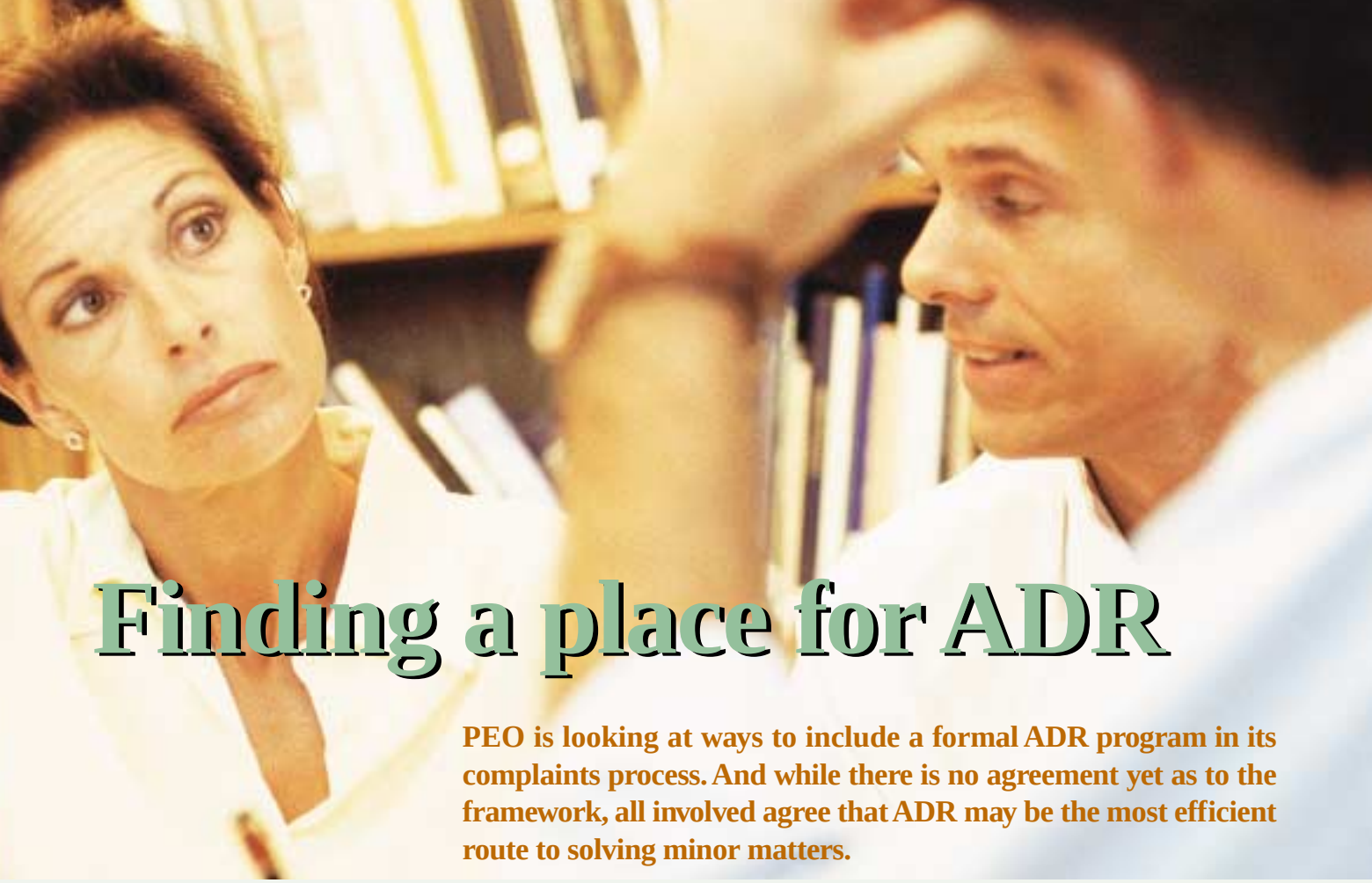

Finding a place for ADR

PEO is looking at ways to include a formal ADR program in its complaints process. And while there is no agreement yet as to the framework, all involved agree that ADR may be the most efficient route to solving minor matters.

by Perry J. Greenbaum

In September 1999, the Honourable Mr. Justice Douglas Carruthers, QC., chair of the Task Force on Admissions, Complaints, Discipline and Enforcement (ACDE), made 68 recommendations with a clear purpose, which was "to improve the way in which PEO governs its members in the public interest, while demonstrating that it does so in a fair and transparent manner."

Although taking up less than one page of the 80-page report, one recommendation stood out: PEO ought to incorporate alternative dispute resolution (ADR) into the complaints process. As the report states in Section 5.2: "There is no reason why PEO cannot fashion a suitable program of ADR to resolve complaints from virtually the time they are made or received by PEO to a time just before the release of decisions of the Discipline Committee."

At its best, ADR holds out the promise of reducing the high costs of money and time (and in many cases emotional energy and lost business) resulting from long-simmering legal battles. If both parties agree, an ADR session can be wrapped up in an afternoon, at a fraction of the cost of a civil case.

The call for ADR to resolve legal issues is becoming stronger, because many people familiar with the legal system sense that the adversarial premise by which the courts and administrative tribunals operate is not always the best way to resolve all types of disputes. Even lawyers are starting to take notice, says Walter Seaton, P.Eng., an experienced engineering, construction and technology disputes mediator based in Toronto. "Lawyers are increasingly realizing that the hard-fought battle in the courthouse is not necessarily the way to go. This is particularly evident of younger lawyers," since, he says, the revised law school curriculum now includes extensive training in ADR.

In late 1999, PEO Council approved 66 of the ACDE Task Force report's recommendations. Most have now been implemented, but PEO has yet to implement ADR in the complaints process. "There is no formal process in place," says Ian Eng, P.Eng., PEO deputy registrar, complaints, discipline and enforcement. Eng concedes that PEO Council is pressing for an implementation timetable, and says he hopes PEO "will begin to implement ADR within the next 18 months."

During that time, the regulatory body must answer some clear questions, including those raised by the ACDE Task Force:

- Is the process to be consensual or mandatory?
- How is it to be initiated?
- Who will act as the mediators or arbitrators?
- Will the form of ADR be different at various stages in the process?

To be sure, before an ADR process is put in place, PEO has to do its homework. For one, it must find the best way to carefully and skilfully embed ADR into its current legislative framework, while not compromising its mission as a regulatory body, which requires that it protect the public interest. This is done by having in place a formal structure to manage complaints.

Making a complaint

Currently, the Complaints Committee receives, on average, about 100 complaints

One reason for the caution is that while the Complaints Committee process is transparent, ADR is typically a closed-door session where the disputants agree to keep the results of mediation private and confidential.

a year. Once a complaint is filed, a three-stage process is set in motion. Stage 1: gathering evidence about the complaint; Stage 2: peer review of the complaint by the Complaints Committee; and Stage 3: discipline hearings before a five-person panel of the Discipline Committee. Each year, between 30 and 35 complaints are heard by the Complaints Committee, which comprises 16 members. And about 10 to 12 complaints are referred to the Discipline Committee each year.

Each stage is formal and meticulously followed. The first two stages can take several months, while the third stage, if necessary, can increase the time for a complaint's resolution to two years. It costs nothing for a member of the public to make a complaint, but the complainant must do so in writing and supply supporting documents. At each successive stage, more time is spent to understand clearly the technical issues central to the complaint.

As it now stands, each complaint, whether major or minor, goes through the same formal process. People familiar with ADR speculate that about 10 per cent of complaints that PEO receives each year could be handled fairly and expeditiously through ADR. "On minor matters, those that don't involve serious principles like the competence of the professional engineer, ADR is an appropriate way to go," says David J.D. Sims, a retired lawyer and Complaints Review Councillor with PEO. "But if there are questions involving competence, the engineer has to go through the whole disciplinary process."

Or as Eng puts it: "Issues that touch upon public safety and major engineering technical issues are probably not appropriate for an ADR process. Public-safety issues ought to follow the current PEO peer-review process, where the conduct and professional practice are reviewed by professional engineers."

One reason for the caution is that while the Complaints Committee process is transparent, ADR is typically a closed-door session where the disputants agree to keep the results of mediation private and confidential. Clearly, cases of public safety have to remain transparent.

Finding a place for ADR

So what type of complaint is suitable for ADR? While PEO has not yet drafted formal guidelines, there are areas in which ADR would seem highly suitable. For one, contract misunderstandings. The client expects a certain number of site visits, according to contract, and feels that the engineer has not been keeping an eye on the job. Or there may be minor building code and design issues. Often conflicts arise between the professional engineer and municipal permit authorities over getting a drawing approved. Eng gives a common scenario: "The drawing goes back to the engineer, who says. 'Yeah, I understand it, but I'm meeting the intent of the code.' So the engineer refuses to make the changes. Such a dispute is suitable for ADR."

Eric Newton, PEO manager, legal affairs, calls these disputes "communication problems."

These are everyday issues in the life of, say, a civil engineer. "These are areas where we [PEO] can't impose anything, because it's not a violation of the *Professional Engineers Act*," says Bernard Ennis, P.Eng., manager, professional practice for PEO. "But we can help both sides see what the roles and responsibilities of engineers are." For Ennis, these are not so much official complaints, but disputes arising out of conflicting views of the engineer's role and responsibilities.

Ennis, who has had training in ADR, is a strong advocate for its use (see Sidebar, Taking on the Objections). "There's a role for ADR in educating the public and engineers," he notes. For example, he foresees a day when ADR could be used to quickly defuse problems: "We could work with building officials, who are often down on engineers because of the activities of a few engineers, which would put PEO and the profession in a better light."

True enough. Another issue with which PEO must come to terms is whether the process ought to be mandatory or consensual. If the numbers in Ontario civil courts are indicative, consensual ADR has a better chance of success than mandatory ADR. As Judge Carruthers points out in the ACDE Task Force report: "Consensual ADR succeeds because of the parties' common desire to reach a resolution. That element is missing in too many cases outstanding in the courts, and is a prime–if not the sole–reason why these cases proceed to trial."

This is borne out by the experience of Seaton, president of Walter Seaton Resolutions Inc. in Toronto and a chartered mediator, one of about 150 in Canada. Seaton's success rate is 80 per cent when both parties consent. As he puts it: "People who have agreed to mediate have fundamentally said at the back of their minds: 'I'm prepared to make some com-

TAKING ON THE OBJECTIONS

In his proposal to advance an ADR program, Bernard Ennis, P.Eng., manager, professional practice for PEO, has drafted some responses to two notable objections raised by ADR's detractors:

Objection 1: ADR is a member service and should be left to the Ontario Society of Professional Engineers

Of course, PEO should not provide ADR as a benefit to professional engineers for all kinds of disputes. Disputes handled by a PEO-sponsored ADR process should be those that involve ethical, practical or minor competence issues. Ignoring these kinds of grievances can leave the public with the impression that PEO cares little about less serious violations of professional ethics, standards and obligations. This impression, in turn, can impair PEO's ability to fulfil its regulatory role, which depends on public trust, generating a downward spiral of perceived poor performance as a regulator and diminished credibility.

Objection 2: ADR is not a useful process since a solution to the dispute cannot be imposed.

There is no guarantee that a conciliation or mediation process will result in a solution to a dispute. However, all successful ADR sessions end with the two disputants developing a written agreement with the help of a neutral third party. This agreement is a binding document. But the greatest advantage of an ADR session is its educational and societal benefits.

promise. Let's get this over with. I want to get on with my life.'"

When, however, mandatory mediation is imposed, the success rate plummets to an average of 40 per cent. (Since 1999, a significant percentage of civil cases in Toronto and Ottawa must undergo mandatory mediation as part of the Rules of Civil Procedure, Rule 24.1.) That's the result of one or both parties having less than a keen desire to resolve the dispute.

PEO does already provide an alternative form of resolution to a complaint that has been referred to the Discipline Committee. Use of a Stipulated Order provides an alternative to a costly Discipline Hearing. The process, says Eng, is an attempt to deal with matters of a less serious nature. The member complained of accepts guilt for certain aspects of the complaint as an Agreed Statement of Facts. The success of the Stipulated Order, he says, is based on agreement of the parties involved. Where it appears that such agreement is not practical, the process should be abandoned and the matter should proceed to a hearing. The focus now, however, is to have ADR in the front end, before disciplinary action is needed.

ADR as deterrence

Just having an ADR process in place might even be enough to quickly resolve disputes. For example, PEO implemented a Fees Mediation Committee in the 1980s, in the last major revision to the *Professional Engineers Act* (see sidebar, Fees Mediation). Since then, it has never heard a case, says Newton, who speculates that even the threat of a meeting in front of a regulatory body like PEO is sufficient to encourage an engineer to quickly and quietly solve any problem with the client.

"The engineer would probably rather do anything than be subject to action by the association," Newton says. "I think that a lot of these disputes are settled by the client saying, 'I would like to go to mediation,' and the engineer saying, 'I'd rather not go that route, so let's talk.'"

Another question is whether ADR should be done in-house or through a third-party provider. For Eng, the answer is clear: "Because PEO is the body that regulates professional engineering, there might be a perception that PEO would have a bias. Thus, an external ADR provider would be the way to go. But that will cost money."

Yet Newton and Ennis argue that ADR could be set up within the confines of the current Professional Affairs department. "It would be a separate, front-end committee that would mediate disputes," Newton says. Or as Ennis puts it: "We are the ones dealing with issues related to professional practice, so we should decide whether ADR should deal with these kinds of issues."

Such an initiative would have the added purpose of leaving room for a complainant to make a formal complaint should mediation not work out. "If the mediation were to fail, there would still be a possibility that the public party could proceed with a formal complaint against the engineer without compromising the complaint process," Ennis points out. Information exchanged during mediation would not be prejudicial and the process would be kept completely separate from the complaints and discipline process.

Equally important is that there already exists a pool of trained engineer mediators, says Newton: "If you are going to have a mediation system in place, it should have mediators trained in some aspects of mediation, which a lot of engineers already have."

And, Seaton adds, a mediator handling an engineering-related dispute ought to have "a substantive knowledge of the engineering and construction areas." In short, a mediator ought to know how an engineer goes about doing his or her work. "For example, when an engineer stamps a drawing, it means something very particular," Seaton says. "The mediator should understand the environment and the conditions in which an engineer operates."

When ADR works, it works well, Seaton says: "If a mediation is successful, people leave with a real feeling of accomplishment. They have settled the dispute. In the engineering-construction area, this is particularly vital, because very often today's disputants would like to be tomorrow's business partners."

Perry J. Greenbaum, an award-winning business and technology writer, can be reached at saltpub@sympatico.ca.

FEES MEDIATION

Fees mediation was set up in the 1980s when the *Professional Engineers Act* was last rewritten. Its purpose is to solve fee disputes through either mediation or arbitration. "If a client has a dispute about an engineer's fee, then that client can approach the association to mediate or arbitrate," says Eric Newton, manager, legal affairs for PEO.

If required, the mediators would be drawn from a roster of experienced professional engineers, and the dispute could be resolved either through non-binding mediation or binding arbitration.

Here's how it would work. The client would send a letter outlining the problem to the committee, which would then send a letter to the engineer, giving him or her an opportunity for mediation or arbitration. If the engineer agreed, PEO would send a consent form to both parties for formal signature. Then fees mediation would be set up. "It sounds like a simple process," Newton points out. "But since the new Act was tabled in the 1980s, we have never had an arbitration or mediation session."