

## Settling disputes privately

### The courtroom is not the only place to resolve a legal battle | by Linda Silver Dranoff



**T**he traditional forum for the determination of legal rights and responsibilities has been the courtroom. Sensible people have always wanted to settle outside court, but there was no structure for the peaceable resolution of matters. During the past 30 years, lawyers and policy-makers have searched to fill this gap. What has evolved are privatized methods of alternate dispute resolution (ADR), which includes collaborative practice, mediation and arbitration.

#### The court process

The court's process is adversarial, time-consuming and expensive, and the result is winner-take-all. Instead of properly financing an effective system and providing inexpensive access to it, governments have encouraged the development of privatized justice. Family laws require lawyers to discuss mediation with their clients to persuade them to divert their case from the court system. Ontario collaborative practitioners are circulating a petition to encourage the federal government to add a requirement that collaborative practice also be canvassed with all clients.

#### Collaborative practice/mediation

Conciliatory interest-based methods are aimed at a win-win result. Instead of fuelling the conflict, they try to manage it. Both collaborative practice and mediation take place away from the gaze and supervision of judges and courts; individuals settle their own cases with the help of their chosen professionals.

Collaborative law is well-suited to parties who need to continue a relationship after the dispute is resolved, for example, in family law and estate matters. It

aims to achieve a mutually respectful and dignified out-of court resolution. Each party has a specially trained collaborative lawyer as an ally, legal adviser, problem solver and advocate. The parties, supported by their lawyers, conduct all their negotiations in four-way meetings, having signed a participation agreement that they are committed in good faith to the process.

If the process does not resolve the case, the lawyers will not act for their clients in any resulting litigation. Neutrals (e.g., mental-health professionals, accountants and financial planners) may also add their expertise to an interdisciplinary team by mutual agreement.

In mediation, the parties negotiate directly with each other with one neutral mediator present familiar with the legal issues who tries to facilitate a resolution. It is often only after achieving a tentative settlement that the parties each go to their lawyers for independent consultation and to finalize a legal agreement. It is at this late stage that they may get information and advice that causes them to change their minds. Collaborative mediation has recently evolved as a hybrid of both forms.

#### Arbitration

Arbitration is basically a private court, conducted in a manner and with rules similar to the court process, but you appoint and pay for your "judge" who is usually a lawyer and whose decision may be appealed to a court in very limited circumstances (compared to the right of appeal from a court decision).

A hybrid of "med/arb" has evolved in some places. The mediator is the one who, if the matter is not resolved, carries

on as arbitrator. Clients must specifically agree to this second step.

#### Private versus public justice

When justice is privatized, the absence of court decisions will impact on the rule of law, which is a cornerstone of our democracy. It is through the interpretation of legislation by judges when they decide issues on a case-by-case basis that the legislation develops the common law and responds to changing community values and needs. Evolution of law is not furthered by privatizing justice.

Collaborative law and mediation provide a way to resolve disputes more quickly and effectively, using a less traumatic process and maintaining personal privacy, since there is no public record. The parties pay for the professionals involved, but they get to choose them. These methods don't work in all cases. When the parties fail to settle their dispute, they may end up in court anyway. There will always be those cases where the parties or the issues require an outside decision-maker.

Arbitration offers a privatized version of the adversarial court process without its redeeming features, such as an accountable judge and an unrestricted right of appeal. When med/arb is selected, the mediator, who has only persuasive powers, sometimes strongly suggests what he would order if he were forced to arbitrate, which may put unreasonable pressure on the parties to settle on those terms. ●

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