DISPUTE RESOLUTION FOUNDATION PRESENTATION TO THE JAMAICAN BAR ASSOCIATION SEMINAR SATURDAY, JUNE 23, 2001

[In Association with the Social Conflict and Legal Reform Project]

SOME CONSIDERATIONS FOR THE JAMAICAN BAR

The Dispute Resolution Foundation was established in 1994 with the Jamaican Bar Association as a foundation member of its Board. Through lobbying and other efforts, it has secured support for its work among judges, attorneys, members of the public and donors.

The Government of Canada through CIDA and the Government of Jamaica through the Ministry of National Security & Justice have entered into an agreement to support the introduction of Case Flow Management and Mediation in the Civil Division of the Supreme Court, as well as a community based component in Trench Town and Flankers.

The Dispute Resolution Foundation has been contracted to provide among other services training and sensitization for members of the Judiciary, Bar, court staff and members of the public. The members of the legal profession will be invited to participate in further consultations and to attend seminars.

1. **New Civil Procedure Rules** proposed :

   - Enabling
   - Requiring

   mediation in the context of Case Flow Management.

   - This builds on years of mediation in Jamaica (from the early 1990s) mainly in court connected criminal cases in the RM jurisdiction and walk-in cases related to civil disputes – contract, land, financial, environmental, employment, school issues, as well as family disputes and community matters with an over 60% resolution rate.

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- Modest legislative initiatives(a) Amendment to RM Court Rules
  (b) Criminal Justice Reform Act

- Alternative Dispute Resolution/Mediation Code will be pursued in 2001-2001 to legislate and provide a uniform framework for Jamaica.

2. Training

- DRF proposes through the SCLR project that members of the Bar be available to attend CLE courses to be provided by the DRF
  (a) To be certified as Mediators and be placed on the Roster or
  (b) To prepare for representing clients at Mediation, or
  (c) To use the referral mechanism.

A major concern for attorneys is whether providing services as mediator will affect client selection due to any conflict of interest/knowledge.

3. The Ontario Mandatory Mediation Programme – Status Report to July 1, 2000. – [Possible guide.]

- Recognises the existence of a Roster of mediators enabling access to a reliable list of certified persons in a managed system for Ottawa and Toronto.

- The project had 326 **Mediators** on roster, 632 applicants to be placed on the roster, of which 192 were rejected and 85 were pending at the date of review as placement is not automatic.

- Of 2215 **mediations** and 326 Mediators, the potential for work was approximately 7 Mediations per rostered Mediator over a 2 year period. However, a much smaller number of mediators is reported to have been utilised, with some doing as many as 150 cases.

- Fees established in Canada were as follows:

Number of Parties	Maximum Fees (Can.$)
2	$600 plus GST
3	$675 plus GST
4	$750 plus GST
5 or more	$825 plus GST

These fees were set by the Government and cover one hour of preparation time and a mediation session of up to 3 hours. These do not include the cost of a **party's attorney who will bill at their normal rates.**

- Dispute Resolution Foundation currently charges very modest and inadequate fees with significant compliance.

4. Backlog Reduction

Opportunities exist now for the use of mediation and other processes in various interventions, including Settlement Weeks.

Any model used would include consultative decision-making with the Chief Justice, Registrar, members of the legal profession and DRF on appropriate cases to be pulled for example to a specially scheduled period with a view to resolving disputes and removing the matters from the List.

This would involve selecting a panel of mediators or training members of the Bar to co-mediate the selected cases and judges being available to receive settlements and dispose of the cases.

A special programme of publicity, training, fees, venues, Judges and time frame would be developed for the purpose. This process would require participation of litigants, attorneys, court staff, mediators and judges.

Extracts from CEDR Mediation Training Course Handbook

SPREADING THE WORD

ALTERNATIVE DISPUTE RESOLUTION (ADR) is a common-sense, cost effective approach to resolving disputes, which preserves relationships.

The more people know about it, the more it will be established as the first choice route for settling disputes.

You can use your training in mediation in many ways:

- By applying mediation skills in your work and home environment.
- In avoiding conflict.
- In consensus-building and in managing and resolving conflicts when it does arise.
- By acknowledging and addressing the conflict, and then using your skills in communication and negotiation, you can help solve a problem co-operatively, to the satisfaction of those involved.

CEDR p 162

THE ROLES OF PARTIES AND LAWYERS

THE PARTIES

There are three (3) main requirements on Parties. They must:

- Have authority to settle
- Be totally familiar with their case
- Be prepared to participate in the process

LAWYERS

Lawyers are present at most commercial mediations. Indeed, the majority of cases are referred for mediation by lawyers, so there is a significant investment in time and reputation that needs to be recognised.

Before the mediation the Lawyer will:

- Advise the Parties on the process.
- Help select the Party's representative.
- Brief the Party in presenting the case (perhaps even do a "dry run").
- Assist in the selection of Mediator.
- Advise on the need for a pre-mediation meeting.
- Prepare the case summaries to be sent to the Mediator and the other Parties before the mediation. Identify documents which are confidential and for the "Mediator's eyes only".
- Carry out a realistic appraisal of the strengths and weaknesses of the Party's case.

At the mediation the Lawyer will:

- Either present the case or support the Party in his or her presentation.
- Advise the Party throughout the mediation, possibly even lead in settlement negotiations.
- Contribute authoritatively to defining each Party's BATNA.
- Identify legal issues that need to be addressed by the emerging settlement.
- Draft, or assist the Mediator in drafting, the settlement Heads of Agreement.

Lawyers have a positive and constructive role in mediation. They often stimulate movement and flexibility, and so the Mediator should ensure that they are involved and valued throughout the mediation.

CEDR pp148-150

A SUMMARY OF THE CORNERSTONES OF MEDIATION

- Check (and re-check) confidentiality
- Let the Parties own the problem and the solution
- Resist imposing your solution
- Be neutral; do not offer an opinion
- Be impartial; give equal value to everyone
- Avoid stereotyping
- Check your own assumptions
- Always show respect
- Develop and demonstrate understanding
- Be open and honest (with yourself and with others)
- Be flexible.

CEDR p 54

SOME ETHICAL ISSUES

The role of the mediator is a sensitive and privileged one. The Parties need to place very considerable trust in the Mediator. This particularly applies in relation to confidential material revealed to the Mediator which is not to be disclosed to the other side, but it also has a much wider application. Mediators who display anything other than the very highest ethical responses are unlikely to find that they are in business for long.

The key ethical issues for the Mediator are:

- **INTEGRITY AND HONESTY**
- **IMPARTIALITY AND NEUTRALITY**
- **DEALING WITH IMBALANCES OF POWER, ADVICE OR REPRESENTATION**
- **CONFLICTS OF INTEREST**
- **CRIMINAL ACTIVITY & THREATS TO SAFETY**
- **MEDIATOR'S NEGLIGENCE**

CEDR

Some Sources of Information

1. ***Bypass Court – A Dispute Resolution Handbook***
   by Genevieve A. Chornenki & Christine E. Hart (Butterworths)

2. ***ADR Principles and Practice***
   By Henry Brown & Arthur Marriott (Sweet & Maxwell)

3. ***Mediator Training Course Handbook***
   Centre For Dispute Resolution, (CEDR) London

4. ***The Mediator Handbook***
   Capital Law & Graduate Centre – Ohio
   Reprinted with permission by Dispute Resolution Foundation

5. ***International Guidelines for Selecting Mediators***
   National Institute for Dispute Resolution (NIDR) Washington

6. ***Web sites***

   1. www.internetmediator.com
   2. www.mediate.com
   3. www.crinfo.org
   4. www.attorneygeneral.jus.gov.on.ca/html/SERV/sermed.htm
   5. www.sc.gov.jm/cprules/draft_civil_procedure_rules.htm

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STEPS FOR SPEEDING UP CIVIL LITIGATION

Practice Direction (Civil litigation: Case management)

Moves to speed up civil litigation and cut costs were announced by Lord Taylor of Gosforth, Lord Chief Justice, and Sir Richard Scott, Vice-Chancellor, in *Practice Direction (Case management) (Civil)* handed down by the Lord Chief Justice in the High Court on January 24.

1 The paramount importance of reducing the cost and delay of civil litigation made it necessary for judges sitting at first instance to assert greater control over the preparation for and conduct of hearings than had hitherto been customary.

Failure by practitioners to conduct cases economically would be visited by appropriate orders for costs, including wasted costs orders.

2 The court would accordingly exercise its discretion to limit: (a) discovery; (b) the length of oral submissions; (c) the time allowed for the examination and cross-examination of witnesses; (d) the issues on which it wished to be addressed; (e) reading aloud from documents and authorities.

3 Unless otherwise ordered, every witness statement was to stand as the evidence-in-chief of the witness concerned.

4 Order 18, rule 7 of the Rules of the Supreme Court (facts, not evidence, to be pleaded) would be strictly enforced. In advance of trial parties should use their best endeavours to agree which were the issues or the main issues, and it was their duty so far as possible to reduce or eliminate the expert issues.

5 Order 34, rule 10(2)(a)(b)(c) of the Rules of the Supreme Court (the court bundle) would also be strictly enforced. Documents for use in court should be in the A4 format where possible, contained in suitably secured bundles, and lodged with the court at least two clear days before the hearing of the application or a trial. Each bundle should be paginated, indexed, wholly legible, and arranged chronologically and contained in a ring binder or a lever-arch file. Where documents were copied unnecessarily or bundled incompetently, the cost would be disallowed.

6 In cases estimated to last for more than 10 days, a pre-trial review should be applied for or, in default, might be appointed by the court. It should when practicable be conducted by the trial judge between eight and four weeks before the date of trial and should be attended by the advocates who were to represent the parties at trial.

7 Unless the court otherwise ordered, there must be lodged with the listing officer (or equivalent) on behalf of each party no later than two months before the date of trial a completed pre-trial check-list in the form annexed to the *Practice Direction*.

8 Not less than three clear days before the hearing of any action or application each party should lodge with the court (with copies to other parties) a skeleton argument concisely summarising that party's submissions in relation to each of the issues, and citing the main authorities relied on, which could be attached. Skeleton arguments should be as brief as the nature of the issues allowed, and should not without leave of the court exceed 20 pages of double-spaced A4 paper.

9 The opening speech should be succinct. At its conclusion, other parties might be invited briefly to amplify their skeleton arguments. In a heavy case the court might in conjunction with final speeches require written submissions, including the findings of fact for which each party contended.

10 This *Practice Direction* applied to all lists in the Queen's Bench and Chancery Divisions, except where other directions specifically applied.

Pre-trial check-list

[Short title of action]
[Folio number]
[Trial date]
[Party lodging check-list]
[Name of solicitor]
[Name(s) of counsel for trial (if known)]

Setting Down

1 Has the action been set down?

Pleadings

2 (a) Do you intend to make any amendment to your pleading? (b) If so, when?

Interrogatories

3 (a) Are any interrogatories outstanding? (b) If so, when served and upon whom?

Evidence

4 (a) Have all orders in relation to expert, factual and hearsay evidence been complied with? If not, specify what remains outstanding. (b) Do you intend to serve/seek leave to serve any further report or statement? If so, when and what report or statement? (c) Have all other orders in relation to oral evidence been complied with? (d) Do you require any further leave or orders in relation to evidence? If so, please specify and say when you will apply.

5 (a) What witnesses of fact do you intend to call? [names] (b) What expert witnesses do you intend to call? [names] (c) Will any witness require an interpreter? If so which?

Documents

6 (a) Have all orders in relation to discovery been complied with? (b) If not, what orders are outstanding? (c) Do you intend to apply for any further orders relating to discovery? (d) If so, what and when?

7 Will you not later than seven days before trial have prepared agreed paginated bundles of fully legible documents for the use of counsel and the court.

Pre-trial review

8 (a) Has a pre-trial review been ordered? (b) If so, when is it to take place? (c) If not, would it be useful to have one?

Length of trial

9 What are counsel's estimates of the minimum and maximum lengths of the trial? [The answer to question 9 should ordinarily be supported by an estimate of length signed by the counsel to be instructed].

Alternative dispute resolution (see *Practice Statement) (Commercial Court: Alternative dispute resolution) (The Times* December 17, 1993; [1994] 1 WLR 14).

10 Have you or counsel discussed with your client(s) the possibility of attempting to resolve this dispute (or particular issues) by alternative dispute resolution?

11 Might some form of alternative dispute resolution procedure help to resolve or narrow the issues in this case?

12 Have you or your client(s) explored with the other parties the possibility of resolving this dispute (or particular issues) by alternative dispute resolution?

[Signature of solicitor, date]

Note: This check-list must be lodged not later than two months before the date of hearing with copies to the other parties.

A BILL

ENTITLED

AN ACT to Amend the Criminal Justice (Reform) Act.

[ ]

BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same as follows:—

Short title, construction and commencement.

1. This Act may be cited as the Criminal Justice (Reform) (Amendment) Act, 2000, and shall be read and construed as one with the Criminal Justice (Reform) Act (hereinafter referred to as the principal Act) and shall come into operation on a day to be appointed by the Minister by notice published in the *Gazette*.

SECOND SCHEDULE (Section 16)

Offences in respect of which mediation order may be made

1. Unlawful wounding under section 22 of the Offences Against the Person Act;
2. Assault under section 39 of the Offences Against the Person Act;
3. Assault occasioning actual bodily harm under section 43 of the Offences Against the Person Act;
4. Any offence under section 2, 6, 11 or 15 of the Trespass Act;
5. Any offence under section 3 or 5 of the Towns and Communities Act;
6. Any offence under section 4 of the Litter Act;
7. Any offence under section 14, 25 or 43 of the Malicious Injuries to Property Act; and
8. Any offence under section 6 of the Noise Abatement Act.".