

## **CREATING AN ADR<sup>1</sup> CULTURE**

Ten years ago, the CBA Systems of Civil Justice Task Force Report recommended the creation of a multi-option justice system that incorporates ADR options into the litigation process.<sup>2</sup> But despite all of the efforts that have been made<sup>3</sup>, despite all of the education and training that has occurred<sup>4</sup>, and despite the recognition of the importance of the recommendations of the CBA Task Force, we are still seeing resistance and confusion amongst lawyers when it comes to ADR processes. It begs the question: Why have these efforts not created an ADR culture within the legal profession?

Each year, I face 24 second and third year law students.<sup>5</sup> In three hours per week for approximately 13 weeks, we debate, discuss and analyze the benefits, drawbacks and uses of the different types of ADR processes available to the legal profession. And when the 13 weeks draw to an end, there is invariably a moment when I am struck by a sudden realization—the students have figured it out! They understand that not every file has to go to Court. They understand how to choose a process to fit the dispute and benefit the clients, and they understand when and why to choose a particular process. The students leave the course with a toolbox full of non-traditional processes and a dramatically different approach to the resolution of the legal problems faced by their clients.

But then something happens. The students begin to article. They see the opportunity to use mediation or some other ADR process and suggest it to the senior lawyer supervising the file. The senior lawyer gives the student a withering look, tells the student that those ideas are fine for law school, but at this firm they went to law school to litigate, not mediate. Or maybe the senior lawyer tells the student that mediation only works for certain types of files, like family files, or worse, mediation is designed to give the case away. The student's already uncertain ego deflates a little more, and the next time the opportunity arises, the student hesitates and decides not to mention mediation or collaborative law or anything other than a court application. The student begins to develop the same approach to handling a file that the senior lawyer takes because that is the approach that is rewarded—that is the approach that gets the student hired back at the end of the articling process. The student, now a young lawyer, climbs onto the traditional litigation treadmill and begins to run on the spot.

---

<sup>1</sup> Appropriate Dispute Resolution

<sup>2</sup> Recommendations 1-3, Systems of Civil Justice Task Force Report, 1995, available through the Canadian Bar Association, 500 - 865 Carling Avenue, Ottawa, Ontario, K1S 5S8.

<sup>3</sup> For example, many regions have implemented programs for court annexed mediation, Judicial Dispute Resolution, Early Neutral Evaluation and other programs aimed at incorporating Appropriate Dispute Resolution into the justice system.

<sup>4</sup> Many law schools teach courses on Introduction to ADR, Mediation Advocacy, Negotiation, etc. Professional societies and Legal Education Organizations offer mediation courses as part of a Certificate in Dispute Resolution and offer training in the Arbitration process.

<sup>5</sup> The author teaches *Appropriate Dispute Resolution* and *Mediation Advocacy* at the Faculty of Law, University of Alberta.

Why are lawyers so resistant to ADR processes? Anecdotally, I am told that lawyers are too busy with their files to learn something new. It takes time to learn new methods, and time means money. If lawyers resolve the case too early, won't it mean less money for them? Do they really want to be without a full desk of files in this highly competitive legal market? Why should they get involved in a process in which they do not feel comfortable and confident, in which they are afraid of losing control and looking silly? No, it is just much easier to put the file into mill and continue doing things the way they have always been done.

Time and again I hear similar explanations. The legal profession gives lip service to the benefits of Appropriate Dispute Resolution processes, but when push comes to shove, the first reaction is combat, A.K.A. litigation. The legal profession needs help. Help to recognize the importance of ADR to their practice and to their clients. Help to recognize that satisfied clients mean more referrals, not less. Help to realize that real lawyers do use ADR!

As members of the Justice System, we must ask ourselves what we can do to create the ADR culture needed in the legal profession in order to develop a multi-option justice system. What follows are a few ideas on how the members of the justice system can do their part to help create an ADR culture in the legal profession:

#### Canadian Bar Association

- Include Appropriate Dispute Resolution as part of Law Day activities
- Encourage Dispute Resolution Sections to share their expertise and knowledge with other sections so that lawyers learn how ADR methods might be used in all areas of their practice
- Include ADR as a standard topic at conferences and as part of the Continuing Education Courses and Seminars offered

#### Clients (Users of the System)

- Be a savvy consumer—become familiar with ADR processes so you can ask your lawyer for alternatives to the traditional litigation process
- Don't wait for your lawyer to suggest ADR, ask for it!

#### Court Administrators and Clerks

- Make handouts on ADR processes available to self represented and unrepresented litigants
- Support court connected dispute resolution processes

#### Government

- Fund the use of ADR processes through Legal Aid
- Make ADR processes available through court connected programs
- Provide funding for the infrastructure needed to support ADR programs
- Institute an ADR usage policy within government client departments, particularly within each Department of Justice

### Judges

- Recognize that ADR is about multiple ways to enter the justice system and not about “turf protection”
- Recognize that “one size does not fit all” and court connected ADR programs are part of a multi-door approach to access to justice
- Explore with the parties whether ADR has been tried before setting a matter down for trial
- Award costs for the use of ADR processes in the same manner as other steps in the litigation process
- Train the Judiciary in the proper use of ADR techniques to maximize the effectiveness of Early Neutral Evaluation and Judicial Dispute Resolution, and to understand the different types of ADR available to litigants
- Be supportive of ADR—lawyers take their lead from you!

### Law Schools

- It all starts here! Incorporate the use of ADR processes in every course taught in order that students learn the different ways to use ADR processes
- Foster the understanding amongst students that lawyers are about dispute resolution, not just trials
- Offer a variety of ADR related courses, such as Mediation Advocacy, Negotiation, ADR Methods, etc.
- Make sure that the ADR related courses are graded courses, not pass/fail courses since students infer that pass/fail subjects are less worthy (important) than the graded subjects
- Consider making Mediation Advocacy a required course in the same way Litigation Advocacy is required (or believed by the students to be required)
- Make sure the students graduate with an understanding and comfort level with ADR processes that will enable them to use the processes and use them well
- Encourage research at the graduate level in Dispute Resolution

### Law Societies

- Cover ADR activities undertaken by lawyers as part of the required standard liability coverage
- Recognize ADR as a practice specialty
- Include a section in the Bar Admission course on Mediation Advocacy so new lawyers understand the unique role of lawyers in the mediation process
- Support funding of ADR processes such as mediation and arbitration through Legal Aid

### Lawyers and Law Firms

- Make it the Dispute Resolution Department, not the Litigation Department

## *Into the Future Conference – May 2006*

- Understand that using ADR does not mean less income, it means happier clients and better word of mouth about your ability to get a good solution, and that means more client referrals!
- Get training in how to advocate for your client in a problem solving process such as Mediation
- Become familiar with ADR processes so you are not afraid to use one when the time is right
- Include mediation/arbitration clauses in the agreements you draft—and use them when there is a problem
- Embrace changes and new ways of resolving problems, even if it means learning a new way to practice
- Learn what makes a good Mediator and Arbitrator so you can select the best for your client

### Legal Education Organizations

- Provide training for lawyers, not just in how to become a Mediator or Arbitrator, but in how to be an effective advocate for your client in the different ADR processes
- Make sure that the role of ADR is considered in every seminar offered

### Mediators and Arbitrators

- Be and act like professionals
- Remember that most lawyers, especially senior lawyers, have not had training in ADR processes and are reluctant to admit that they do not understand the process—especially in front of their client!
- Help lawyers understand their unique role in the process and how they can work with you to the client's advantage
- Take every opportunity to educate lawyers about the different processes available

### Professional Societies for ADR Professionals

- Work toward becoming a regulated profession that supervises the standards and training of ADR Professionals

I hope these ideas will provide food for thought and will stimulate the individuals and groups at this conference to discuss what actions they can take to really ensure an ADR culture.