Making the rule change work

This time a Markham-based lawyer and mediator weighs in on proposed changes to Ontario's mandatory mediation.

By Jack Zwicker

Barely six years after its piecemeal introduction in Ontario, it appears that the clock may have run out on the use of early mandatory mediation. Heading the effort to streamline the civil justice system, Ontario Superior Court Justice Warren Winkler, has co-authored a memorandum containing a series of proposed rule changes.

The underlying goal of this 'pilot project' is a re-alignment of available resources so as to permit the civil justice system to handle caseloads within acceptable timelines. In recommending the elimination of Ontario's Rule 24.1 governing mandatory mediation, the question that the bench and bar will have to face is whether the proposed cure will prove worse than the disease.

As the law now stands in Ontario, mediation is mandatory only in Toronto, Ottawa-Carleton and Windsor. And even in those jurisdictions there are specific exclusions from the application of Rule 24.1.

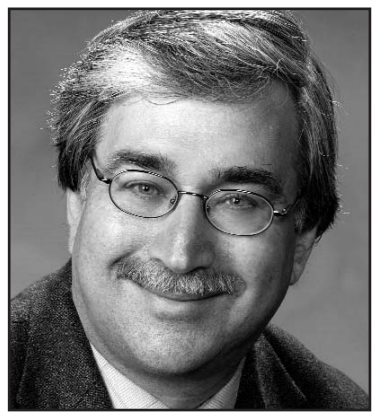
At the heart of the debate regarding what has been an unending series of procedural changes in Ontario since the mid-1980's, is a fundamental but unarticulated issue. And that issue involves the kind of civil justice system which best serves the public interest.

Plainly put, the issue the profession has to face is whether we continue to assume that every case, regardless of content, requires a conveyor belt approach whose ultimate destination is trial.

Given the nature of the 'entitlement culture' in which we all live, the public and the bar will always find creative new reasons for more and better lawsuits. One of the fundamental questions that we need to ask then is whether every case needs to be treated using a 'one size fits all' approach.

After the enactment of the *Charter,* the Supreme Court of Canada made a conscious decision that it no longer wished to be a final court of appeal for certain kinds of cases which might otherwise satisfy its rules governing appeals. It effectively redesigned itself and changed its mandate.

Were Ontario trial courts to do likewise, they might use the information which already forms part of their existing data bank to determine both the



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nature and the numbers of cases which require adjudication by a trial judge. As an organizing principle, such cases regardless of subject area, would involve public law issues which advance the state of our jurisprudence.

Those cases which do not involve some new issue of law and which result solely in 'distributive justice' might be better dealt with by considering the following rule changes.

Rather than leaving it up to the discretion of counsel as to when to conduct examinations for discovery, the rules regarding discoveries should contain enforceable time limits which would permit one party to move against the other where those limits are not observed.

In those cases where counsel appeared to be unduly delaying discovery, serious cost sanctions, if not dismissal would follow as a consequence of a motion to compel timely discoveries. Identical rules could be added to compel counsel to locate and produce documents at an early stage in the litigation.

On the heels of early production and discovery, the rules ought to include a series of provisions for 'mini-trials'.

The 'mini-trial' concept is becoming increasingly popular in the United States especially in cases whose facts are complex. Because of its greater informality, both counsel and the presiding mini-trial judge are able to get at the fundamentals of the dispute more quickly and less expensively. Counsel are compelled to organize and edit their briefs so as to emphasize quality, not quantity.

Because the opinions expressed by the mini-trial judge are not binding, counsel still have the freedom to continue to litigate if they choose. However, if the experience of some of the largest and wealthiest U.S. corporations is any guide, the use of 'mini-trials' is leading to earlier and more cost effective resolution for clients.

Next, rule 24.1 governing mandatory mediation, should be changed so that mediation takes place only after discoveries and 'mini-trials' are completed, not before. It is a common refrain of counsel that mandatory mediation before discovery forces parties to 'go through the motions' simply because they are not ready for mediation.

By coupling mini-trials with mandatory mediation, the public interest is better served simply because clients and counsel are forced to confront the relative strengths and weaknesses of their cases early. The merit of this two-pronged approach is that clients are more likely to settle especially if they see the writing on the wall, well before they and their counsel are so invested, that they feel as though they have past the point of no return.

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Conduct 'undermined public confidence'

COSGROVE
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Bryant alleges that the judge's conduct "undermined public confidence in the administration of justice in Ontario and has rendered Justice Cosgrove incapable of executing his judicial office."

The judges' and defence counsels' associations have weighed in to support Justice Cosgrove's argument that s. 63(1) of the *Judges Act* violates the constitutional principle of judicial independence.

They dispute the legitimacy of the power of the federal and provincial attorneys general, under s. 63(1), to require the CJC to launch a formal public inquiry into whether a superior court judge should be removed from office, without first subjecting the AGs' allegations to the usual behind-the-scenes investigation, scrutiny and other safeguards used to screen out unmeritorious complaints.

"The issue is: 'Should the attorney general of a province have a preferred status as a complainant, particularly when the attorney general is one of the major litigants before the court ?'" explained Superior Court Justice James Kent of Hamilton, a member of the judges association's conduct review committee. "There are many judges who feel that's wrong. This is an issue that affects all federally appointed judges across the country."

"The inquiry panel has granted us intervenor status," confirmed Justice Wendy Baker of the B.C. Supreme Court, president of the association for Canada's 1,000 federally appointed judges. The judges have hired Code Hunter's Sheilah Martin of Calgary, to make written submissions on the association's behalf, while Alan Gold of Toronto's Gold and Fuerst holds the CLA's brief.

CLA President Ralph Steinberg said the association's concern is that the *Judges Act* "gives a special power to one of the litigants in criminal litigation, and that is an undue advantage. The consequence is the fear that if one of the litigants has this extraordinary power of complaint, then such a power could be seen to have a chilling effect, or act as an intimidating force to independent judicial judgments."

Steinberg added: "We are not saying that that occurs, but that there is a potential for it to occur."

The judges and criminal lawyers both stressed they were not taking a position on the merits of the attorney general's complaint against Justice Cosgrove, 69.

The Brockville-based judge, who was appointed two decades ago to the then-county court, was verbally flayed, and reversed, a year ago by the Ontario Court of Appeal.

In *R. v. Elliott*, [2003] O.J. No. 4694, the court said the trial judge made "unwarranted findings" of misconduct against senior Ontario Crowns and police, including 150 "baseless and frivolous" breaches of Charter rights, as well as the stay of proceedings and a costs

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