"REGULATING MEDIATION"

Introduction : Currently, if the parties to a dispute wish to avail themselves of the services of a mediator they have several options. Either they can defer to a mediation service providing organisation, (MNB) which offers some guarantee as to the mediation credentials of their members, to appoint or nominate/ recommend a mediator; they can choose an individual on the basis of personal recommendation; or they can consult a list of mediators and make a selection from it. There is no shortage of mediators who offer their services on the web and through other commercial directories supported by glossy presentations, which often make sweeping, grandiose statements in support of the mediator(s) and their apparent track record of success. The choice for the uninitiated is baffling. Which, if any, of the mediation service providers should they put their trust in? There is no single official source of mediators. Anyone can legally declare themselves to be a mediator and set themselves up in business.

The services of a commercial mediator do not come cheap. How can the parties to a dispute be sure that the mediator chosen to assist them in their search for a resolution to their dispute will be "*up to the job*?" A debate is currently raging about quality assurance in the mediation market.[1] It is hardly surprising. All of us will have heard anecdotal evidence of mediations that have failed miserably, apparently because the mediator was incompetent, or of settlements that have been achieved in-spite of the worst efforts of the mediator. Happily there are also those of us who have been congratulated on bringing about a resolution to a dispute, to the mutual satisfaction of the parties, by a party who entered the process as a confirmed "Doubting Thomas".

There is a danger that the mediation movement, with all the benefits that it has to offer, could be derailed by loss of consumer confidence, if quality assurance mechanisms are not introduced to ensure that clients are protected from incompetent mediators. There are strong arguments for and against regulation. If compulsory regulation is to be adopted, who will provide it, a state body or the industry itself? For the industry to provide effective self regulation it would need first to acquire an overarching body recognised by all providers and individual practitioners, somewhat like the Law Society or Bar Council. Voluntary recognition of such a body is unlikely, so statutory intervention to make membership a prerequisite of practice would be required. However, once in existence the body could render superfluous the pre-existing organisations. Furthermore there would be a cost implication for the profession in establishing such a body, which would no doubt quickly acquire disciplinary powers. Where would the body draw its officers from and who would appoint them? Who in turn would regulate the conduct of the body and what degree of accountability would it have towards the professionals it holds sway over?

How practicable is it to firstly regulate the conduct of mediators, secondly to accord a quality stamp of approval for mediators and thirdly, what happens to the quality assurance body if and when a rogue mediator slips through the net and the parties, having relied upon that stamp of approval, end up with a mediation that goes pear shaped? A further difficulty lies in the fact that the reason why a mediation fails is often because the differences between the parties simply proved to be too great to be bridged, or because one or both of the parties was either not prepared to compromise at all, let alone make realistic concessions.

The problem is compounded by the plethora of organisations that act as mediation service providers, trainers and accreditation bodies, both domestically and internationally. This is amply demonstrated by the European Commission Green Paper, which charts the principal providers across Europe and examines the range of differing governmental / institutional approaches of member states to mediation. Whilst it is possible that the European Union may produce a Mediation Directive in due course, the extent to which it will regulate the profession and establish minimum standards, as opposed to merely providing broad generalist guidance, is yet to be seen. It is submitted that the flexible nature of mediation is part of its strength given the diverse range of social interests that are served by it. Any form of regulation that imposed too severe a straight jacket on the conduct and practice of mediation would inhibit both its present use and its adaptability for the future.

[1] See Commission of the European Union Green Paper COM (2002) 196 ; See also The Department for Constitutional Affairs at http://dca.gov.uk/civil/adr, previously the Lord Chancellor's Department (LCD), which has taken a keen interest in the ADR movement and the scope for regulation.

The contrast between the approach to date of the US and Europe to this issue is very telling. The modern mediation movement was invented by an initially small group of US legal practitioners, judges and interest groups, who were dissatisfied with the high costs of litigation, the time element involved in litigation and the hazards of jury trial. The practices and procedures of mediation developed by trial and error and different sectors adopted radically different approaches to the art to suit their various needs. The client base for mediation expanded rapidly as its value and worth gained recognition.

No doubt the progress of the movement was littered with examples of both good and bad practice, but as long as the positive outcomes outnumbered the failures, the risk of mediation for users, despite its lack of regulatory quality assurance mechanisms, was patently less than that of litigation. The movement evolved to critical mass before the authorities even took cognisance of its existence. Eventually first individual states such as Texas[2] and latterly the Federal Government[3] produced mediation legislation, an event that R.Faulkner and I made a humble contribution to. Even so, the legislation, which represented an extremely light touch, leaves regulation primarily in the hands of the ADR industry. The primary effect of the legislation is not to regulate but rather to encourage the use of ADR and forges a link between ADR and the courts. The US courts have in turn broadly supported the ADR movement, enforcing mediated settlements. A similar process is currently underway with respect to the Dispute Review Board movement. The courts have intervened on a few occasions in respect of patently biased mediators and in respect of misconduct by DRB panellists[4] but otherwise both movements have been largely left to their own devices by the law.

That said, both in the US and in the UK the flood gates of professional liability have been well and truly opened. It is too late to try and bolt the stable door. As King Canute found, attempts to stem the tide are futile. All areas of commercial and professional practice have been forced to take a belt and braces approach to protecting themselves against liability both by the adoption of best practice rules and professional conduct regulation and further by taking up professional indemnity just in case these measures prove to be insufficient to ward off legal action for the consequences of events that in previous times would not have been deemed to involve a duty of care.

Despite the standard provisions in mediation appointment documents that seek to provide immunity for the mediator, it is advisable that all mediators carry professional indemnity (PI) insurance. Equally, despite the fact that it is the parties who ultimately accept / appoint the mediator not the mediator nominating, appointing, recommending body (MNB), again it appears that it is now necessary for the MNB to also carry PI cover. All this despite the fact that, as the law currently stands, in the absence of bad faith, neither is likely to be held to account by a court.

The requirements for a careful MNB are not too difficult to ascertain. What it would take for them to fulfil the requirements is less easy to deal with.

The MNB should first ensure that the mediators they recommend are competent, but what is the measure of competence? Is it professional qualifications? If so, how rigorous should the examination be when one is assessing skills as opposed to academic achievement? Is it prior track record? If so, how does a mediator acquire a track record in the first place? "Chicken and Egg" and "Catch 22" come to mind.

Secondly, the MNB should ensure that the mediator has a clean record establishing that he is professional. Whilst, it is possible for the MNB to monitor through feed back forms the performance of its active mediators (assuming the parties bother to make returns), first time mediators present a problem for the MNB. Furthermore, the private nature of mediation is such that the short-comings of a mediator engaged in mediations outside the sphere of influence of the MNB are unlikely to become public knowledge.

Addressing both of these issues may therefore be difficult, though that alone is no reason for doing nothing, unless it can be demonstrated that the danger represented by the problem is insignificant and the cure would be potentially worse than the disease.

2 S154 Texas Civil Practice and Remedies Code 1987.

3 Federal Arbitration Act : Alternative Dispute Resolution Act 1998 : Uniform Mediation Act. 28 USC 651 :

4 **Los Angeles County Metropolitan Transportation Authority v Shea-Kiewit-Kenny**. 4 Dec'97 Cite as 97 C.D. O. S. 8960

Independence : A prerequisite of appointment?

How important is it that a mediator be an independent, impartial outsider? The answer, in respect of adjudicators is well established. In order for justice not only to be done, but also "*to be seen to be done*," the adjudicator should be independent, since no man should be the judge in his own cause.[5] Nonetheless, the bar, where it exists, is against secret conflicts of interest. Where a conflict is well known to and accepted by both parties the arbitrator is entitled to serve. The circumstances in which it is inappropriate for someone to serve as an arbitrator is complex, but it should be noted that the mere fact that an individual is known to the parties should not be a bar to office. However, on times, the erecting of Chinese Walls may be needed, in order for a close colleague within a chamber or practice to serve on a dispute if a party to a dispute, is represented by a colleague.

In the public sector, the mere fact that a quasi-judicial decision maker is a civil servant working for and in the relevant, affected government department is not a bar to office in state tribunals.

In the private sector, it is not deemed unacceptable for contract administrators, who have been appointed by and are remunerated by the employer, to decide quality and completion matters, which affect the interests of both the employer and contractor.

So where does all this leave mediators and conciliators? Should they be totally independent or is it permissible for the mediator to be known to, work for or be in some other way related to either of the parties? In house dispute settlement processes, amongst others, are very likely to breach such a requirement.

The absence of legal authority on the matter indicates that the matter has not caused concern to date. Most mediation service providers require their mediators to confirm an absence of conflicts of interest before accepting an appointment or otherwise declare their interest and leave it to the parties to decide whether or not to proceed with the appointment. It is submitted that this is a sensible precaution, but is it a legal requirement, and if not should it be? If it is made a legal requirement, what consequences should the law ascribe to a breach and what impact would a breach have on the enforceability of a settlement?

Regulating the conduct of mediators – what should the rules stipulate?

Bias - Impartiality : Continuing the previous theme, what if the mediator subsequently becomes aware of a conflict of interest after appointment? Should the conflict of interest be declared? If not, what implications arise for the validity and enforceability of the settlement agreement, if any, from a failure to declare that interest to the parties?

External Confidentiality: In common with most professional callings and in line with a central feature of private ADR, namely that the parties are able to ensure the privacy and confidentiality of their private affairs, away from the glare of the press and the public scrutiny, the mediator and the parties alike[6] are traditionally bound to preserve confidentialities and are not permitted to benefit from or trade on confidential information disclosed during the mediation process. This is a standard provision of most mediation process agreements, a breach of which has direct and enforceable legal consequences.

Apart from reinforcing the law, it is difficult to know what else might be usefully added to an already complicated area of law. Any attempt at codification could, unless it went far beyond the scope of mediation and applied to general practice, result in different standards for mediation than for other instances of privilege.

Balance – fairness - equal opportunity **:** Clearly, each of these are desirable and objectives mediators should strive to achieve. The greatest problem however is in establishing what standard of due process should apply to the myriad of different circumstances served by the mediation process. Certainly, a single standard to fit all is not possible or desirable, without seriously limiting the scope of coverage of the process. If on the other hand the lowest possible standard is set, then it would achieve nothing worthwhile. However, to establish a range of standards for different forms of process would be both complicated and difficult to enforce. To start with it is far from clear that the list of categories is established and thus closed. The market is continually finding and establishing new applications for the process, with the new providers making up rules that they deem appropriate, as they proceed. It is difficult to perceive how else this might be achieved.

5 **Dimes v Grand Junction Canal** [1852] 3 HLC 759.

6 See Mediation Corner, ADR NEWS Vol 4 No2 2004 for commentaries on privileged without prejudice agreements.

Fair outcomes : To what extent, if at all, should the mediator concern himself with the fairness of the outcome of a mediation and if so, what is the consequence of a failure to do so? Assuming there is a duty, as discussed below for the mediator to abstain from providing advice particularly in respect of offers on the table (a fortiori providing advice advocating unfair terms) it is difficult to see what a mediator can do to guard against unfair outcomes. Where the parties are represented then the mediator should be able to rely on the representative performing his duty to the client. What, if anything at all should a Mediator do if it becomes apparent that one of the party representatives is incompetent and the party is likely to suffer in consequence? Is this simply the party's problem for choosing an incompetent advisor? The mediator is not there to judge the professionalism of advisors. Perhaps inviting the party to consider the implications of relevant factors and how the party would address those factors is the best way forward, without directly exposing the perceived deficiencies of the representative, might be appropriate.

It is difficult however to see how the mediator might be held accountable for failing to adopt such a precaution. Furthermore, a danger for the mediator in getting involved is that the representative may have very good reason for the advice given to his client, which the mediator is unaware of.

Internal Confidentiality : Are there any circumstances where a mediator should break the covenant against revealing confidential information disclosed in a private session to the other party without consent? Since confidence in the discretion of the mediator is central to the success or mediation, the answer must be a firm no. However, a mediator may find himself in a dilemma once appraised of information that indicates wrongdoing by one party, which is prejudicial to the other, who is unaware of that wrongdoing. Lawyers owe an overriding duty to the court and justice, which requires disclosure in extreme situations and provides an exception to the rules on legal privilege. These do not extend to the mediator, so it is advised that a mediator should either seek consent to disclose, or resign, though the problem is that resignation sends a warning signal to the others party that there is a significant problem that they are unaware of.

Advice **:** To what extent, if at all, should a mediator abstain from providing a party(ies) with advice, whether legal or practical, and if so what is the consequence of wrongfully offering advice or worse, bad advice? Many mediators will not have professional indemnity cover for advice giving. Furthermore, the mediator will need to ensure that he does not cross over the professional boundary into legal practice, particularly if not a member of the legal profession.

It is standard practice for the mediator to tell the parties that he is not there to provide legal advice to either or both of the parties. Most mediation rule-books require the mediator to abstain from providing legal advice. Where as discussed above (*Fair outcomes*) the parties are represented there should be no need for the mediator to provide advice. However, where a party represents himself the temptation to provide advice may arise, particularly where a party is evidently at sea and does not recognise let alone understand the position they have placed themselves in.

The distinction between asking a party to consider whether or not a particular course of action is tenable as opposed to intimating that you are of the opinion that a proposed course of action is not tenable (or alternatively inviting a party to consider a course of action and recommending a course of action) is significant, albeit that the change in wording is slight. Whilst such advice may move the resolution process forward to the mutual benefit of both parties, on other occasions it might befit one party, potentially to the detriment of the other, affecting the balance of fairness in the process.

To move from expecting mediators to exercise common sense and good judgement over such matters to the drawing up of an express "Advice Rule" is likely to prove to be a challenging task for the draftsman and if it places too tight a straight jacket over mediation conduct could limit the flexibility of the process and do more harm than good. It should not be forgotten for instance that in social mediation the parties may both expect and rely on the mediator providing advice, particularly in respect of what is considered to be acceptable social codes of conduct. Hence, the dividing line between conflict management and dispute resolution comes once more to the fore. Another hazy distinction, namely that between conciliation and mediation is also relevant here.

Decision making **:** To what extent, if at all should a mediator be allowed to make and impose decisions? Is this a matter for the parties to agree in advance or subsequently, during the process? If, in the absence of agreement, a mediator, faced with an impasse, proposes a decision (or more subtly strongly suggests a solution) and the parties concur, can either party subsequently disown the decision/suggestion on the grounds of undue pressure? It would appear to be unlikely, in that the acceptance amounts to voluntary adoption so that the solution becomes the property of the parties.

If a mediator is empowered to make decisions, does it cease to be a mediation and become an adjudicatory forum or alternatively a conciliation process?[7] If the latter, will separate and distinct rules need to be drafted in respect of conciliation and mediation, to include for the first time a definitive definition of both processes that distinguishes between them in a meaningful and workable manner? It is submitted that achieving a consensus on this alone may be no mean feat.

A central problem here is that the mediation industry has grown and expanded into new applications, all the time maintaining the word mediation as a central descriptor, whilst at the same time defining the rules for that specific area of activity. A modern development that exemplifies this is "Victim /offender mediation." A local so called "Victim/Offender Mediation Scheme" in operation in South Wales appears to concern the offender rather than the victim. The pressure on the offender to participate is strong, since the alternative is a court sentence. The objective appears to be to mediate the offender's attitude towards their offending conduct, central to which is an acknowledgement of wrongdoing and an expression of regret. The mediator lets the offender know in no uncertain terms what is expected of the offender. The penalty for failing to play the game is a return to court for sentencing. How such a model would fit into any regulatory mediation mechanism is anyone's guess. Perhaps specific regulations are needed for victim/offender mediation, assuming these would be acceptable to the operators of such schemes.

Pressure – undue influence **:** How much pressure, if any, should a mediator be allowed to apply in order to achieve a settlement, and what is the consequence of overstepping the mark? Is a party to a mediated settlement able, on the grounds of undue influence, able to get a settlement set aside and if so is this more likely to be the case where a party is self represented, since presumably a central part of the role of a party representative will be to support the client and ensure that sufficient advice is provided to enable the client to resist any undue pressure to settle on disadvantageous terms.

Exerting pressure is encouraged under the rules of some mediation service providers and frowned upon by others. There is little or no consensus on this issue at the present time. In particular the providers of conciliation type mediation services will view the exertion of pressure by the mediator as an essential part of the closure process.

Given the popularity of the mini-trial type mediation process, regulation here is again likely to prove difficult to draft to accommodate the various models of mediation, without resorting to sub-categorisation of forms of mediation. Otherwise, if regulation outlaws some forms of mediation practice this is likely to prove extremely controversial and unacceptable to those practitioners displaced by the new rules.

Control and Authority **:** To what extent, if at all, is there a duty (over and above the fact that it is probably desirable and necessary in order for the mediation to be effective) for the mediator to establish control and authority over the process, and what implications are there for the enforceability of a settlement arising out of a mediation where the mediator has failed to establish his authority?

This question is most likely to arise where a mediation fails to produce an agreement and one or other of the parties seeks to recover the cost of the failed process on the grounds of mediator incompetence.

The problem however is that respect and authority are derived from many sources and cannot be imposed. Rather it has to be earned. Where a mediator assumes that respect is automatically due a rude awakening is often in order. An unbridled, belligerent, rude party can rapidly derail a mediation forcing the other party to withdraw.

[7] Distinctions between mediation and conciliation and the relevant rules of due process that apply see "The Role of the Mediator" for Society of Expert Witnesses, October 2002 by C.H.Spurin.

The mediation process is strewn with pitfalls for the unwary mediator who is unlikely to know of sensitive factors private to the parties. The problem is greatest for the enthusiastic hands on mediator, generally a major plus in a communications led process, but one with the drawback that rushing in can lead to regrettable gaffs which might be hard to subsequently undo. It is easy to say that listening carefully to the parties and quietly observing, with the use of circumspect language can avoid such gaffs occurring, but too much caution can lead to a failure to generate momentum, confidence and enthusiasm.

Place that then in the context of the obstructive party, full of their own beliefs and self importance, but yet capable of changing their own mind (and recollection of events) when the occasion calls for it. Whilst singularly responsible for the failure of a mediation, it falls quite easily to such a party to refuse to accept their own role in the failure and to seek to apportion responsibility to the mediator. At that stage the slightest gaffs become exaggerated and any sense of proportion is lost.

However, any attempt to hold the mediator to account for a failed mediation, whether the allegation is justified or not, is problematical since the mediation process is bound by rules of privacy.

A final twist to this question regards the allocation of court costs. Where a party has obstructed and thwarted the mediation process this may be a reasons for the courts awarding costs under the CPR for subsequent litigation in respect of the dispute. Under some jurisdictions the mediator is called upon to issue of certificate of co-operation/non-cooperation with the process, which may go beyond a bland declaration that the parties attended. It is not hard to imagine the day arriving when the obstructive party denies non-cooperation and attributes responsibility for the failure to the mediator, all in the cause of preserving costs.

Representation : To what extent, if at all, should the parties be required to be legally or otherwise professionally represented at a mediation? If a party is not represented, should the mediator proceed with, defer or abandon the mediation? The SPIDR mediation rules for instance require that the parties are represented. If that is the case, should they be legally represented or is any representation sufficient? In some US states such as California legal representation at mediation is mandatory. This does however raise the difficult question of how to react to a court ordered mediation when a party wishes to appear pro-se at the mediation and has likewise presented themselves pro-se before the court.

In contrast to the above, many social mediation providers explicitly exclude lawyers. For example, in the US the DRBF advises against legal representation. If lawyers attend, they are denied a right of audience and are only permitted to advise their clients from the wings. However, where legal rights are at stake, the pressure on the mediator to ensure fairness is increased if a party appears pro-se, since the mediator cannot play the client off against their representative and has to supply the reality check directly and perhaps even to provide some form of evaluation or advice, a practice frowned upon by some mediation service provider organisations.

This, it is clear, is yet another matter on which there is an absence of consensus. Can there be a single rule on this issue or should there be different rules for different types of mediation? Or alternatively should it be a matter for the discretion of the mediator and/or the parties?

Mediation and counselling : To what extent, if at all, should a mediator act as a counsellor to the parties and what is the interrelationship between counselling and advising? This is an issue which inevitably arises in relation to social and family mediation, but has little relevance to commercial mediation. Nonetheless, there are occasions where the mediator may be faced with mediating viewpoints on normative behaviour, particularly where questions of entitlement and the "reasonable man" are at issue. The dividing line between counselling and advising is likely to be very thin on times.

Mediation Fees **:** What is a reasonable mediation rate? Is there a standard rate or is the rate dependent upon the standing of the mediator and what the market will bear? Should court mediation scheme rates act as a benchmark? Should the cost of mediation be in anyway proportionate to the dispute at hand? Complex matters can be involved with small sums at stake but where reputation is thrust to the fore, whereas a dispute over large sums of money may in fact be quite straightforward to deal with. Rates currently range from pro-bono/token fess upwards.

Duration of Mediation **:** How long should a mediation take? This is related to the last issue, since the longer a mediation lasts, where an hourly rate is applied the more it will cost. The problem is that this is like asking how long is a piece of string. If it is remembered that a mediation is not about establishing facts and liability but rather about canvassing viewpoints, it is possible to mediate large disputes with many facets in a relatively short period of time. The longer a mediation lasts, particularly in terms of days, the harder it is to achieve a settlement. However, apart from the parties withdrawing in frustration, what liability, if any can attach to a mediator who makes an unnecessary meal out of a mediation? Perhaps the only practical answer is that this may ultimately impact upon his reputation and acceptability as a mediator by the industry.

Joint or private sessions? Some mediators refuse to engage in private sessions insisting that all communication should be open and fully disclosed, whereas for others the caucus is standard practice and deemed essential in order to explore options without prejudice to the bargaining position of the parties. Should this be regulated or be left to the discretion of the mediator? Joint sessions have the advantage of relieving the mediator of any responsibility for internal confidentiality. However, they increase the burden of the mediator to maintain control of the process and require very high levels of diplomatic skill.

What is the measure of competence?

Reputation / confidence : What makes a good mediator? The following is not an uncommon response : "*I don't know but I can recognise one when I see one, or at least, I know the names of the famous mediators who must therefore be good*." Whilst this does not assist very much, it points out the problems of introducing regulations that might cut out recognised mediators who do not fulfil the regulatory criteria but who will continue to be in demand whatever the regulations say. Frequently high-profile mediations are put in the hands of respected members of the community who have no mediation experience, but are respected for their political / managerial skill. This is particularly so in the case of public international disputes. US Presidents and Senators it would appear are naturals at the art of mediation and diplomacy!

Reputation and confidence cannot be formally measured. A regulation is likely therefore to be based on formal qualifications. What should be specified as a minimum training standard? What should the benchmark contain and how would it be measured / assessed? Whilst there are extensive bench marks for legal practice there is no independent universal bench mark for arbitration practice.

Criminal records : Should those with criminal records, un-discharged bankrupts and individuals with other relevant stains on their character be barred from mediation practice? Or do such experiences add to the knowledge and understanding of the practitioner in specialised areas of practice? Can the poacher turn gamekeeper?

Training / Examinations : In the US the bench-mark is attendance for 40 hours under the guidance of a certified mediation training organisation. In the UK the Law Society has set out a core curriculum for solicitors to practice as mediators. A wide range of community mediation organisations and private mediation service providers also offer training programs of differing lengths and with varying content, some concentrating on hands on practical skills whilst others concentrate on theory. Yet others depend on varying periods of mentoring or pupilage. A further requirement of some providers is either a minimum number of appointments or continuing professional development.

There is little cross accreditation in the industry which means that it is difficult to establish any degree of accepted practice or standards in mediation training in the UK.

Should a mediator be merely an expert mediator or in addition an expert in a given area of practice? Some providers consider that mediation itself is sufficient of a skill and art to enable the mediator to handle any dispute, whatever professional discipline or commercial field happens to be involved. Others consider that expertise in a field relevant to the dispute is essential to being able to mediate effectively. Should any prior knowledge include relevant legal understanding? This is deemed unnecessary by many supporters of interests based mediation but would be strongly commended by risks analysis/reality check/evaluative mediators.

Accountability of nomination bodies

Accountability to the parties : To what extent could and should a MNB be accountable to a dissatisfied party, for nominating a mediator who commits mal-practice? Would accountability depend on whether or not the mediator had a bad track record or was unqualified in some way? The problem with track records is that they are rarely made public. Perhaps a public record would be needed to make such accountability meaningful. In the meantime, insurance cover is likely to become the norm "just in case" liability is ever imposed.

Accountability to an overarching body : Might an overarching body have disciplinary powers over MNB's? If so, what would the nature of these powers be? Financial or regulatory, with or without supervision and inspections? And if so who will pay for all this?

Perhaps MNB's will be required to monitor mediation provision, but from experience the client response to feed back forms is poor. Should feed back forms be the property of the mediator or should they be logged into a register of complaints? Could an MNB be required to submit an audit to the overarching body, perhaps with copies of feed back forms? If an MNB gets a negative feed back return from a client what should it do next?

Determining who is at fault : without prejudice and confidentiality.

Establishing bias or other wrongdoing by a mediator in the course of a mediation is likely to prove to be problematical given the confidentiality of the process. Most mediation appointment agreements include a statement that the mediator will not testify in court, establishing an immunity for the mediator and privileged status. Legal authorities on the issue of mal-practice are few and far between. The famous California judgement against a group of insurance claims mediators is the exception rather than the rule. The mediators concerned were single party appointed and regular players, each time for the same insurance underwriters. The court was able to conclude that there was overwhelming evidence of a pattern of bias in favour of the carriers and against the interests of the assured claimants. However, in the absence of a track record it is likely to be virtually impossible to establish wrong doing.

If an MNB is to operate a professional standards tribunal, who will have the right and or duty to give evidence, the complainant, the other party and the mediator?

Could and should charges include "Bringing the MNB into disrepute" and what does it embrace?

Once a tribunal process is initiated, what impact does that have on the enforceability of a mediation settlement agreement?

What are the disciplinary options available to the MNB tribunal – a warning, a fine, suspension? Are the tribunal proceedings subject to judicial review and does the mediator have the right to a full hearing? Should there be an appeals process? The answer to all three is likely to be YES. That being the case, who pays for all of this?

Once an individual has been de-listed by an MNB should other MNB's take note and follow suit? Is there a duty to inform other bodies or should there be a central register?

CONCLUSION

This review has raised far more questions than answers. Mediation is a clearly a business. It is less clear to what extent mediation is a profession. More so than adjudication or arbitration, the inter-personnel skills of the mediator are paramount, followed closely by the degree of authority that the mediator can exert, by virtue of reputation and standing and by establishing and maintaining a presence during the process. These are quite different qualities to those measured to establish and maintain professional standards for lawyers and arbitrators. Measuring and monitoring these is likely to prove difficult, if not impossible.

Is it therefore unreasonable to consider whether or not regulation of the mediation business should best be left to the market place, based on the reputation and standing of nominating bodies, service providers and their self-regulatory mechanisms, and to the reputation of the individual mediation practitioner? In many other walks of life, it is perfectly reasonable to advise that the "***buyer beware***" and make necessary inquiries before making an investment.

The jury at present is out – we will have to wait and see what the verdict of the industry and consumer pressure groups is in due course. This is an issue, which is due to run and run.

By CHSpurin