

Regulation of Mediation – How could this impact your legal practice?

INTRODUCTION

Members of the Law Society of B.C. (LSBC) are very familiar with “regulation.” Some lawyers recommend mediation to their clients. Increasing numbers of lawyers are mediating instead of, or in addition to, practicing law. Should mediation practices be subject to regulation?

ONTARIO BILL 14

Issues about the regulation of mediation arose in Ontario with the introduction of Bill 14, Schedule C of the *Access to Justice Act 2005*. Schedule C includes amendments to the *Law Society Act* intended to provide a framework for regulation of paralegals in Ontario. The Schedule C approach moves from a “membership” model to a “licensing” model. It authorizes the Law Society to license persons by class to practice law or to provide legal services. The definition of “legal services” includes activities that could be associated with mediation, particularly those with a more evaluative emphasis.

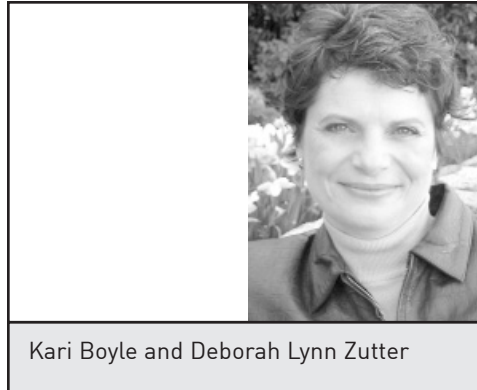
The Ontario ADR community believed that Bill 14 “over-reached” and argued that mediation and mediators should be exempt from the Act. Although the Law Society has stated that it will exempt mediators in its by-laws, the Ontario Bar is lobbying the Attorney General to list the exemptions specifically in the legislation.

WHAT ARE THE ISSUES?

The Ontario situation raises important issues relevant to B.C. about the nature of mediation, its relationship to the practice of law and the appropriateness of regulation. These issues include:

1. What is the purpose of regulation?

The primary purpose is the protection of the public. In addition, for Court connected mediation



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programs, it is important to ensure the competence of the mediators and thereby, the integrity of the court process.

2. What is the present situation in B.C.?

With the exception of lawyer mediators working within the definition of family disputes as

those are defined in Appendix 2 to the *Professional Conduct Handbook*, mediators practicing in B. C. are unregulated. This is not to say that many unregulated mediators do not voluntarily subscribe to Codes of Conduct produced by organizations to which they belong, such as the ADR Institute of Canada (locally known as BCAMI) and Family Mediation Canada (FMC). Furthermore, mediators who appear on the BC Mediator Roster Society Directories (Civil, Family and Child Protection) have met prescribed standards of training and ability and they agree to abide by the Code of Conduct established by the Roster Society. The regulations set out in Appendix 2 describe situations in which a lawyer mediator is disqualified from acting (conflict of interest), the duties of the mediator (actively encourage Independent Legal Advice) and require that family law disputants enter into a written agreement before mediation commences that addresses matters such as confidentiality.

Mediation confidentiality is an issue. There is statutory protection in limited situations when mediations are conducted pursuant to the *Child, Family and Community Service Act* or pursuant to the *Notice to Mediate (General) Regulation*. Mediation confidentiality has been recently attacked in British Columbia and in Ontario.

Some mediators voluntarily seek certification by mediation organizations to which they belong, such as FMC and BCAMI. To qualify, they must demonstrate their ability to mediate and, to some extent, their knowledge of law. As a condition of employment,

Family Justice Counselors, who provide no-fee mediation services to qualifying couples with parenting disputes, must be certified by FMC.

There are no provisions in the *Professional Conduct Handbook* specifically regulating lawyers whose clients are participating in mediation.

3. What could regulation mean?

There are a number of different regulatory models, including (in rough order of formality):

- Codes of conduct
- Certification
- Licensing – Qualification/admission requirements
- Performance standards and expectations
- Performance assessment, complaints processes, discipline and decertification.

4. What are some of the benefits of regulation?

The arguments for regulation include:

- **Public protection** – Mediation participants should receive competent and ethical mediation services.
- **Confidentiality** – The confidentiality of mediation communications must be legally protected.
- **Conflict of Interest** – Providing guidelines to lawyer mediators and to lawyers about what is a conflict in mediation matters and what to do about it would benefit clients.
- **Clarity of Role** – Clients need to understand that when lawyers mediate, they are acting as neutrals.
- **Transparency** – The type of mediation that is being offered, the procedural preferences of the mediator, how mediation services are paid for and who will learn about mediation outcomes should be regulated.
- **Appropriate, not Alternative** – Mediation is a 21st century dispute resolution option. For example, the *Uniform Mediation Act* is being enacted across the United States with the result that the behavior of lawyers in relation to mediation is being regulated.

5. What are some of the risks of regulation?

The arguments include:

- **Unnecessary** – “If it isn’t broken, don’t fix it.” The LSBC receives very few complaints about lawyer mediators. Labour mediation is well-established.
- **Unduly Restrictive** – Any regulatory scheme

would likely include requirements for qualification and for on-going training. Lawyer mediators who are currently providing mediation services could fail to qualify and could be prohibited from mediating as members of the LSBC. There is also the concern that creating competency criteria could be abused and create a ‘closed market’ benefiting a few, privileged lawyer mediators.

- **Barriers to Entry** – Many excellent mediators possess professional backgrounds other than law. Any effort to limit mediation to the practice of law would disenfranchise these mediators and could limit public access to excellent dispute resolution services.
- **Stifle Creativity** – Mediation is evolving. Regulation could inhibit its natural growth, could entrench standards that have little empiric worth, or, worse, have unintended results that cause harm.
- **Cost** – Effective regulation is expensive.

WHERE TO NOW?

Issues regarding regulation are much too complex to discuss in detail in this brief article. The LSBC has considered the regulation of lawyer mediators and of lawyers whose clients participate in mediation. The ADR Task Force delivered its draft report and recommendations to the Benchers on October 14, 2005 and asked that the report be circulated to the members of the bar for feedback. The Benchers declined to do so. The report has been returned to the ADR Task Force. Whether the report will be circulated and in what format remains to be decided. **BT**

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