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The Humanist Attorney-A New Gatekeeper to Justice in Mediation

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1. In the famous battle of Gandalf and the Balrog in the Fellowship of the Ring, the great wizard stuck his staff in the ground and shouted "You shall not pass!" It is reminiscent of the words used by Kafka[1] in his parable of the Gatekeeper of Justice where the litigant who seeks admittance through the doors of justice meets a large and intimidating figure of the gatekeeper blocking his path bellowing "you shall not pass". Years pass by as the litigant sits and waits to get the chance to access this door only to be denied by the great gatekeeper. As the litigant draws a final breath the gatekeeper shuts the door leaving the litigant dead at the doorstep.

2. Attorneys are regarded as the great gatekeepers of justice with a paramount duty to provide access to justice to all. While Kafka's parable on access to justice is multi-dimensional, it illustrates barriers to justice created by the legal profession itself with the high costs, complexity and delay involved in civil litigation. It reminds us of the many suffering litigants waiting on the law and being deprived of justice by the law's delay, its inefficiency or its unjust application of the law. The deeper meaning to Kafka's parable, is his warning not to create obstacles to achieving truth, justice, the rule of law or fulfilling your fundamental right to peaceful coexistence while discharging your duty as a gatekeeper.

3. If mediation is now recognised as an equally important process to attaining justice and upholding the rule of law, should the attorney also be the gatekeeper on the steps of this new doorway of ADR and if so what role will you play? That of Kafka's gatekeeper or will you assume a more evolved role in tune to the demands of this collaborative brand of justice. To frame this message in a cultural context, I wish to introduce a traditional carnival character from Trinidad and Tobago known as the Midnight Robber, a character evolved from the days of slavery and has connections to the griot tradition of Africa. He is an exaggerated display of force and power and his fierce lyrics is known as robber talk..a mix of satire, humour and social commentary…his lyrics are scathing but representative of the

[1] Franz Kafka

largesse and excesses of our social world. If our Midnight Robber were to represent Kafka's Midnight Lawyer this is what he will say:

"Drop to your knees and tremble in yuh sleeves and let your face lose its lustre

It is I, the Almighty, the great and "Luciferous" midnight lawyer

When I was born the sun refused to shine the earth shook the birds flee

Women screamed and men bawled as I crawled out my mother's womb and I start to charge fees

When I was but a youngster

They gave me names like "liar "counsellor" "the ultimate gladiator"

I am world renown I am omnipotent! For you to get justice I am the great gatekeeper

With the flick of my pen and my lyrics in front de judge I will make big men run for cover

I will drag out a case, kill dem with authorities, trick them with my ambush strategy

All for you to get justice and for your opponents to flee

If you want a divorce I will tear de family in two, you want money I will break your opponent bank,

And if they want to settle I will leave dem without a shirt on dey back

For your broken bones, your missing limb, I will give you a new life with a bag of money and don't tief

For you to get justice make sure and pay my fee on brief

Now I hear about dis mediation dey want to talk nice, respect feelings, gain trust, procedural justice, nobody have to loss

If you let me in that mediation room you don't do de talking and I go show dem who is de real boss

Better still if you want me take over de mediator chair

And I go show dem who case weak and tell dem my judgment fair

So talk yuh talk, you mocking pretenders I hear they want me after all these years to be a humanist attorney

But to change me is trying to change the course of a hurricane, a tsunami or the big bang theory

I am advocate par excellence with millions of years of existence

For every sore I have de plaster

I don't care what you think forget de mediation I'll get yuh trial

It is only I the hired gun who know how to become the master of your disaster…"

4. Of course the Midnight Robber/Lawyer accentuates some of the stark differences between the adversarial and mediative routes to justice. The adversarial lawyer is a misnomer in the mediation world with emphasis on litigated outcomes and not on clients' true needs. It invites a focus on the forensics of legal process rather than the therapeutic effects of process on clients' well-being. It refines client's stories into legal submissions rather than broadening the narrative to ensure clients' voices are heard and appreciated. It searches for outcomes that are singularly advantageous to one or destructive of the other rather than beneficial to all. It adopts a process that is individualistic, narrow sighted and disproportionate rather than one that encourages collaboration, compassion and consensus building. Ironically it was the adversarial culture which made the ADR doorway more attractive to diffuse the negative impact of adversalarism. To now see that doorway manned by the adversarial attorney is simply a non-starter, there is simply no place for the adversarial attorney in the mediation world. Some will question whether there is a need for an attorney at all.

5. However a dilemma in traditional legal practices has come about through our increased awareness of mediation as a gateway to access to justice which is effective and in some case more superior to litigation. ADR and mediation was traditionally billed as an alternative or an inferior mechanism towards achieving justice for the client. It is common

for example to hear the expression that "mediation exists in the shadow of the law". It was not regarded as an integral part of the civil litigation landscape. In the Caribbean this may in part have led to the initial intake of non-lawyers as mediators and an aversion of those mediators to any attorney participation in mediation. In some legislative schemes participation by clients alone without an attorney in a mediation is the default position and early training in conducting mediation in our jurisdiction saw mediators preferring to exclude the attorney's physical involvement in the sessions.

6. Significant developments in the mediation world has taught us that the exclusion of attorneys from the mediation process will be counterproductive to producing just results. These developments include the Lord Woolf report spurring the reform of civil procedure rules in the Caribbean with an emphasis on non-adversarial methods of resolution, introducing court annexed mediation schemes, pre-action protocols (Trinidad and Tobago), the concept of the vanishing trial, mandatory/automatic court annexed schemes (Jamaica), adverse costs orders or wasted costs orders where a party or attorney unreasonably refuses to try mediation and an international validation to the mediation profession by the Singapore Convention. These relatively new developments has brought the mediation world inevitably into a clash with the traditional adversarial world. Attorneys are now needed in this process and what is required are new rules of engagement and a proper understanding of the role the attorney is now called upon to play to avoid becoming a Kafka gatekeeper.

7. The attorney is no longer to be regarded as a stranger or an alien to the mediation process. Clients will be deprived of proper advice, there is a low probability of informed consent and it will promote a system of meditated outcomes focused on settlement but not on a fair process to achieve those ends. There is a unique service to be provided by the attorney in the mediation process without de-valuing the benefits of client empowerment or detracting from the utility of using mediators without legal backgrounds in a mediation.

8. In the Caribbean the message of the need for the attorney at a mediation is only by a process of osmosis filtering into mainstream mediation practices. In a recent of case **Moraldo v O'Brien**[2] concerning the setting aside of a consent order based on a mediation agreement, the attorney who attended the mediation session who was an experienced attorney at law

[2] CV2017-00857

of over 25 years call indicated that it was his first mediation session that he attended and he simply saw his role as taking no part in the discussions unless invited to do so by the mediator. At quite the other end of the spectrum the mediation process in some jurisdictions are at the risk of being dominated by attorneys as mediators and participants and the mediation becoming a soft substitute for a trial or a form of "litigotiation". In my view what is missing in the evolving role of the attorney in mediation is a focus on the needs of the client and an understanding of the broader picture of access to justice through a collaborative model of problem solving which calls for a new type of attorney.

9. The client is on the search for a resolution to a dispute in the quest for social justice. The shape, pattern and form of justice varies and often times requires re-engineering of legal thinking to appreciate real and practical outcomes for litigants. To this extent I view litigation as alternative a dispute resolution process as is mediation. For the client's Access to Justice there are many doorways and it is for the well informed client to choose the most appropriate doorway to dispute resolution. The mediation doorway is as important and appropriate as the litigation doorway. To access it however, as in litigation, comes with its own special skills set for the attorney both as a participant and as the mediator. In both capacities while the attorney discharges the duties and roles as an attorney in the practice of law, it is done through a different awareness of process and substantive skills necessary to appropriately keep this door to justice accessible, available and understandable. What the mediation world needs of lawyers is a transformation from the adversarial attorney to the humanist attorney.

10. Before I examine the qualities of the humanist attorney, I will underscore four preliminary matters. First that for the purpose of this discussion my focus is on court annexed mediation rather than other forms of mediation such as victim offender mediation, community mediation or private mediations imbedded in several public service and human resources platforms. Secondly that we must make the distinction between facilitative mediation and evaluative mediation. The latter requires legal analysis and a deeper appreciation of the legal impact of parties' needs and positions. Third I underscore that the world of mediation is generally attorney neutral. It is an area of expertise which does not require an attorney at law either as an essential participant or as the mediator. It is a focus on human needs and values with less emphasis on legal interpretation and legal analysis. Fourth the label of an "attorney mediator" is a misnomer. A mediator must observe the principle of neutrality and

self-determination. As any mediator who is also an attorney will tell you the very first thing they must tell the parties is that they do not sit in the mediator chair as an attorney, no legal advice will be provided and the mediator is not wearing a legal hat. This is a mediator with a special set of skills but as any subject matter specialist that mediator has a legal background which may or may not prove useful in navigating the conversation between the parties.

The Mediation Environment-People Skills Not Legal Skills

11. To understand the need for a new type of attorney, the humanist attorney, to be the new gatekeeper to mediation is to understand the environment in which that attorney will discharge a new role and function. Mediation as a separate doorway carries all the hallmarks of a separate profession. The mediation environment is characterised by the thematic philosophy of compassion, collaboration and consensus building.

12. Recognising the significant role played by mediation, it is now a regulated area. From community mediation to family mediation, in our jurisdiction the Mediation Act Chap. 5:32 sets down the boundaries of the mediation practice. The Mediation Act is regulated by a mediation board, whose objects are to certify mediators, training programmes, training agencies and mediation trainers. There is a code of ethics, a process for the certification of mediators and disciplinary regulations governing disciplinary proceedings against mediators.

13. But in this profession, indeed in this hallway, the space is now occupied by many more actors than simply the attorneys. There are counsellors, accountants other specialist religious leaders, community elders who are competent to be mediators. The person qualified to lead the discussion at a mediation is a mediator who must possess a particular set of skills to conduct a mediation. They must do so:

    (a) in a manner which will instil confidence in the mediation process, confidence in their integrity and confidence that disputes entrusted to them are handled in accordance with the highest ethical standards;

    (b) by being responsible to the parties, to the profession, to the public and to themselves, and accordingly shall be honest and unbiased, act in good faith, be diligent, and not

seek to advance their own interest, but rather the needs and interests of the mediation parties;

(c) by acting fairly in dealing with the mediation parties, have no personal interests in the terms of the settlement, show no bias towards individuals or parties involved in the disputes and be certain that the mediation parties are informed of the process in which they are involved.[3]

14. Critical in this process is client empowerment. Decisions are not made for the litigant but they co-create, and design their own peace plans. The process is not individualistic but collaborative and encourages not debate but a co-operative problem solving approach to disputes.

15. At the heart of the process are ethical mandates of informed consent, self-determination and confidentiality.

16. To be certified as a court annexed mediator it is not necessary to possess a legal degree, what is required generally in our schemes in the Caribbean are:

(a) Hours of training (40-100 hours in mediation training); and

(b) Experience in mediation or otherwise being assessed as suitable for court annexed mediation.

I consider those as basic requirements and as court annexed mediation schemes evolve, I hope to see a development of these standards in keeping with the importance of court annexed mediation.[4]

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[3] See section 3 of the Code of Ethics in the Mediation Act, First Schedule

[4] Other requirements which should in the future be introduced as mediator standards for court annexed schemes:

(a) Basic knowledge of the civil process; (which non attorney can be exposed to in a court annexed training programme)
(b) Emotional intelligence;
(c) Minimum age requirement (21-30 years old?);
(d) The number of times the candidate has been retained as a mediator;
(e) Candidate's role in mediation (ie: sole mediator, co-mediator, observer or student with feedback from an instructor);
(f) Involvement in the mediation community;
(g) Complexity of the mediated disputes;
(h) Types of cases mediated;
(i) The type of training program(s) taken;
(j) The nature of the training -whether theoretical, practical or a combination;

17. What is now expected of the mediator in facilitative mediation in the Caribbean is not a legal analysis of the disputes but compliance with the following professional standards:

(a) Competency- The mediator should only mediate when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties;

(b) Experience- The mediator must have significant experience with the litigation and settlement process.

(c) Ability to manage and steward the parties through the process;

(d) Ability to assist in identifying issues;

(e) Ability to reduce misunderstandings between the parties;

(f) Ability to explore and clarify the parties' respective interests and priorities;

(g) Ability to explore possible solutions that will satisfy the interests of all parties and thereby resolve some or all of the issues in dispute;

(h) Ability to conduct the mediation in an impartial manner;

(i) Self-determination- The mediator should recognize that the mediation is based on the principle of self-determination by the parties who have the ability to reach a voluntary, un-coerced agreement;

(k) The extent to which the training covered such topics as interest-based mediation, conflict analysis, negotiation, ethics, confidentiality, role-playing, cross-cultural sensitivity and power imbalances;
(l) Involvement in dispute resolution mentoring or training programs, including the role of the candidate (lead, assistant etc.) and the nature and length of their involvement;
(m) Public speaking or teaching on the issues of dispute resolution at schools, colleges, universities or in any other community forums;
(n) Role in development of training courses and material;
(o) Observed and conducted three court mediations;
(p) Accreditation effect for a period of two (2) years.
(q) Or otherwise being assessed by the Mediation Board as suitable as a court annexed mediator.

To maintain good standing, the Mediator must:
(i) continue to be of good moral character;
(ii) render mediation services at least once a week to any PMC Unit;
(iii) participate during Settlement Weeks; and
(iv) complete refresher courses to be prescribed by PHILJA within the two (2) year period.

Failure to maintain good standing shall be a cause for the revocation and/or non- renewal of the accreditation.

(j) Ability to be committed to the process;

(k) Proper consideration of ethical issues.

18. It is commonly said that the key qualities a mediator should possess are the patience of Job, the sincerity and bull dog characteristics of the English, the wit of the Irish, the physical endurance of the marathoner, the agility of a football halfback, the guile of Machiavelli, the probing skills of a good psychiatrist, the confidence retaining characteristics of a mute, the hide of the rhinoceros and the wisdom of Solomon. Sriram Panchu remarked that the seven Ps for a good mediator should be Perseverance, Patience, Practice, Profession, Perspective, Pondering and Peacemaking.

19. Reflecting on our first court annexed mediation project in 2011 in a mixed roster of mediators of attorneys and those without a legal background, our statistics revealed that clients placed a higher value on the ability to talk in a safe space over an actual settlement. Remarkably though not surprisingly the top mediator with the most settlements was not an attorney. His background? - A lay preacher and a degree in theology.

The Humanist Attorney

20. The mediation world is therefore a unique one with its special objectives and standards of practice. But this world is not the preserve of the adversarial attorney. First this world needs a new attorney, the humanist attorney. Second, as I go on to define this attorney we will recognize that inherent in this new actor is a duty to collaborate and recognition that there is a wider world of expertise outside of the legal one which critically enriches the experience of clients in mediation and ensures that the output of the mediation process is a truly unique product of social justice.

21. This concept of the humanist lawyer is a term coined by Sudhish Pai with reference to the Mahatma Ghandi as the first humanist advocate. He had extracted two promises from his client, the first to know the whole truth favourable or not of the client's case and second his right to accept what struck him as a fair compromise without consulting his client. Not litigation victory but just settlement was his aim of social justice. I have borrowed this concept to demonstrate a new role to be performed by lawyers in mediation with a deeper understanding and mindfulness of the effects of the law on one's client and focused on achieving peaceful outcomes which are practical, humane and enduring. It is a lawyer

whose practice is less adversarial and more collaborative, less combative and more co-operative, empathetic and mindful of the social needs of disputants. A lawyer who views the legal profession as a healing one and collaboratively engages others to arrive at humanistic results for litigants and clients in conflict.

22. The attorney Hon T F Bathurst observed that:

> "A key strength for the successful lawyer is the ability to switch hats and transform from adversarial court advocate one day, highlighting the strengths of a client's position, to dispute resolution advocate the following day, participating in collaborative problem-solving and encouraging a client to move away from a position, think creatively and accept compromise."

23. But the problems attorneys face with the mediation process, is not their lack of proper mediation training, the problem is much more fundamental. It stems from a legal education skewed towards an adversarial model and more fundamentally, the lack of ethical rules and moral code to guide and shape the identity of the humanist attorney. Present ethical rules which promote the "zealous protection of client's interest", "conflict of interest obligations" promote an inevitably adversarial and isolationist approach that is totally out of step with the ethical rules of engagement in a mediation.

24. In a recent presentation to the Grenada Bar I identified the three main ethical rules that must be recognised to validate and legitimise the role of the humanist attorney- the duty to inform and participate, the duty to collaborate and the duty to act in good faith. With respect to the duty to inform and participate, I pointed out that attorneys who have access to the doors of justice for the client will be failing in their ethical duties if they fail to properly educate clients on the option of mediation in settling disputes and properly preparing clients for mediation. The duty to collaborate is a paradigm shift from the ethical role of the traditional attorney. It focuses on the attorney's role at a mediation from ensuring that their client is advised throughout the process of mediation to becoming a problem solver in trying to find the best resolution for both clients. It encompasses the ability to negotiate and seeking permission to directly work with the other party. The duty to act in good faith can be drawn from existing ethical codes, practice direction and mediation practice. It is a duty to ensure that the process is used purposively to arrive at fair results and not descend into the adversarial norms of litigation.

25. To that end I reformulated some draft ethical rules which I also attach to this presentation.[5] While present ethical codes make passing reference to the duty to settle in the client's best interest, more thought must be given to the ethical support of collaborative modes of lawyering.

26. The humanist attorney is an educator and leader in the mediation process. In the **Mediation Process by Christopher W. Moore 4th Edition** the learned author noted the need for lawyers as resource persons in mediations:

> "Lawyers are a special category of resource persons. They provide numerous types of services of disputants (Bronstein, 1982; Riskin, 1982). They maybe legal advisers offering information about possible settlement ranges or potential judicial decisions should the dispute be brought to court; or strategists, general advisers, or surrogate negotiators for disputants who are disinclined or unable to represent themselves. If lawyers are to be present in negotiations, the mediator, parties, and their legal counsel need to be clear about the role they will pay. If they are to be coaches or strategists, the mediator may request that lawyers remain silent in joint session and confine their activities to consultation with their clients in caucuses or private meetings. Alternatively, lawyers may participate fully as either co-negotiators or as direct advocates for parties, with the latter retaining only final decision-making authority. The degree of lawyer involvement depends on the case, the will of the parties, and the mediator's style and preferences. It should always be remembered that mediators and lawyers are not adversaries. Lawyers provide clients with advocacy skills they may not have and be needed to reach fair and balanced settlements. They can also provide parties and mediators with legal information that is important to consider when reaching agreements. It is generally in both parties' and mediator's interests to reach agreements that respect, or at a minimum do not contradict or are not at odds with, common accepted legal parameters and standards. Finally, it should be noted that both mediators and lawyers can help each other work with difficult parties. Mediators can help lawyers by providing effective third-party procedures that promote greater understanding and agreement making. Lawyers can help mediators by providing reality testing with

[5] See Appendix A

parties, and raising questions about their client's Best Alternative (s) to a Negotiation (BATNAs) if talks fail to result in an agreement."

27. As this valuable resource in the mediation process, I return to one of the most important principles that should govern the lawyer's approach in this role as mediation collaborator which is the principle of client self-determination. The lawyer must be prepared to surrender the central role in the definition and presentation of the client's case. It is vital that clients tell their own stories. It is through the telling of those stories that clients may achieve some emotional closure or release, and may lay the groundwork for a resolution. The lawyer retains an important function, but should focus energy on the preparation and counselling stages, and act as a support person for the client during the mediation.

28. There is a growing field of the mediation advocate or I prefer the term "mediation collaborator" where the attorneys can play a more pro-active and engaging role in the mediation session to assist the mediation parties in helping them to arrive at a settlement. There are some core functions which demonstrates that mediation is not a practice which should be alien to the legal world but it sits quite comfortably with your evolving role of the humanist attorney seeking a just settlement.

The Features or Requirements of the Humanist Attorney

- To advise their clients on relevant legal issues, including the Agreement to Mediate.
- To allow the mediator to conduct the process and to provide support to the mediator where appropriate.
- To permit and encourage their clients to participate fully and directly in the process.
- To assist clients to focus on their real personal and commercial interests as opposed to their legal rights.
- To assist clients to communicate accurately and comprehensively and to negotiate constructively and productively.
- To provide to their client legal information and advice, where appropriate, on their rights and duties.

- To assisting in the drafting of agreements and the formalisation of the mediation in appropriate ways.
- To undertake any activities required for the formalisation of ratification of the mediated agreement and to liaise with other lawyers where necessary.
- To reassure clients who have second thoughts and to inform them about the options of dealing with problems in the implementation of the agreement, including through return to mediation.
- To maintain the confidentiality of the mediation meeting.
- As part of giving advice at key stages as litigation progresses, ensuring that the client is sufficiently aware of ADR alternatives to litigation.
- Providing objective information on relevant ADR options, including potential benefits and drawbacks, or giving a client sufficient guidance on where/how to get information.
- Advising the client on pre-action obligations relating to consideration of ADR.
- Advising clients on obligations under the overriding objective in relation to ADR.
- Ensuring that the client is aware of penalties that may result from an unreasonable refusal to use ADR.
- Giving appropriate advice on funding and costs in relation to ADR.
- If ADR is selected, getting clear instructions on the form of ADR to be used, objectives to be achieved etc.
- If ADR is not selected, ensuring that objective reasons are identified and sufficient evidence of them retained.
- If appropriate, assisting in the selection of an independent third party to conduct an ADR process.

29. But certainly not:

- To give ongoing unrealistic predictions about likely outcomes in court or other non-mediation processes and their relative advantages or disadvantages.
- Acting as the adversarial advocate of their clients' legal rights.
- Cross-examining the other client or clients.
- Raising technical procedural points or insisting on formality.
- Engaging in other adversarial or combative strategies.[6]

30. Finally a fundamental characteristic of this humanist attorney is humility. Understanding that the mediation world is not a stomping ground for attorneys. Appreciating the importance of the client's needs and the humility to appreciate there their needs can be met by other subject matter specialists such as accountants, life coaches, counsellors, human resource personnel, project managers, therapists, engineers and the like. The humanist attorney must collaborate with other specialists to help co-create a new future for litigants. It is no surprise that 70% of the certified mediators have no legal background. While I encourage the increase in uptake of attorneys as mediators, they too must recognise the use and validity of non-legal specialists to help the process.

The Evolved Civil Litigation Landscape

31. In the seminal work of Richard Susskind in "The End of Lawyers" he admonished the legal profession to begin re-tooling itself to accommodate the downsizing of firms, the evolution of legal services, and the reliance on technology in order to remain relevant to the increasing demands of our society and to create simplicity in the provision of legal services. In Phillip

[6] Similarly at the Hugh Wooding Law School's emphasis is being placed on mediation advocacy: "Your bag of tools in this evolving world – where space is being unveiled for a new type of advocate – requires you to build on your skills to become the mediation representation advocate. This mediation representation advocate still has a sharp probing mind; however, this mediation representation advocate probes to build collaboration with the other side, rather than slay them as under trial cross-examination. This mediation representation advocate understands the power of paraphrasing and effectively communicating (by words and body language), the approach will no longer be that mediation is just something for the attorney to run with 'on the fly'. In this emergent Caribbean context, our attorneys will be attentive, fully focused on using mediation effectively and be problem-solvers, all while still advancing their clients' interests. Attorneys will now be seen as the promoters of, rather than the hindrances to, the progress of mediation. Attorneys will give mediation its due respect as a meaningful process with impactful outcomes. So, where do you stand with your toolbag today? Start nailing your readiness for the mediation ignition, within or without a court-mandated process, by arming yourself with your toolbag of mediation representation skills. This can only augur well for positive conflict transformation and a more sophisticated practice of the law."

Howard's book "Life Without Lawyers" he lamented the lack of legitimacy of a legal system which creates distrust and individualism fracturing and not healing a nation's development. In Julie Macfarlane's work "The New Lawyer" the bedrock of traditional legal thinking buttressed by traditional legal training she saw as a rights based orientation, a confidence that courts produce just results, and a mind-set that lawyers should be in charge. Such a belief system results in inefficiency and the disempowerment of the disputant. In his article "Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court" Forrest S. Mosten theorises that rather than the myopic adversarial approach to problem solving, a peace-making approach can lead to greater client satisfaction, because it is fuelled by a positive motivation.

32. The evolution of mediation and the rise of the humanist attorney as a collaborative gatekeeper will lead to the creation of a new breed of attorneys to dominate the legal landscape on their return to the civil litigation environment not as an adversarial attorney but now a fully evolved problem solver, a collaborative lawyer. I continue to advocate for the development of collaborative law practices.

33. Collaborative law is a non-adversarial mechanism for resolving disputes:

> "As a problem solver who is creative... you try to locate the best possible resolution for your client... you search for solutions that might benefit both sides and therefore might be acceptable for settlement. You develop a collaborative relationship with the other side and mediator... you advocate your clients interests instead of legal positions, listen attentively and proactively, avoid derailing the search ....
>
> Enduring solutions whether inventive or not are likely because both sides work together to fashion tailored solutions that each side fully understands can live with and knows how to implement." **Abramson.**

34. It is an infusion of these problem-solving skills to make "lawyering" easier. In fact, I urge you to consider several new models to practicing law on a consensual building model which can open the doors to a niche maker for young attorneys: ENE, and collaborative law practices. A practice of law whereby lawyers enter into agreements with their clients to represent them for the purposes of negotiation and to obtain their best consensual outcome. In the event that the matter must be litigated, their retainer will be terminated and the brief returned to their client.

Conclusion

35. A final thought as I conclude, that our legal education needs to be rewired if it is to be aligned to the growing needs of litigants for real, practical and humane solutions.[7] Only until there is reform of legal education into a problem solving model would I advocate for such a legal degree to be a pre-requisite to mediator certification. That topic I leave for another discussion.

36. However, in this overview I hope we saw how sadly misplaced the mighty Midnight Robber was in his articulation of the adversarial lawyer in the mediation process. It is that approach which alienated him from the mediation world in the first place. But what we now recognise is the utility of the humanist attorney in the mediation doorway, sharing his role as the mediation gatekeeper with other specialists. Fulfilling your gatekeeper role to justice comes with a duty not to erect artificial barriers to justice by your own mediation practice. Once you stand at the mediation doorway you have transformed yourself from the gladiator to the humanist lawyer, the peacemaker with traditional legal analysis being synergised with practical therapeutic outcomes.

37. Whether acting as the mediator or working with your client, you are actively engaged in a process of collaboration not combat, consensus building and not individualistic goals and compassionate to the process and its participants and not impervious to the impact the law may have on real people. In this doorway there are limitless potential to secure real justice. A proper analysis of the role of this humanist attorney and the ethical rules needed to sustain its development will lead to a further evolution of the traditional legal landscape eventually making trial the new ADR and legal problem solvers the dominant forces in the traditional civil landscape.

[7] Harold I. Abramson in his instructive text Mediation Representation-Advocating as a Problem-Solver recognised that very little attention has been placed on training attorneys to be problem solvers. His text has spawn a new generation of training for attorneys as a mediation representation advocates: "You need a different representation approach for this burgeoning and increasingly preferred forum for resolving disputes. Instead of advocating as a zealous adversary you should advocate as a zealous problem solver a strategy that has been shown in various studies to be more effective."
He also goes on to explain at page 5 that: "As a problem solver who is creative, you do more than try to settle the dispute. You try to locate the best possible resolution for your client. You search for solutions that go beyond the traditional ones based on rights, obligation and precedent. Rather than pressing for win-lose outcomes you search for solutions that might benefit both sides and therefore might be acceptable for settlement.

38. I re-iterate my call again for the development of collaborative law practices and hope we can see germinate in this CLC humanist attorneys enthusiastic about the notion of a CLA Mediation Initiative to among other matters: continue debate and research into these areas of the intersection of mediation and lawyering; examine and formulate a uniform set of standards for mediation practitioners in the Commonwealth; produce a pathway for certification of a commonwealth mediator; research and development in new forms of mediation; educate sensitise and train the bar as to its new role in mediation; intervening in Commonwealth disputes to create a platform for constructive dialogue and resolution.

39. Hopefully this lawyer in the humanist model may belt out a new tune totally opposite to that of Kafka's Midnight lawyer:

> "*I can change the shape of constellations turn the sun into a moon and blow different tides*
>
> *Even I can change shape to meet these new and different times*
>
> *For the citizen's access to justice and the rule of law I will be the lord protector*
>
> *This calls for a humane touch, consensus builder and be a problem solver*
>
> *To fight for peace I eh need no gun to pontificate*
>
> *But two arms to embrace to educate be compassionate and collaborate*."
>
> **Justice of Appeal V. Kokaram**

APPENDIX A

ETHICAL GUIDELINES

1. The Duty to Participate

1.1 An attorney shall select a dispute resolution method that is appropriate for the client's needs and dispute.

1.2 An attorney shall take into account all characteristics of their client, their specific needs and preferences as well as the attitudes and actions of the other party.

1.3 An attorney shall be well informed of all available dispute resolution processes, their specifics and recommended institutions and service providers to efficiently propose such methods to a client and professionally support the client through the chosen process.

1.4 An attorney shall provide advice on the risk and advantages of the choice of different dispute resolution processes.

1.5 An attorney shall encourage the client to explore all available resolution process options, including mediation and other alternative dispute resolution processes before initiating litigation, unless there are strong reasons such as urgency to do otherwise. In that event, mediation and ADR options ought still to be encouraged even after the commencement of litigation.

1.6 Circumstances in which mediation may be a particularly suitable process may include the following:

- the client expresses a preference for mediation;
- the client expresses a wish to avoid litigation and arbitration;
- the client is contractually bound to mediate before litigating or referring to arbitration;
- the client cannot afford to litigate;
- applicable law / jurisdictional issues arise that make mediation more appropriate;

- none of the issues in dispute is legally complex or novel, requiring judicial or arbitral determination;
- the parties have common business or personal interests that may be jeopardised by the dispute (e.g. an on-going business or family relationship);
- it is important to have a swift resolution to the dispute, in particular, court litigation could have other (internal or external) adverse effects for the client or its business;
- a court ruling would not adequately deal with the underlying concerns, or, for any other reasons, subjecting the dispute to a decision of an external third party (such as a state or arbitration court) would not be appropriate or desirable;
- a lawsuit may only resolve part of the dispute;
- there is a risk that a court judgement would not be effectively enforced;
- conducting litigation is in conflict with other vital interests of a client;
- the subject matter of the dispute is predominantly of a managerial nature;
- the costs of a lawsuit are out of proportion with the interests at stake;
- the dispute may be due to miscommunications, such as, data discrepancies, personal conflict, or cultural differences; or
- it is important for the client to keep the dispute strictly confidential.

Comment

The client's selection of the most appropriate dispute resolution process should therefore always be enabled by the attorney advising carefully on this key consideration, as this is an integral part of any thorough and duly conducted case analysis. It should always be borne in mind that the client's interest comprises both substantive and procedural aspects, which are equally important to a client, and, as a result, both should be duly taken into consideration by the attorney. It follows then that those performing legal analyses should always, from the very outset, consider all

possible options for handling a conflict situation and in this context, assess the position of a matter.

To be able to advise the client in the choice of the dispute resolution process, the attorney needs to acquaint him or herself sufficiently with the matter in question and carry out a thorough cost- benefit analysis of the available process options. This step should never be skipped or neglected, and attorneys should always be able to demonstrate to their clients that this professional task has actually been duly performed. Especially, before engaging in litigation and arbitration, it is important that the client understands how long the process may take, how much it may cost, what can be the risks involved and what is the likelihood of achieving the desired outcome, including possible risks related to the enforcement stage.

It is therefore necessary that the attorney carries out a risk assessment of the case, setting forth the best and worst scenarios and a realistic target level, against which the client may evaluate available process options. Such a risk assessment may need to be revised and updated as the case evolves (e.g. as more information and evidence is gathered on the case during the course of chosen process). A front-loaded inquiry into the case and a documented case assessment helps the client to better evaluate the available options and set realistic expectations.

1.7 That attorney shall advise the client on the selection and engagement of the most suitable mediator will enhance clients' settlement prospects in the mediation.

Comment

When selecting a mediator: (a) first look to a mediator's skill and experience as a mediator, and then to any additional qualifications that may be helpful, such as expertise in the subject matter of the dispute or law; (b) consider the role of the mediator and whether a particular style of mediation may be better suited to the dispute.

1.8 The attorney shall be present throughout the mediation process unless the client who is fully advised on the risks and advantages of attending the mediation alone requires that the attorney shall not be present.

1.9 The attorney shall provide competent advice to the client in all of the critical stages of the process including:

a) helping client to fully understand the process and answering questions;

b) decision to select the process and refer dispute to mediation;

c) making the offer to / accepting the offer of mediation from another party;

d) identification, selection & appointment of a suitable mediator;

e) finalising the agreement to mediate / rules of engagement, if any;

f) briefing the mediator;

g) attending pre-mediation meetings, if any, between client and mediator;

h) selection, appointment and briefing Experts, as may be required;

i) giving client legal advice / opinion on legal issues, rights & obligations, if any, arising in the dispute;

j) assessing the strengths and weaknesses of the client's case;

k) assessing the strengths and weaknesses of the other parties' cases;

l) scheduling costs (including legal costs) incurred to date by the client in the dispute;

m) estimating costs (including legal costs) to be incurred if not resolved in mediation;

n) assist client with preparation of negotiation strategy for the mediation / settlement range in monetary cases;

o) assist client to identify their needs and interests in having dispute resolved in the mediation;

p) engage in alternative scenario-checking with client and generally managing client expectations by reference to what might reasonably be achievable in litigation or arbitration;

q) assist client in drafting a mediation summary or position statement for any joint mediation meetings;

r) assist client in deciding who will attend mediation meetings as part of team representing the client party at the meetings;

s) assist client to identify and / or suggest possible alternative options for resolution and settlement;

t) assisting the client generally in preparing for the mediation, knowing that in mediation as in all other processes, failure to prepare usually equates to preparation for failure in the mediation;

u) advising the client when the mediated settlement agreement is being drafted;

v) assisting the mediator as may be appropriate or as requested.

1.10 An attorney shall in preparing the client for mediation:

(a) Describe and explain the mediation process, what will happen at the session and the role of the mediator. In particular, discuss issues such as confidentiality and the nature of ‘without prejudice’ negotiations.

(b) Explain what is expected of the client;

(c) Remind the client that the objective of the mediation is not to "win", but to reach a mutually agreed resolution;

(d) Ensure that the client or client's representative has authority to settle;

(e) Discuss the costs, risks and benefits of not reaching a Settlement Agreement;

(f) Ensure that the client is conversant with the facts and issues of the case;

(g) Explore the client's position, goals and interests;

(h) Assist the client in identifying any common goals or interests towards the resolution of the dispute;

(i) Advise the client on how to best put forward his or her interests; and

(j) Discuss with the client, prior to attending the mediation session where possible or during caucus where necessary, the other party's position, goals and interests, toward resolution of the dispute.

(k) Assist clients to complete a risk analysis. A draft risk analysis may be discussed with clients and then reviewed with the legal team. A risk analysis will assist in determining a range of options for settlement.

(l) Help clients identify positions and interests and the best ways to achieve outcomes. It is useful to consider the interests of other parties and ways to overcome any tactics or objections likely to arise.

(m) Decide who will do the talking in the mediation. Often, with appropriate preparation, clients will be in the best position to convey facts and other non-legal issues. If so, an attorney may need to assist clients with preparation for their involvement.

2. Duty to Collaborate

2.1 The attorney shall at all times act diligently, efficiently, promptly, and competently in all matters related to the mediation.

2.2 (1) An attorney shall not must not disclose any information disclosed during the mediation unless such disclosure is required by law.

(2) Without prior permission of the mediator and the other parties, an attorney must not reveal any information disclosed by the mediator during private sessions to the other parties or their legal representatives.

(3) All information and documents disclosed during the mediation, including any settlement or draft offers/counter-offers, are confidential and privileged between parties to the mediation and their legal representatives.

(4) An attorney shall consider rules about confidentiality (which may vary from jurisdiction to jurisdiction) before attending a pre-mediation conference so that they may be established by the parties and the mediator at the pre-mediation conference.

Comment

As with all dealings with clients, anything that is said or done in a mediation is strictly confidential. In addition, subject to the requirements of the law and any relevant Rules of Court, an attorney must maintain the confidentiality required by the parties and by any mediation agreement.

2.3 An attorney shall be prepared for the mediation and look beyond the legal issues or quantum and consider the dispute in a broader, practical and commercial context.

Comment

Litigation defines the issues by pleadings. Before a mediation, an attorney should, as well as assessing the legal merits of the case, consider the dispute in commercial Guidelines for Lawyers in Mediations terms and in light of the client's business, personal and commercial needs, generate possible practical options for resolution.

Pre-mediation conferences convened by the mediator are a good opportunity to establish a relationship with the mediator and arrange any practical matters relevant to convening the mediation.

2.4 In the event that the attorney attends the mediation session, it is expected that he/she shall not actively participate in the mediation session, nor shall he/she address the Mediator directly except where he/she is so permitted by the Mediator or unless his/her input is specifically requested by the Mediator, or if the parties for any reason are unable to adequately speak for themselves.

2.5 If in attendance, the attorney shall sign the Confidentiality Agreement and attest to the Settlement Agreement where one is reached.

3. Duty to Act in Good Faith

3.1 At the Mediation Session the attorney shall:

(a) participate in the mediation process in good faith;

(b) protect the client's interests in connection with any Settlement Agreement reached;

(c) not take over the mediation session and lecture the parties on the law, but if called upon to explain a legal principle in mutual interest of both parties, he/she should adhere; and

(d) request caucus where necessary to facilitate resolution or to avoid a breakdown of the mediation process.

Comment:

Mediation is not an adversarial process to determine who is right and who is wrong. Mediation should be approached as a problem-solving exercise. An attorney's role is to help clients to best present their case and assist clients and the mediator by giving practical and legal advice and support.

The skills required to effectively represent a client at mediation differ from those used in trial advocacy. In litigation an attorney's objective is to persuade the decisionmaker to accept the arguments advanced by the attorney and to find in favour of the attorney's client. In mediation, an attorney's objective is to use advocacy skills, which are best applied to persuading the other parties and their attorneys that settlement options proposed by the attorney's clients would better meet the legitimate interests of all parties. To that end, attorneys are encouraged to consider the options and interests of other parties, as well as their clients, and assist the parties in dispute to appreciate that a mutual resolution, not an imposed judgment or determination, would best satisfy their needs.

Where it is necessary to present argument by the attorney, those arguments presented in terms and language that is persuasive to the other party are preferred. Legal arguments or language are not always necessary.

3.2 The attorney should listen carefully, even to material which may be irrelevant to litigation as it may be conducive to setting an atmosphere for settlement. It can be

helpful to acknowledge arguments made against clients to show that the other party's position has been heard and understood.

SUMMARY GUIDE FOR MEDIATION ATTORNEYS

(a) Assess the risks of the mediation.
(b) Ensure the client understands who will be present at the mediation and how the process will work?
(c) Know what are the costs to date and what are the projected future costs.
(d) Spend some time talking to the mediator before the mediation day to find out more about the mediator's approach and the style he or she likes to adopt.
(e) Consider having a pre-mediation meeting with the mediator before the day of the mediation.
(f) Bring any documents they think they may need to the mediation.
(g) Arrive early enough at the mediation to allow the client to acclimatise themselves before the mediation starts.
(h) Make sure that there are arrangements in place for refreshments, including contingency plans if the mediation goes into 'overtime.'
(i) Be aware of any time constraints that may apply to anyone present.
(j) Become an active listener and understand what that really means.
(k) Not be afraid to sit around the same table as the other parties.
(l) Not be afraid to let your clients talk, whether to the mediator or to each other.
(m) Always be prepared to let the parties meet with the mediator without their attorneys present.
(n) Find an opportunity either before the mediation or at an early stage during the mediation to discuss with the other side's attorneys what the broad shape of a possible agreement might look like.
(o) Never underestimate the enormous power of an apology or an expression of regret.
(p) Encourage lateral thinking and creative solutions.
(q) Make a proposal for settlement if they have it and make it early.
(r) Try to keep their client focussed throughout the whole process on the future and on finding a way to resolve the current situation.
(s) Find inventive ways to attract the opposite party to the negotiation table.
(t) Pay special attention to the careful crafting of the settlement agreements.

(u) Determine when and how to use appropriately worded Tomlin orders.

APPENDIX B

CERTIFIED MEDIATORS IN COURT ANNEXED MEDIATION

From a general overview of the Caribbean, in order to become a certified mediator in court annexed mediation, a person must:

TRINIDAD AND TOBAGO

(i) In civil non family matters:

(a) complete a minimum of forty hours in a standard mediation training programme accredited by the Mediation Board; and

(b) demonstrate practical experience and suitability, by having observed a minimum of four mediation sessions conducted by a certified mediator and having conducted four mediation sessions under the supervision and observation of a certified mediator; or

(c) otherwise have been assessed by the Mediation Board to have demonstrated the requisite practical experience and suitability.

- ***See Part 1, Third Schedule, section 1 of the Mediation Act 2004 of Trinidad and Tobago.***

(ii) In family matters:

(a) be certified as a mediator in civil non-family matters;

(b) complete a minimum of forty hours in family mediation training programmes accredited by the Mediation Board; and

(c) be an Attorney-at-law with practical experience in family matters or have a degree or extensive experience and training in social work, mental health matters, behavioural or social sciences or any other equivalent qualification, and either—

(i) have observed three family mediations conducted by a certified family mediator and have conducted three family mediation sessions under the supervision and observation of a certified family mediator; or

(ii) have been otherwise assessed by the Mediation Board to have demonstrated the requisite practical experience in and suitability for family mediation.

- ***See Part 1, Third Schedule, section 2 of the Mediation Act 2004 of Trinidad and Tobago.***

ORGANISATION OF EASTERN CARIBBEAN STATES

(i) Satisfactorily complete the training for Mediators leading to certification by the Judicial Education Institute/the University of the West Indies.

(ii) Be a fit and proper person.

(iii) Do not have unspent criminal convictions and any conviction in fraud or other dishonesty.

- ***See section 3.6 of the Eastern Caribbean Supreme Court, Practice Direction No. 7 of 2020- Court Connected Mediation.***

BELIZE

(i) 40 hour mediation training with the following objectives:

"1. Demonstrate a deep understanding of terms, concepts and core mediation values.

2. Confidently explain and apply the mediation process

3. Understand the Supreme Court process, Mediation Rules and Forms

4. Understand the Mediation Agreement and its importance to the process

5. Devise and apply effective mediation strategies

6. Effectively utilize the caucus

7. Draft mediation agreements

8. Further develop the following:

   a. The Ability to make effective openings

   b. Active listening skills

   c. Ability to build accord with participants

   d. Greater impartiality and effective use of neutral language

9. Understand and observe the Mediator's Code of Ethics

10. Understand the Mediator's responsibilities to the parties

11. Understand and manage the role of Attorneys in the mediation process

12. Participate in Co-mediation

13. Understand and apply strategies to:

   a. Manage cultural differences in mediation

   b. Facilitate mediation of disputes involving large groups

   c. Managing power imbalances in mediation

   d. Manage emotionally charged disputes

   e. Increase parties understanding and evaluation of the opportunities and risks of litigation as opposed to a mediated settlement.

14. Overcome barriers to communication and settlement

15. Break deadlock and overcome impasse in mediation

16. Demonstrate competence and skill as a mediator."

- ***See The University of the West Indies Open Campus Belize- Court Annexed Mediation Course Outline.***

JAMAICA

(i) Complete 56 hour Meditation Training Programme.

- ***See Dispute Resolution Foundation Meditation Training Court flyer.***

APPENDIX C

SURVEY OF CLC 2023 DELEGATES ON ATTORNEY'S ROLE IN MEDIATION- QUESTIONNAIRE

ATTORNEY'S APPROACH TO MEDIATION	
Select one Jurisdiction: Africa ☐ Asia ☐ Canada ☐ Caribbean ☐ Europe ☐ India ☐ UK ☐ Australia ☐ New Zealand ☐ Pacific ☐ Other ☐	
I advise my clients of the merits of mediation at the earliest opportunity in civil proceedings	Always ☐ Sometime ☐ Never ☐
I encourage my client to utilise mediation as part of good pre-action protocol/ practice	Always ☐ Sometime ☐ Never ☐
I consider that I have an active and important part to play in a mediation process	Always ☐ Sometime ☐ Never ☐
I prepare my client to take an active part in discussions at a mediation	Always ☐ Sometime ☐ Never ☐
I consider it my duty to attend mediations with my client	Always ☐ Sometime ☐ Never ☐
I do not encourage cross examination of opposing parties at a mediation	Always ☐ Sometime ☐ Never ☐
I prefer to speak for my client at a mediation session	Always ☐ Sometime ☐ Never ☐
I prefer to work collaboratively with opposing counsel at a mediation session to arrive at the best possible outcome for both parties	Always ☐ Sometime ☐ Never ☐

I consider mediation very helpful in solving my client's dispute	Always □ Sometime □ Never □
I consider mediation a more effective method for my client to access justice than a trial	Always □ Sometime □ Never □
I do not consider having my client pay for mediation a barrier to access to justice	Always □ Sometime □ Never □
I consider mediation as merely a preliminary step before continuing to litigate	Always □ Sometime □ Never □
I consider mediation an essential part of the process of civil litigation	Always □ Sometime □ Never □
I will advise my client to mediate even if my client has a strong case	Always □ Sometime □ Never □
I will advise my client to attend mediation and prepare the client to make concessions to the opposing party	Always □ Sometime □ Never □
Having an attorney mediator is preferred in court annexed mediation	Always □ Sometime □ Never □
I prefer to select a mediator with good communication skills rather than simply select an attorney for my client's mediation session	Always □ Sometime □ Never □
I will only select an attorney mediator for my client's mediation session	Always □ Sometime □ Never □

APPENDIX D

SURVEY OF CLC 2023 DELEGATES ON ATTORNEY'S ROLE IN MEDIATION-RESULTS

DUTY TO INFORM/PARTICIPATE	
Always advise clients on mediation at an early stage	69%
Will engage in mediation before litigation	46%
Always prepare client fully for mediation	92%
Mediation is sometimes very helpful in resolving dispute	76%
It is sometimes more effective than a trial	69%
Mediation fees can sometimes be a barrier to access to justice	61%
Sometimes see it as merely a preliminary step to litigation	76%
But sees it as an essential step	61%
Always sees it as my duty to attend	76%

DUTY TO COLLABORATE	
Will sometimes speak for the client	61%
Will always seek to collaborate	76%

DUTY TO ACT IN GOOD FAITH	
Will sometimes mediate despite the strength of the case	69%
Will sometimes make confession	69%
Wil always not seek to cross examine party	76%

MEDIATOR/ATTORNEY	
Will sometimes choose attorney as mediator	69%
Always prefer strong communication skills	53%
Sometimes attorneys are better than mediators	76%