacy and confidentiality. But here's the thing — neutrals who conduct med-arb have to know what they are doing. Media-

tion experience isn't enough. They need skills to run a fair hearing and write reasoned awards.

The decision of *Hercus v. Hercus* [2001] O.J. No. 534 illustrates the perils of med-arb led by an unqualified person. The process included unilateral and undisclosed submissions to the mediator-arbitrator, failure to give notice or allow submissions, and



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decisions without any stated rationale — all natural justice no-no's.

The *Hercus* med-arb was improvisational. On the initiative of the mediator-arbitrator, the parties moved in and out of mediation and arbitration from issue to issue. The lack of clarity did not equip them for the different stages with contrasting requirements and consequences. Mediation involves give-and-take intended to produce agreement, and participants' statements are not evidence. Arbitra-

tion involves proof and advocacy, and what participants say has legal import. But in *Hercus* the parties were not told whether they were negotiating with an outsider's help or presenting evidence and argument to their decision-maker.

The *Hercus* decision calls for clear stages set out in writing. First, a distinct and confidential settlement process as a pre-requisite to the next step. Then, arbitration in accordance with natural justice, including procedural rights and a fair and impartial decision-maker who delivers reasoned decisions.

So what does med-arb look like when conducted by an experienced practitioner? A Nov. 1 breakfast meeting of the ADR section of the Ontario Bar Association showed two distinct med-arb models. The first — which conforms most closely to the *Hercus* principles — is mediation with an arbitration add-on. The second is arbitration with a mediation add-on. This may sound like a distinction without a difference but it's not.

The first model is used for family conflicts and, to a lesser extent, business relationship issues like shareholder or partnership disputes. It also occurs in some commercial contracts as future dispute resolution clauses prescribing a resolution ladder — negotiation then mediation then arbitration.

The first model has discrete, identifiable stages: mediation is followed by arbitration, all con-

ducted by a single person. A written med-arb agreement specifies when and how participants move from mediation to arbitration and mediation communications can only be used as evidence with explicit consent. Everything is spelled out.

Each neutral brings a different style but the basic structure is clear — mediation is the initial stage with arbitration as the impasse-breaking mechanism. The two stages can take place on the same or different days. Arbitration is usually final and binding but Ontario's Bill 27 may change that for family arbitration because for them it mandates appeals with leave.

The second med-arb model comes from labour relations. It starts with a grievance arbitration or other adjudicative mandate and mediation is *implied*. Participants arrive ready for a hearing but permit, even expect, the arbitrator to initiate (or test for) settlement talks. Like the first med-arb model, settlement talk is excluded from arbitration but depending on the neutral, participants may move in and out of mediation and arbitration as things progress.

The second med-arb model flourishes in an environment of recurring players — neutrals, lawyers, union representatives and institutional employers — where trust can be developed through repeat interactions. The model also enjoys statutory approval like s. 48 of Ontario's *Labour Relations Act*, which authorizes med-arb in labour relations.

This level of informality and improvisation, however, is not currently practical for most family, insurance or commercial disputes. Mandates tend to be one-off, without repeat players. Arbitration

statutes are lukewarm or silent toward med-arb and experience with this hybrid process is limited. As a result, neutrals and participants rely on oral med-arb at their peril.

Post-*Hercus* mediation-arbitration calls for process clarity and written agreements. To maximize success:

- Ensure a common definition of med-arb, a sequential dispute resolution process beginning with mediation and ending with arbitration;
- Pick a trustworthy neutral versed in mediation *and* arbitration;
- Confirm the mediator-arbitrator's mandate in writing;
- Separate the mediation and arbitration stages and clarify the rules that apply to each;
- Define how and when the parties will move from one stage to another;
- Treat settlement talks as without-prejudice discussions unless there's good reason to the contrary;
- Frame clear issues for arbitration and make sure everyone had sufficient notice and time to prepare;
- Work with the mediator-arbitrator to devise the most efficient and cost-effective hearing with steps like written submissions, agreed statements of fact, presentation time limits, and will-say statements subject only to cross-examination;
- Once the arbitration process has started, resist the urge to return to mediation.

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## Is it really *mandatory* mediation?

By Paul Dollak

A few years ago, mandatory mediation was introduced in three cities in Ontario. The objective: reduce the costs and delay of litigation.

When the program was launched, many expected that it would soon be implemented

province-wide. That was the recommendation of the official study of the pilot project that preceded it. That was how the launch was reported in this paper and elsewhere.

Then, late last year, the mandatory mediation rules were suspended in Toronto, where more

than 75 per cent of the mediation sessions were taking place.

Why? Concern about increasing costs and delay.

This time, though, change did not come about because of any study but, as stated in the Practice Direction that suspended mandatory mediation, because some lawyers were expressing concerns to Regional Senior Justice Warren Winkler.

The most significant change implemented by Justice Winkler in response to these concerns was to leave it up to the parties to determine the timing of their own mediation.

Prior to the Practice Direction — and still in Ottawa and Windsor — if parties did not hire a mediator soon after the commencement of an action, a mediator would be

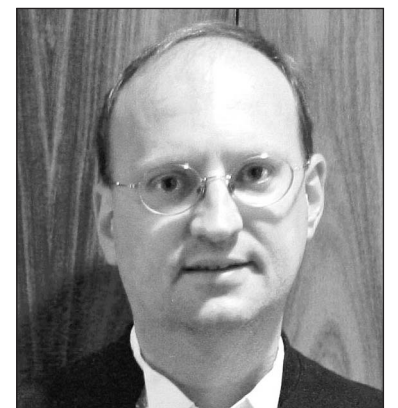
appointed for them. Now, in most new matters commenced in Toronto, parties have until 90 days after they set their matter down for trial to engage in mediation.

This takes the pressure off counsel to agree to early mediation. In fact, given that only about five or six per cent of matters ever get to trial, there will rarely be any pressure at all.

But wait — didn't Justice Winkler extend the requirement to mediate early to all simplified procedure matters and wrongful dismissal cases commenced in Toronto?

And didn't Justice Winkler say that costs would be ordered against parties who did not take the requirement to mediate seriously?

Yes and yes. But the Practice Direction also undermined these small concessions by simultaneously suspending the administrative mechanism whereby a mediator would be appointed for parties who did not appoint one them-



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selves.

No more court-appointed mediator prodding the parties to complete their mediation before the deadline — in any matters.

No more court-appointed mediator demanding compensation for his or her fees if the parties do not comply with the rules — compensation that the court readily used to

*see COMPENSATION p. 12*

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