

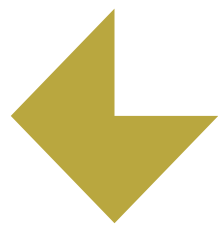


# The Mediator's Brief



**MCKENZIE LAKE**  
LAWYERS

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## The Changing Face of Advocacy

Conflict resolution makes everyone a “winner”

*by*

**Malcolm Bennett**

I have been reading an insightful book by Julie Macfarlane titled **The New Lawyer**. It particularly resonated with me as I have tried to transition myself from the traditional role and beliefs of an advocate to a new form of advocacy in a *conflict resolution* based practice.

I will leave it to my colleagues to judge how well I am doing but there can be no question, in my view, that clients are better

served — and are coming to expect — conflict resolution based advocacy.

I hope to be able to discuss why we all need to change the way in which we deliver our services in my next several articles. This new form of advocacy is essential for the new lawyer and it may be perhaps easier for him or her to adopt than those of us who have done it the same way for many

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years. The status quo is so much easier but so less effective and responsive to the client's needs and interests today.

### **Changing Beliefs: The What and Why**

I would suggest that in our traditional role as lawyer, we have some core beliefs and values. They are: **(a)** we are duty bound to assert and protect our client's "rights"; **(b)** we believe in the legal / judicial system to determine one's "rights"; and **(c)** lawyers are the ones with the legal knowledge and thus we assume power and authority over our client.

I believe all of these beliefs need to be re-examined and reframed in transforming how we deliver our services to clients.

### **(a) Rights Based Conflict Resolution**

This is the model by which we have traditionally delivered our services.

There is a winner and a loser. It is our job to convince the other side we are right and they are wrong. Our client is good, their client is the bad one. It is a play-to-win attitude. Negotiation is seen as a sign of weakness.

In one case, I read the quote, "*My job is to win the war, not to manage a peace.*" This quote encapsulates the attitude that settlement means just

giving up. Instead, we try to wear the other side down.

Positional bargaining, the cornerstone of rights based conflict resolution, does not focus on nor address a client's goals, needs, or interests. We have all heard, but it is true, that it is driven by getting a bigger piece of the pie rather than looking at ways to make the pie bigger.



We also know that at the end of the day, as only a few cases go to trial, that it is not a win / lose situation in a negotiated settlement. After protracted litigation, offers are exchanged and something in between is accepted by the clients as the costs, both financially and emotionally, take their toll. They just want it over.

As a result of this, the client is often left dissatisfied about the result, process and cost.

### **(b) We Have a Legal System to**

### **Decide Justice**

I think we all believe in our legal system of justice. It has always been a foundation of our legal learning and training. We are confident in the system to decide rights.

In the context of family law however, we need to assess whether the system is able to adequately assess and address our clients needs, interests and goals.

What is our client's view of "justice?" In some cases they may need to be vindicated or have it determined that they are "right." I think, in many cases, their view of justice is a resolution that is reasonable and that has been achieved in a process in which they have been engaged and heard.

Unfortunately, that may not be the result in our current system.

Our system has rules, procedures and steps that need to be followed. Sometimes, the emphasis is on process not outcome. There are strategies and tactics that can be used to shift control or power. There are procedures that can be used as leverage to get what you want.

Delay is, unfortunately, also inherent in the process. It can be used to one's advantage and hence to the other party's disadvantage.

There may be a difference in experience level of counsel that may impact outcome. All of these

things, more often than not, tend to heighten the level of conflict.

At the end of the day, who amongst us can guarantee a client a result? Do we tell the client that the result may depend on the assigned judge? Do we put responsibility for outcome on how well the client is perceived by the judge? Do we shoulder them with the responsibility for the outcome?

Can we say that this system addresses the client's needs, interests and goals in a process in which the client has played a significant role, has been heard, and has had a full opportunity to be a part of the process to arrive at the outcome?

An interest based process, that identifies each person's goals, needs and interests, and then sets about exploring options and possible outcomes with the full participation of both parties is more often apt to achieve "justice" as envisioned by the clients.

### ***(c) The Lawyer / Client Relationship***

The traditional view of this relationship sees the lawyer as the one with knowledge, expertise, and hence the power and authority over decision making. The client plays a passive role, placing their trust in the lawyer to represent their "interests."

There is a significant imbalance of power in favour of the lawyer. The

lawyer decides on process and file management.

How often do we, wrongly, view the client who persistently calls or e-mails us a nuisance? We complain of having to hand-hold them and would rather just be left alone to do our job.

We try to control the client's emotions, viewing them as counter-productive to resolution rather than



acknowledging them as valuable to uncovering the client's needs, wishes and interests.

We should be recognizing that the client wishes to be part of the process and to be actively involved and engaged in forming the outcome.

Unfortunately we too often see ourselves as the one to "solve" or "fix" their problem. We fall prey to becoming invested in the outcome, and "winning" becomes the goal.

We come to own the problem and the result should be self evident. The client views him or herself as having no control over the process or the outcome.

Their interests and needs may not have been addressed but tacked onto a "legal issue" in which they have had limited input.

We are seeing that with greater access to legal information from social media, clients are asking to be more involved in the process and outcome. They have a greater knowledge of conflict based resolution and are asking about this process for their situation.

It is my experience as well, that the values and beliefs of more clients favour a less adversarial approach to resolution. I do not hear that they want to "win" or denigrate their spouse. They want a fair, reasonable, speedy and cost-effective process that is most likely to produce that type of result.

It seems to me that the nature of the lawyer / client relationship is going to have to be reformed to meet clients' expectations.

In summary, the core beliefs we have and how we adjust those beliefs in delivering services to our clients will have to change, in order to meet what they expect of, and from, us in the future.

In my next newsletter, I will discuss the New Form of Legal Negotiation. Stay well!



## Quetico Provincial Park for peaceful backwoods canoeing

If you are looking for a true wilderness canoeing experience, you must put Quetico Provincial Park high on your list. Located about 2 hours from Thunder Bay, I had the opportunity to spend a week canoeing in the park with my three kids and their partners this past August. It had always been on my wish list, but the distance to get there always seemed an obstacle until my son located to Thunder Bay.

Quetico is backwoods canoeing as there is no signage for those portages. Your map, compass, and GPS are your guides.

The park is 4,758 square kilometers, and contains 1,400 kilometers of canoe routes, 612 portages, and over 600 lakes. The park borders on the Boundary Waters of Superior National Forest in Minnesota.

Logging has been banned in the park since 1971, and motorized boats since 1979. The result is a truly pristine and preserved wilderness that has stayed as beautiful as other parks may have been years ago.

The scenery is magnificent, the fish plentiful, and the silence serene; interrupted only by the song of the loon.

If you want a truly memorable trip, put Quetico Provincial Park on your must-visit list.



## Block Fee Schedule

To assist counsel who wish to divert their Family Law cases to mediation or arbitration, Malcolm Bennett Acc. FM is offering the following block fee schedule:

### **MEDIATION**

1. A block fee of \$5,000 for a one-day Mediation which includes intake interviews of parties, screening, all preparation and teleconferences with counsel prior to mediation.
2. If a further mediation session(s) is required, a block fee of \$1,500 for a half day and \$2,500 for a full day.

### **ARBITRATION**

1. All interim motions up to a maximum of \$500.
2. Pre-arbitration conference \$100.
3. Each day of arbitration \$2,500 (includes all preparation by the arbitrator).
4. Providing arbitrator's written award up to a fee of \$1,500 (\$300 /hr.).

**Note:** Fees do not include HST.

Please call 519-672-5666 or email Lacey Dotterman at [Dotterman@mckenzielake.com](mailto:Dotterman@mckenzielake.com) for further information.

## Malcolm Bennett Acc. FM

Malcolm Bennett graduated from the University of Western Ontario and was called to the Bar in 1975. With over 30 years of experience, he restricts his practice to family law, estate litigation, and mediation and arbitration for both family law and estate matters. Mr. Bennett is a member of the Law Society of Upper Canada, the Canadian Bar Association, the Ontario Bar Association, the Middlesex Family Law Association, the ADR Institute of Ontario, the Ontario Association of Family Mediators, the Academy of Professional Family Mediators (London), and the Collaborative Family Law Group of London.

