ETHICAL CONCERNS REGARDING MED-ARB IN FAMILY MATTERS

Larry and Linda have been married for twelve years; regrettably they are now getting a divorce. They have two children and own their home. They both work, earning about the same income. They have approximately $200,000.00 equity in their home, which is their primary asset. Larry received an inheritance from his family, which enabled them to purchase the house. Larry wants to be fair but believes there should be some adjustment for this factor. Larry and Linda have both been to see lawyers and were told it could cost approximately $50,000.00 each for them to go to trial. They have inquired about mediation, but are concerned that if it is not successful things will not be resolved and they will still have to go to court. They have recently heard about mediation/arbitration on the news; but also heard that there is a lot of controversy. What should you tell them?

With the advent of the internet, the public is becoming far more inquisitive about and educated in matters involving their health, finances and the law. With regard to legal matters, couples who are divorcing are looking for a faster, more cooperative and less expensive way to resolve their disputes. Most people involved in a legal dispute do not want to go to court and are looking for a broader range of alternative dispute resolutions (ADR). This is particularly true in the area of family law for couples like Larry and Linda.

Mediation is seen by many as an attractive option; however it does not guarantee a resolution. Arbitration is another alternative; but people are concerned that it does not give the parties to the dispute enough control over the outcome. A hybrid which uses both of these ADR models, commonly referred to as med-arb, may be the solution. However, med-arb does not come without limitations.

Recently, there has been significant debate amongst the legal community. Those in favour of med-arb suggest that it is a more cost effective and efficient dispute resolution alternative than

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litigation. Those opposed to med-arb argue that the process offends the principles of natural justice and may raise concerns of bias. This debate is ongoing. On December 5, 2011, the Law Times published an article called “Med-Arb splits the legal community”. In response, two Ontario lawyers wrote competing letters to the editor, referencing the pros and cons of med-arb in family law matters. The purpose of this paper is to examine the ethical concerns regarding med-arb.

DEFINITIONS AND HISTORY

Prior to reviewing the ethical issues regarding med-arb, it is important to understand the meaning of each process, as well as a brief history of their evolution as ADR processes. Mediation and Arbitration have operated separately for many years. Only recently has the hybrid model of “med-arb” gained popularity.

Mediation

Mediation involves a neutral and impartial third party who acts as the mediator. The mediator works with the parties to facilitate communication and assist them in negotiating a resolution of their dispute. If the matter is resolved, the terms of the agreement reached are usually reduced to writing signed by both parties, creating an agreement that is binding and enforceable between the parties. The benefits of mediation are that the parties craft their own solution to their dispute and it is usually more affordable. The greatest criticism of mediation is that it does not guarantee that a final resolution will be achieved.

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2 McKiernan, M. “Med-arb splits the ADR community”, Law Times, December 5, 2011.
Various forms of mediation have existed for hundreds of years. Disputes were resolved by mediation prior to the existence of a formal court system. In the 1968 Divorce Act⁴, mediation was encouraged in family law matters. Section 9 of our current Divorce Act⁵ requires that lawyers advise their clients of mediation services available to negotiate support and custody matters. Some Provincial legislation imposes similar requirements on family law lawyers. In 1984 Family Mediation Canada was formed. However, its work was initially done primarily by mental health professionals and not lawyers.⁶ In the late 80s, some lawyers began to obtain training in family law mediation and the popularity of mediation has grown and continues to grow significantly within the legal community.

Arbitration
Arbitration is a private form of adjudication and also involves a neutral and impartial third party. It is a consensual process. The parties agree to retain the arbitrator to resolve their dispute. After a hearing, where each party gives evidence and makes submissions, the arbitrator makes a binding and enforceable decision. The benefits of arbitration are that it is a confidential and private process, and it is usually faster and more efficient than traditional litigation. One criticism of arbitration is that it is too adversarial and the parties lose control of the outcome of their dispute.

Like mediation, arbitration has been in existence for hundreds of years and has been used to resolve a variety of disputes. In Canada, arbitration was formally recognized in legislation in 1986, primarily related to commercial disputes.⁷ Arbitration subsequently expanded into other areas of law, including labour disputes. Arbitration of family law disputes has evolved very

⁵ Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), s. 9.
slowly and in some provinces, like British Columbia, it is virtually non-existent. In 2004, Catherine Morris determined that, “despite the purported advantages, few Canadians use arbitration to resolve family law disputes.”\(^8\) However, since 2004, arbitration in family law matters has gained popularity and grown quite rapidly in some locations. In 2010, Lorne Wolfson confirmed that family law arbitration has “developed into a well-respected dispute resolution option and has become the procedure of choice for many family law practitioners and their clients.”\(^9\) However, expansion appears to have occurred primarily in the larger urban cities.

**Med-arb**

Med-arb is also a consensual process; which is a hybrid of mediation and arbitration. In most cases, a single neutral third party, (a “med-arbiter”), is retained to perform both the mediation and the arbitration. Typically, the parties first try to mediate their dispute and if they are unsuccessful in resolving some or all of the issues, they move to arbitration. The med-arbiter then makes a binding decision intended to resolve the entirety of the dispute. There are a number of different variations of med-arb; including arb/med, med-arb-opt-out, co-med-arb, mediation and last offer arbitration (MEDALOA), overlapping neutrals, shadow mediation, binding mediation and non-binding arbitration.

Med-arb has also been used as a dispute resolution option for many years. Sam Kagel, a San Francisco lawyer and arbitrator, is often credited with developing med-arb during a nurse’s strike in San Francisco.\(^10\) The true origins of med-arb occurred during World War II, in

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approximately 1942, when President Roosevelt created the National Labour Board to mediate and arbitrate labour disputes.¹¹

Chief Justice Alan Gold is frequently credited with bringing med-arb to Canada, when it was used in the late '60s and '70s, to resolve labour disputes on the St. Laurence.¹² Since then med-arb has continued to grow in popularity, particularly in labour and commercial disputes.

In 1995, David C. Elliot examined the process of med-arb for the Alberta Law Review. In his report, he stated:

**Parties in dispute, or contemplating a dispute resolution process, want to settle their disputes amicably, but equally want the dispute resolved. Lawyers must assess what, at first sight, might seem like poor choices for dispute resolution. This article examines an increasingly popular process – using a combined mediation/arbitration process to settle disputes – med-arb.¹³**

Med-arb was expanded to family law matters in approximately 2000 and since then has grown quite quickly in popularity, primarily in large urban centers like Toronto, Ottawa and Calgary. In 2007 med-arb was specifically recognized by the Ontario Court of Appeal as a dispute resolution process, in a family law matter, in the decision of *Marchese v. Marchese*¹⁴, where the court stated:

**We do not agree…that there is any ambiguity in the words ‘mediation/arbitration’ or that those words mean ‘mediation or arbitration’. Mediation/Arbitration is a well recognized legal term of art referring to a hybrid dispute resolution process in which the named individual acts first as a mediator and, failing an agreement, then proceeds to conduct an arbitration.¹⁵**

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¹² Telford, supra note 9.
¹⁵ Ibid. at para. 4.
Between 2000 and 2012, in Ontario, there has been a variety of judicial scrutiny (appeals, judicial reviews and applications for a stay or enforcement) of arbitration awards in family law matters. These decisions have included a number of arbitration awards that arose out of the med-arb process. These cases have provided the courts with an opportunity to comment on the viability of the process and have provided me with a good place to start my examination of the ethical issues that have arisen in arbitration awards involving family law matters.

EXAMINATION OF ONTARIO FAMILY LAW ARBITRATION AWARDS

I have examined 48 Ontario court decisions (made between January 1, 2000 and September 12, 2012) where one of the parties applied to court for an appeal, judicial review, stay or enforcement of a family law arbitration award.¹⁶ My examination confirms that the Ontario courts have recognized mediation and arbitration as a preferred form of dispute resolution and that a great deal of deference is given to the arbitration awards. Throughout the decisions, the courts have encouraged parties to engage in mediation and arbitration. In Davies v. Davies the court said at paragraph 27:

I agree with the [husband] in that it is preferable that the parties engage in mediation in order to resolve their issues. The court encourages such activity where both parties agree and are willing, able and prepared to engage in healthy discussions with the view to resolve issues in a cooperative spirit....¹⁷

Some of the literature suggests that the majority of cases appealed are as a result of the med-arb process. However, that is not borne out in my research. Of the Ontario decisions I examined, 58% involved awards originating from the med-arb process and 42% from strictly an arbitration award. The breakdown of each category is as follows:

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¹⁷ Davies v. Davies, 2011 CarswellOnt 10947 (Ont. S.C.J.)
The number of cases involving appeals, judicial review and enforcement are almost equally divided between cases that were straight arbitration or cases involving med-arb. It should be noted, however, that the decisions involving stay applications all originated from the med-arb process. The results of these applications are as follows:

<table>
<thead>
<tr>
<th>Status of Application</th>
<th>Appeal</th>
<th>Enforcement</th>
<th>Stay</th>
<th>Judicial Review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Granted</td>
<td>11</td>
<td>6</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Dismissed</td>
<td>11</td>
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<tr>
<td>Total</td>
<td>22</td>
<td>15</td>
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**Ethical Issues arising from the Ontario Court decisions**

I discovered some common concerns regarding the ethics of the process woven throughout many of these decisions. I have attempted to summarize them below and have indicated the number of decisions which address each concern. I will then expand on each concern below.

The ethical issues I have identified as arising in the Ontario Court decisions may be summarized as follows:

- The arbitration or med-arb agreement itself is of paramount consideration. It must be in writing and signed by the parties and the arbitrator. (11 decisions)

- The arbitrator must ensure that there is a fair hearing that satisfies the principles of natural justice and procedural fairness. (7 decisions)

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18 Some of the cases dealt with an application in more than one category; I choose which was most applicable.
• The arbitrator must be impartial and maintain an impartial process throughout the proceeding.  (6 decisions)

• The arbitrator’s reasons should be clear, concise and should include sufficient detail to justify the award.  (5 decisions)

• The arbitrator must screen for domestic violence and power imbalance.  (2 decisions)

The remaining decisions I reviewed, were appeals based purely on the merits of the award.

The Agreement

In Ontario, the arbitration or med-arb agreement must be in writing, comply with the regulations and the parties must have received independent legal advice.¹⁹ The terms must be clear and concise with no ambiguities. There should be a clear delineation between mediation and arbitration and that delineation must be conveyed to the parties in some fashion, preferably in writing.

As I noted earlier, the Ontario Courts have demonstrated a great deal of deference for the arbitration and med-arb process.²⁰ However, they have also made it very clear that the actual agreement and any amendments must be in writing. In E.E. v. F.F. and G.G., at paragraph 119, the court stated:

My ruling should not be read to suggest that parents who prefer arbitration or med-arb should not be entitled to the protection that the amendments intend to provide. It should be a reminder for parties who prefer to mediate and arbitrate to address any process concerns and clarify these concerns in writing and address the amendments as early as possible in the process.²¹

The Hearing and Natural Justice

The Ontario courts have, as well, made it very clear that the hearing process itself is also very important. Firstly, the parties must know when the mediation ends and the arbitration begins. It

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is preferable that this delineation be in writing. The transition should be made very clear to the parties and it is preferable that, once the arbitration has commenced, the process not revert back to mediation. If there is to be further mediation, there must be closure in the arbitration process and a new mediation process begun.

With regard to the form of hearing, the parties may agree to whatever format suits them, provided the “hearing” complies with the principles of natural justice and is fair to each party. In *E.E. v. F.F. AND G.G., supra*, the Court stated:

> With respect to the mothers’ claim regarding their denial of natural justice, it should be noted that “hearing” is not a defined term in the legislation. Black’s law dictionary defines a hearing as a judicial session usually open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying. The decision was not made in their absence. They had an attendance, filed affidavits, made oral representations and the arbitrators considered their request. I do not read s. 26 of the *Arbitration Act* mandating or requiring a hearing where the arbitration involves the terms of an adjournment.22

In addition, the parties must have an opportunity to present their case fairly and know the case of the other party, so they have sufficient opportunity to respond. In *Hercus v. Hercus*, the court said:

> Arbitrators must listen fairly to both sides, give the parties a fair opportunity to contradict or correct prejudicial statements, not receive evidence from one party behind the back of the other and ensure that the parties know the case they have to meet. An unbiased appearance is in itself, an essential component of procedural fairness.23

All of the rules of natural justice must be complied with or it could result in an appeal of the arbitration award. This was referenced at paragraph 74 of *Kainz v. Potter*, where the court stated:

> A breach of the rules of natural justice is regarded as an excess of jurisdiction. While courts respect the power of an administrative tribunal to govern its own proceedings,

22 Ibid at paras. 130 – 132.
23 *Hercus v. Hercus* 2001 CarswellOnt 452 (Ont. Sup.Ct.).
they do intervene to ensure that a party knows the case to be met and is able to respond... In essence, s. 19 incorporates the principles of natural justice.

In that case, the court allowed the appeal of the arbitrator’s decision due to extreme flaws in the process.

**Impartiality and Bias**

A number of the Ontario cases addressed the issue of impartiality and bias. At paragraph 60 of *B. (S.G.) v. L. (S.J.)*, the court did a very thorough analysis and applied the general test of bias in *Roberts v. R.* [2003] 2 S.C.R. 259 (S.C.C.) being:

> The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would [that informed person] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

In *B. (S.G.) v. L. (S.J.)*, *supra*, the Court also addressed the concern of comments made by the arbitrator. The Court concluded that the onus is on the party alleging the bias to “establish that the decision-maker has prejudged the matter such that any representations would be futile...”.

If a party alleges bias, they must do so in a timely fashion and not wait until after the award has been granted. The Court will take into consideration “the timing of the complaint and the lack of steps to have the arbitrator removed”, when making a determination of bias. Thus, the unhappy party cannot wait to hear the results of the arbitration and then raise the issue of bias; they should raise the issue of bias directly to the arbitrator and during the arbitration process.

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26 Ibid.
27 Ibid.
The Arbitration Award

The arbitration award must be clear and concise, leaving no room for interpretation as to what the arbitrator intended. The court will not try to interpret the award and, if there are any ambiguities, the matter will be remitted back to the arbitrator for reconsideration or clarification.

In Haratsis v. Haratsis, the Court stated:

This court has no jurisdiction to “reasonably interpret” the arbitrator’s decision. This court may not interpret but may only enforce the clear decision of the arbitrator. If there is any ambiguity in the arbitrator’s decision, the court should not treat a request for enforcement as an opportunity to substitute its own assessment. (para. 23)

... Section 45 (4) of the Act provides that, where clarification is required, the matter should be sent back to the arbitrator for clarification, in accordance with section 45 (4) of the Act. If the meaning of the arbitrator’s words is clear, however, section 6 of the Act provides that this Court has the authority to enforce the arbitration award....

This matter was remitted back to the arbitrator for clarification.

Another issue for the arbitrator to determine, prior to the hearing, is if a court reporter should be used to record the hearing and how the record of proceedings will be maintained. This information might be required on an appeal, judicial review or and application for a stay or enforcement. This issue was addressed in Speciale v. Speciale, wherein the court held at paragraph 19 stated:

By choosing not to have a record, the parties narrow the scope of intervention by an appellate process as there is no basis to disagree with the factual basis of the award. The facts are as the Arbitrator has found. He found facts relevant to the balancing of factors and as indicated, those facts sit comfortably with the award in the context of the necessary balance.

30 Speciale v. Speciale, 2009 CarswellOnt 2272 (Ont. S.C.J.)
Where the parties choose not to have a court reporter, this should be referenced in the arbitration or med-arb agreement. Even in that instance, it is still the responsibility of the arbitrator to keep a record of the proceedings, including the exhibits.

**Screening for Domestic Violence**

Most provincial legislation imposes a duty on the ADR professional to screen for domestic violence prior to commencing the mediation or arbitration. This is something the Ontario courts have emphasized is of utmost importance. However, an objection on the basis that the arbitrator did not screen for domestic violence must be raised early in the proceedings and may not, in and of itself, be grounds for appealing an arbitral award. In *E.E. V. F.F. AND G.G. supra*, the Court stated:

> Those interested in participating in an arbitration process and desiring additional protections afforded by the regulations applying to family arbitrations need to address this issue, if there is any doubt. They should however not wait for an award they are not happy with to raise the concern. Screening for domestic violence and power imbalance is an important remedial provision. Having a clear understanding on the process and the rights of appeal are also important, but these parties were, until the last attendance, represented by knowledgeable counsel and repeatedly appeared before knowledgeable arbitrators who would have taken steps to protect the parties and address concerns.\(^{31}\)

The application for judicial review in *E.E. V. F.F. AND G.G. supra* was dismissed.

In *Wainright v. Wainright\(^{32}\)*, the court held that a mother was not bound by a med-arb clause due to a power imbalance between the parties. In doing so, the court looked at the parties’ conduct during the relationship and since separation and expressed concerned regarding a significant power imbalance and the best interests of the child. In addressing these concerns, the court stated:

> The evidence that was given by both parties at trial leaves me with serious concerns about whether this is an appropriate case to include a requirement to mediate/arbitrate as part of a final court order and, thus, to make it mandatory especially in light of Mr.

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\(^{32}\) *Wainright v. Wainright*, 2012 CarswellOnt 4113 (Ont. S.C.J.)
Wainwright’s obvious ambivalence about the mediation process. This concern is based on the principle that the best interests of the child remain paramount in any decision involving the child.

... Based on the authorities outlined above, it is clear that the Superior Court of Justice can refuse to give judicial approval to the mediation/arbitration clause contained in the parties’ minutes of settlement, provided it is determined that to do otherwise would risk the best interests of the child. The Superior Court’s jurisdiction to do so is grounded in both its paresns patriae jurisdiction (s.69 of the Children’s Law Reform Act), the statutory requirement to disregard domestic agreements where they do not accord with the best interests of the child (s.56(1) of the Family Law Act) and its general duty not to abdicate responsibility for custody and access issues to third parties.33

The literature indicates that screening for domestic violence and power imbalance occurs regularly in family law mediation. However, with the emergence of arbitration and med-arb, screening for domestic violence is equally as important prior to the commencement of the arbitration hearing.34

**Stay of Proceedings/Enforcement**

As noted earlier in my paper, the Ontario courts have afforded a great deal of deference to the arbitration and med-arb awards. Provided there are no concerns regarding domestic violence, as referenced above, and the parties have signed a binding arbitration or med-arb agreement; the court will usually enforce the decision or order a stay of proceedings and refer the matter back to arbitration. In *Haratsis v. Haratsis*, the court stated:

The Arbitration Act, 1991...entrenches the primacy of arbitration proceedings over judicial proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene, and by establishing a “presumptive” stay of court proceedings in favour of arbitration.35

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33 Ibid at paras. 136 and 164.
34 Wolfson, supra note 8.
35 *Haratsis*, supra note 28 at para. 36.
While the court decisions have provided a very good summary of the ethical issues that may arise in the arbitration and med-arb process, an examination of the literature in this area is also important and relevant.

**ADDITIONAL ETHICAL ISSUES RAISED IN THE LITERATURE**

In addition to the ethical issues I have noted as arising from the Ontario decisions, a number of other ethical concerns have been raised by the scholars in the area. Claude Thomson (commonly referred to as a pioneer of ADR in Canada) and Annie Finn together summarized the disadvantages of med-arb as follows:

Many experienced and highly ethical neutrals remain convinced that mediation and arbitration by the same person are inherently incompatible. A mediator focuses on the interests of the parties and encourages a settlement according to the parties' best interests, not necessarily in a manner that respects their legal rights and obligations. In contrast, an arbitrator is expected to fairly and impartially decide according to the law and the evidence by delivering an award that finally determines the legal rights of the parties.  

My research discloses that the following additional ethical concerns have been raised in the literature:

- Caucus
- Confidentiality
- Coercion
- Professional Responsibility
- Regulation

**Caucus**

One of the difficulties that arise during mediation is that parties can become emotional and communication then digresses very quickly. This is particularly true in the family law context.

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Often one or both parties are hurt or angry. Sometimes they have not been in the same room together for quite some time. This frequently impacts the ability of the parties to communicate clearly and will likely have a negative impact on the negotiations. When these breakdowns in communication occur, the mediator will often use private caucus to separate the parties and speak to each party individually. This process works very well and is frequently used in mediation. However, in med-arb this can be a challenge because of the effect these private meetings may have on the neutrality (or the appearance of neutrality) of the med-arbiter.37

One of the concerns with caucus in the med-arb model is that the med-arbiter, while acting as the mediator, controls the flow of information between the parties. This provides the med-arbiter with a significant amount of control over the process. If the matter then proceeds to arbitration, the med-arbiter may have obtained information during caucus that is not available to all of the parties, which may affect (or appear to affect) the outcome.

One option, to avoid this concern, is to conduct all portions of the mediations in joint session. However, in the family law context, where emotions may be running high, this is not always possible. Phil Epstein, Q.C., a prominent med-arbiter in Toronto, notes, “I believe experienced mediators know that caucusing is sometimes, if not frequently, necessary to break logjams, allow people to save face and to come up with creative solutions. This is often impossible if the parties are face to face all of the time.”38 If done properly, caucusing is a very effective tool in mediation and should continue as an option in the med-arb process.

37 Ibid.
Confidential Information

Tied very closely to the concerns regarding caucusing is the concern that the med-arbiter may be told confidential information not known to the other party. In traditional mediation, during caucus, it is quite common for the parties to share confidential information with the mediator which they do not want shared with the other party. It is essential that the mediator keep this information confidential, unless authorized by the disclosing party to share that information with the other party. This request for confidentiality is not a concern in mediation. However, it can become problematic in the med-arb model, where the matter does not settle and proceeds to arbitration.

This concern is the cornerstone of the ongoing debate in the literature as to whether it is appropriate that the same professional conduct both the mediation and the arbitration. Blankenship stated, “critics of med-arb are therefore concerned that med-arbiters may acquire ‘information in attempting to bring about a settlement that should have no bearing on their decision as.... adjudicator’. They suggest that it is unrealistic to expect a mediator – turned – arbitrator to put these underlying issues aside when making a decision.”

The Ontario court has commented on the issue of confidential information and whether there should be separate professionals involved in the med-arb process. In Kay v. Korakianitis the court stated:

The separation of functions of mediator and arbitrator is designed so that, at mediation, the parties explore various positions on a without prejudice basis. Parties who voluntarily participate in a mediation process expect that the positions of that they take or statements made by the mediator will be confidential if agreement is not reached. That is, the positions taken by a party or by the mediator in the mediation will not be disclosed in any subsequent judicial proceedings. This expectation of confidentiality allows a mediator to explore solutions to the issues in dispute. If a mediator disclosed to an arbitrator any of the contents of mediation...then the purpose of having mediation

\[\text{blankenship, supra note 10.}\]
before arbitration would be defeated. Any discussions that are, by their nature, settlement discussions and confidentiality must be respected.  

Proponents of med-arb suggest that this concern is vastly exaggerated. Judges frequently hear objections to evidence or conduct a *voir dire* to determine the admissibility of evidence in matters before them. If the evidence is excluded the Judge must then disabuse herself of the information provided and make her decision as if she did not know the specific information excluded. This process has existed for years and is an acceptable part of our judicial system, which is not questioned. The same should and ought to apply to confidential information the arbitrator may have heard during the mediation; that information is not to be taken into consideration in the arbitration.

The literature suggests a few options available to address these concerns. One option is to agree that should the matter proceed to arbitration, the med-arbiter be required to convey all confidential information obtained during the mediation process to each party. Another option is to agree that the med-arbiter will disregard all information heard during the mediation, including the matters in caucus, and only base her decision on the evidence presented at the arbitration. A further option is for the parties to “opt-out” of using the same med-arbiter for the arbitration process and have an alternate arbitrator appointed.

John Blakenship, an arbitrator and mediator in Tennessee and a proponent of med-arb had this to say about the concerns:

> Parties to med-arb are free to fashion the process as they see fit and they can implement specific procedures or safeguards to deal with the confidentiality issues. Moreover, the issue ultimately rests with the competence of the neutral and the trust the parties place in him or her. Parties should be aware of the confidentiality issues when

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considering med-arb, but they should be perfectly free to enter into the process so long as the information sufficient to obtain their informed consent has been disclosed.\textsuperscript{41}

This suggests that this concern is best addressed by relying on the skills and training of med-arbiter. The onus rests upon her to gain the confidence of the parties, during the mediation phase, that she will not rely upon confidential information obtained during that process, in arbitration.

In the \textit{Marchese}\textsuperscript{42} decision, the court clearly recognized med-arb as a dispute resolution process. However, in that decision, the court did not address the issue of caucus or confidential information in the context of the med-arb process. This is likely an issue that may arise in the future and the courts will be required to address.

Section 19 of the Ontario \textit{Arbitration Act}\textsuperscript{43}, which addresses the requirement of fairness and equality, states:

\begin{quote}
19 (1) In an arbitration, the parties shall be treated equally and fairly.,

(2) Each party shall be given an opportunity to present a case and to respond to the other parties’ cases.
\end{quote}

Section 19 is one of the sections of the Act that the parties cannot opt out of. Accordingly, it is open for the courts to comment on whether caucus is appropriate and what a med-arbiter should do with confidential information obtained from one of the parties. Barry Leon and Alexandra Peterson wrote an article for the New York State Bar Association commenting on the \textit{Marchese, supra} decision. They also addressed the issue of confidential information and section 19 of the Act and predicted the courts will deal with this issue as follows:

\textsuperscript{41} Blakenship, supra note 10.
\textsuperscript{42} Marchese supra note 13.
Given the recognition by the Court of med-arb as a “well recognized legal... hybrid dispute resolution process” and the fact that private caucusing is fundamental to mediation, it seems likely that an Ontario court would find that the required procedural fairness can be achieved if the mediator-arbitrator, when acting as arbitrator, takes no account of material information obtained in private caucusing about which the other party has not been informed and to which it has not had an opportunity to respond.

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Given that parties in Ontario are free to agree to med-arb, it is likely that courts in Ontario will enforce the result unless persuasive and cogent evidence shows that the mediator-arbitrator relied on material information obtained in a private caucus of which the opposite party was not aware and to which it had no opportunity to respond....

Overall, the literature suggests that this issue will not be a concern provided it is explained to the parties, the guidelines regarding confidential information and caucus are concise and agreed to and the terms are set out in the med-arb agreement. This should all happen in advance of commencing the med-arb process. It will also require a well trained, experienced and ethical med-arbiter who will disregard any confidential information obtained during mediation in the arbitration.

Coercion

Another concern regarding med-arb is that the med-arbiter has control and power over the parties and the process. It is argued that there is a risk that this can result in significant pressure on the parties to settle because they do not want to proceed to arbitration. Further, if the med-arbiter does provide opinions during the mediation, one of the parties may feel pressured to negotiate a deal they do not actually agree to because they are feeling “coerced” to do so by the med-arbiter.

Barry Bartel summarized the issue of coercion in this fashion:

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A degree of coercion within the med-arb process is productive as long as there is not coercion to utilize med-arb. In other words, as long as the parties understand the med-arb process and its characteristics, and choose willingly to give the med-arbitrator the powers associated with the position, the potential disadvantages of the process are no longer limitations but its strengths.\textsuperscript{45}

It would appear that the “coercion factor” may be a positive influence that encourages parties to negotiate a settlement during the mediation phase, rather than allowing the matter to go to arbitration. The onus really is on the med-arbiter to be “sensitive to the line between appropriate pressure to settle and inappropriate coercion”.\textsuperscript{46} Again, the most important thing is that the parties are aware of this concern prior to commencing the med-arb process and that the terms are addressed in the med-arb agreement.

**Transition from Mediation to Arbitration**

The transition from mediation to arbitration needs to be clearly defined and there should be no ambiguity. The parties should be aware when mediation has concluded and when arbitration begins. Preferably, there should be a number of days between each process, so the parties are aware that there is a clear distinction. It is recommended that the cessation of mediation and conversion to arbitration be clearly conveyed to the parties, in writing.

A question that arises from this concern is: Who decides when the mediation should be terminated and the arbitration commence? In most jurisdictions, it is the med-arbiter that determines the mediation has broken down to such a degree that continuing would be futile.\textsuperscript{47}

\textsuperscript{46} Blankenship supra note 10.
\textsuperscript{47} Blankley, K.M. “Keeping a Secret from Yourself, Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case” (electronic copy available at: http://ssm.com/abstract=1793515).
Professional Responsibility and Regulation

Across Canada, there are a number of organizations to which mediators and arbitrators may belong. These organizations usually have a code of conduct or practice guidelines that govern their members. However, my review of the literature and study of the professional organizations across Canada, indicates that there are no ethical guidelines governing, nor are there any professional organizations specifically devoted to the med-arb process.\textsuperscript{48}

Mediators and arbitrators are not required to join a particular professional organization. However, if they are a member of an organization, they are likely bound by ethical guidelines of that organization. If the ADR professional is a lawyer, they are also governed by the Professional Handbook and Rules of the Law Society of their province. Many of these organizations have complaint processes in place to address complaints from the public.

In order to determine if there had been an increase in complaints relating to the med-arb process, I contacted over twenty professional organizations and Law Societies across Canada. While the number of responses I received was disappointing, the information received was informative.

Many of the law societies across Canada are struggling with how to govern lawyers who provide mediation and arbitration services. The Law Society of British Columbia does have a method of recording complaints related to the med/arb process. Since January 1, 2007 there have only been three complaints regarding lawyers engaged in the med-arb process (out of almost seven thousand total complaints).\textsuperscript{49} Thus less than .04\% of the total complaints made to the Law


\textsuperscript{49} Email from Doug Munro, a staff lawyer at the Law Society of British Columbia to the author, November 6, 2012 (on file with the author).
Society of BC relate to med/arb. The Lawyer’s Insurance Fund in BC does provide coverage for med/arb; however, my research discloses that there have been very few claims in this area.\(^{50}\)

Kari Boyle, the Executive Director of Mediate BC, is not aware of any med-arbs being conducted in the area of family law.\(^ {51}\) Since 2010, Mediate BC has kept a record of complaints relating to mediation. Out of a total of 7 complaints, 6 related to family law matters. These complaints primarily involved high conflict families.\(^ {52}\) All of the complaints were resolved.

The ADR Institute of Canada, Inc. (ADR Canada) appears to be one of the larger national organizations having both an arbitration and mediation component. ADR Canada has affiliates in British Columbia, Alberta, Saskatchewan, Ontario and Atlantic Canada. Their website however makes no reference to the med-arb process. ADR Canada has two separate set of rules: the National Mediation Rules; and the National Arbitration Rules. My review of these rules indicates that, some of the rules may conflict if applied to the med-arb process as opposed to either the mediation or arbitration process alone.

Section 15.7 of the ADR Canada National Mediation Rules states:

\[
\text{If the Mediator holds private sessions (including breakout sessions and caucuses) with one or more parties, he or she shall discuss the nature of such sessions with all parties before commencing such sessions. In particular, the Mediator shall inform the parties of any limits to confidentiality applicable to information disclosed during private sessions.}^{53}\n\]

Section 7 of the ADR Canada National Arbitration Rules states:

\[
(a) \text{ A copy of any communication between the Tribunal and the parties or other representatives shall be delivered to the Institute.}^{54}\n\]

\(^{50}\) Ibid.

\(^{51}\) Telephone interview with Kari Boyle, Executive Director of Mediate BC, with the author, conducted December 3, 2012 (notes on file with author).

\(^{52}\) Ibid.

\(^{53}\) ADR Institute of Canada, Inc. National Mediation Rules, as amended April 15, 2011.
(b) No party or person acting on behalf of a party shall have a communication with the Tribunal in the absence of any other party concerning the substance of the dispute or any contentious matter relating to the proceeding.54

The mediation provisions of the ADR Canada National Mediation Rules, contemplate the use of private sessions or caucus. However, a restrictive reading of section 7 (b) of the ADR Canada National Arbitration Rules suggests that caucus is not appropriate in arbitration.

Another example is in relation to an offer to settle. Section 38 of the ADR Canada National Arbitration Rules states:

At any time before the hearing on the merits, a party may deliver to the other party an offer marked “without prejudice” to settle one or more of the issues between it and any other party on the terms specified in the offer. An offer to settle may specify a time within which it may be accepted and it will expire if not accepted within that time. The Tribunal shall take into consideration the offer, the time at which the offer was made and the extent to which it was accepted when dealing with questions of costs and interest. No party shall inform the Tribunal of the fact that an offer had been made under this Rule until after all issues in the arbitration other than costs have been determined.55

During the mediation stage of a med-arb, parties frequently discuss offers to settle with the mediator. Should the matter proceed to arbitration, with the same neutral acting as mediator and then arbitrator, as arbitrator the neutral would be aware of these offers; which appears to be in contravention of section 38 the ADR Canada National Arbitration Rules.

When I contacted ADR Canada to discuss the med-arb process, I was advised that ADR Canada is not a regulatory or licensing body for arbitrators and mediators. I was also advised that ADR Canada does not keep track of the number of arbitrations or mediations conducted by

55 Ibid.
their members. Nor were they able to provide a response to my inquiries regarding any complaints made to them about mediation, arbitration or med-arb.\textsuperscript{56}

The American Bar Association (AAA) Model Standards of Conduct for Mediators and the Code of Ethics for Arbitrators in Commercial Disputes contain similar conflicts when viewed in light of the med-arb process. While the AAA website references med-arb; it does not support the conduct of the mediation and arbitration by the same professional. The AAA website states:

A clause may provide first for mediation under the AAA’s mediation procedures. If the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the AAA’s arbitration rules. This process is sometimes referred to as “Med-Arb.” Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator.\textsuperscript{57}

Despite this caution, the AAA does provide a sample med-arb clause that can be used in agreements.

The Institute of Arbitrators and Mediators Australia (IAMA) does not specifically refer to the med-arb process. However, IAMA Mediation and Conciliation Rule 11 (1) states:

If the Dispute is not resolved, the Mediator or Conciliator shall not, without the written consent of all parties, accept an appointment to act as arbitrator, or act as advocate or adviser to any party, in any subsequent arbitral or judicial proceedings arising out of or in connection with the dispute.\textsuperscript{58}

My research suggests that, given the growing popularity of med-arb, professional organizations, such as the ones referred to above, will be forced to address the conflicts created in the ethical standards they set for their members as they relate to the med-arb process.

\textsuperscript{56} Email from Mena Sistito, Manager, Membership and Designations of ADR Canada, to the author, December 12, 2012 (on file with the author).

\textsuperscript{57} American Arbitration Association, Drafting Dispute Resolution Clauses – A Practical Guide amended and effective September 1, 2007.

\textsuperscript{58} Institute of Arbitrators and Mediators Australia Mediation and Conciliation Rules November 2001.
Comments from the Practitioners

My research and this paper would not be complete if I did not examine the ethical concerns of med-arb from the practitioner’s perspective as they are the professionals dealing with the clients and conducting the med-arb process.

Richard Flake is an arbitrator, mediator and trainer from Houston, Texas. Flake is a trainer for the AAA and was named “Arbitrator of the Year” by the National Council of Better Business Bureau. In his article, “Med/Arb – a viable ADR vehicle?” he states:

My experience, both as a neutral but perhaps more importantly as a client in the med/arb process leads me to the conclusion that the parties themselves (less so their counsel) have little fear of impropriety in this regard. Most parties are comfortable with the strength of their own case and in their own fact gathering so as to be relatively unconcerned with the positions and “potential trickery” of the other side. The “trust factor” of the neutral also plays an important role. Parties usually trust an experienced neutral to be able to cut the wheat from the chaff.\(^{59}\)

Lorne Wolfson, who is a prominent mediator, arbitrator and trainer, in Toronto, Ontario, states:

Clients choose med/arb because it is accessible, cost effective, private, efficient and customizable. Lawyers suggest med/arb to clients because they believe that it brings parties to the table to negotiate in a meaningful way, and they believe there is more predictability in the outcome from a known group of mediator/arbitrators that are educated in family law than from judges who are unknown to lawyers and may not have expertise in family law. In our experience, over 90% of med/arb cases resolve in the mediation phase and never reach the arbitration phase. It is often the stick of the arbitration that assists the mediator/arbitrator in moving the parties to a negotiated resolution.\(^{60}\)

Phil Epstein, QC, who is also a Toronto based mediator and arbitrator, estimates that the settlement rate for med/arb is approximately 98%.\(^{61}\)

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\(^{60}\) Wolfson, supra note 8.

\(^{61}\) Epstein, supra note 37.
In Toronto, a group of med-arbiters, including Messrs. Wolfson and Epstein, meet on a regular basis to discuss the ethical concerns that arise in the med-arb process. This group has developed a model med-arb agreement which is used by many of the med-arbiters in Toronto. They have included provisions in their model med-arb agreement which attempt to address the ethical issues that arise, in the med-arb process.  

Based on the literature and on the information I gathered from practitioners, med-arb as an ADR process is growing in popularity and clients using the process have few concerns or complaints regarding the process. Med-arb more often than not results in a resolution of the parties’ dispute, which is the parties’ objective.

**Conclusion**

The cost of litigation is increasing significantly. In 2011, the Chief Justice of Canada, Justice McLachlin cautioned that our legal system is becoming more and more inaccessible to the lower and middle class of society.  

For couples like Larry and Linda, the cost of a trial is prohibitive and they (and others like them) are looking for alternatives for resolving their disputes. In addition to the costs of litigation, many couples looking to ADR processes, such as med-arb, as being more efficient, faster and as providing greater certainty that their disputes will be resolved.

Critics can continue to debate the viability of med-arb; however, it appears that the “train has already left the station”. The most important parties in this process, the clients and professionals, who use med-arb, see it as a viable alternative dispute resolution process. Given the benefits of med-arb, it is likely to continue to grow in popularity. A lingering question will be

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62 Telephone interview with Lorne Wolfson, with the author, conducted December 12, 2012 (notes on file with author).
how to address the ethical concerns raised by the courts and the academics and which I have raised and considered in this paper.

Even proponents of med-arb agree that there are significant ethical issues that must be addressed. My research indicates that, the solution to most of these ethical issues lies in ensuring a well-drafted agreement, a fair procedure and the skill and training of the med-arbiter. The med-arb process, including the pros and cons, must be explained to the parties. The concerns, referred to above, should be addressed in the med-arb agreement. The process must be fair to both parties. It is critical that the med-arbiter is properly trained and aware of the ethical concerns, so they are addressed if/when they arise. It would also be beneficial if the professional organizations, such as ADR Canada, amended their practice standards to provide guidance to their members engaged in the med-arb process.

No doubt, couples like Larry and Linda will continue to search for dispute resolution alternatives. In my view, med-arb may not be for everyone; however it should be an ADR model that is available for consideration by properly informed couples like Larry and Linda.