

WHEN IS ADR APPROPRIATE?

Materials by Richard Steinecke¹

Issues:

1. In the professional discipline/regulation context, what interests are at stake that need to be considered when developing an ADR mechanism?
2. How can ADR be made more accountable for public interest regulators (as opposed to dispute resolution tribunals)?
3. At what point in the process is ADR the most effective in resolving complaints of wrongdoing (e.g., in the nature of professional misconduct or incompetence)?

Set out below are a couple of articles, somewhat dated now, on the use of ADR in the profession regulation context. These articles are from the Grey Areas newsletter published by our firm and which are also available on Quicklaw (under database GANL).

ALTERNATE DISPUTE RESOLUTION FOR REGULATORS

Holding hearings (adjudication) is an established method of settling differences between two parties. However, adjudication has a number of disadvantages including:

- (1) it is very expensive;
- (2) most courts and tribunals have an extensive backlog making early resolution impossible;
- (3) most hearings are public which jeopardizes the privacy of the parties in cases where privacy is appropriate; and
- (4) adjudication is an adversarial dispute resolution method that focuses on contested positions not interests.

In recent years, alternative methods of resolving disputes (ADR) has generated significant interest from both lawyers and disputants. ADR has become a common feature in commercial litigation, family disputes and insurance matters.

The College of Physicians and Surgeons of Ontario has recently pioneered the adaptation of ADR to regulatory matters. One of the first mediators to handle a matter concerning the College of Physicians and Surgeons of Ontario is Genevieve Chornenki. Ms. Chornenki is the founder of Mediated Solutions Incorporated and an ADR educator. She received her training in ADR in the United States in the mid-1980's before it was available in Ontario.

Ms. Chornenki says that ADR encompasses a range of procedures for resolving disputes short of a formal hearing including:

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- (1) negotiation through agents or solicitors;
- (2) mediation with an independent, trained mediator; and
- (3) arbitration (informal, expedited hearings).

Most regulators already engage in negotiation. Arbitration on the other hand might be viewed as circumventing the hearing mechanism established for the regulator. Mediation, however, if properly structured, is an option by which regulators can discharge their public mandate and permit parties meaningful involvement in the process.

In the context of a regulated profession, mediation is a voluntary process. This is consistent with section 4 of the *Statutory Powers Procedure Act* which permits statutory bodies to employ alternative processes on consent. Consent of the complainant, the practitioner and the regulator is necessary to undergo the mediation process. Typically, all three (and perhaps any other interested party such as the institution where the practitioner works) are parties. An independent mediator would explore the opinions and interests of all the parties (either at a meeting or by shuttle diplomacy) and attempt to work out a resolution acceptable to all parties. All parties must agree to any settlement. Since no factual findings are made in mediation, the regulator must find a way to ensure that public interest concerns are dealt with.

Ms. Chornenki says there are a number of advantages to mediation over a formal hearing.

1. The participation of the complainant and practitioner is more extensive. They generally have a fuller opportunity to express their views and concerns and to fashion a solution responsive to those concerns. They are not confined to a role of being a complainant/witness or respondent.
2. This participation may result in a more meaningful settlement for participants.
3. Trained mediators are more likely to have the skills necessary to facilitate settlement. A successful mediator will suspend moral judgment, distinguish between the position of a party and the interests of that party, encourage parties to talk about what is important to them and why, remove themselves personally from the discussion and be persistent. The regulator's responsibility is to represent the public interest, but complainants often have concerns about it too.
4. The options for a mediated settlement can be broader than the penalties that can be imposed through a hearing process. For example, an apology generally cannot be imposed by a regulator. However, in an appropriate case, it can be an indication that a concern has been heard and listened to.
5. A settlement through a mediator is generally much less costly than a hearing. For example, a mediation may be completed for a fraction of the cost of a single day of a hearing. But, she stresses that regulators should be wary of letting cost considerations dominate.

The disadvantages of mediation include:

- (1) time can be lost if the mediation is unsuccessful; and

(2) there is added expense if the mediation is unsuccessful.

In addition, mediation is not suitable in all cases. The parties must be willing to mediate and capable of bargaining. They must have some capacity to be flexible, to listen to what others have to say and to evaluate what is realistically possible in the circumstances. Ordinary regulatory channels, such as discipline, should be kept open for those who wish to use them.

The Patients' Rights Association, for example, has concerns about the way in which ADR is used by some regulators. Its Executive Director, Mary Margaret Steckle, says that ADR has been used in cases involving serious allegations of substandard practice which pose a risk to the public. There is no legislative procedure established for the use of ADR. She wonders whether complainants who agree to participate in ADR are totally aware of their rights. There is a concern that financial savings to the regulator is the driving force behind the process rather than protection of the public. She is also concerned where the regulator does not publish the identity of the practitioner when a settlement is reached. The Patients' Rights Association, however, sees a valid role for ADR in appropriate cases and with appropriate legislated safeguards and is in the process of developing a position paper on the matter which should be available early in 1994.

These disadvantages can be reduced by setting appropriate conditions to the mediation. Some conditions suggested by Ms. Chornenki include:

- (1) screening by the regulator of the allegations and parties for those which necessitate a public hearing;
- (2) only mediating matters that will otherwise face a hearing (so that both parties are motivated to negotiate -- the practitioner to avoid a possible adverse finding and the complainant to avoid testifying);
- (3) ensuring confidentiality of the mediation process (to encourage full participation) but public access to any settlement reached (to promote public confidence in the process);
- (4) ensuring that any settlement reached is approved by a statutory committee that is accountable for its decisions; and
- (5) ensuring that all interested parties participate in the mediation so that their needs and concerns are discussed and incorporated into the settlement, where appropriate.

Ms. Chornenki advises that the mediation be conducted by a mediator who is independent of the regulator and that the parties to the mediation should consist of the practitioner (regulated), the member of the public (complainant) and the tribunal (regulator) -- whose responsibility it is to ensure that the public interest is protected in accordance with its legislated mandate. If the regulator itself serves as mediator, it will not be perceived as independent and this may inhibit disclosure and cooperation among all parties.

Lisa Feld, another mediator, is conducting a major study of the pilot ADR project of the College of Physicians and Surgeons of Ontario (CPSO). The Study on Complaint-Mediation in Ontario's Self-Governing Professions, conducted under the auspices of the Program on Negotiation at Harvard Law School, is a project of the Ontario Fund for

Dispute Resolution. Besides identifying what changes should be made to the CPSO's mediation regime, the Study will also develop a complaint mediation model that can be used by other self-governing professions. Lisa Feld reports that more than a dozen such professions have been actively participating. The Study's final report is due in March 1994.

ADR BY REGULATORS IS QUESTIONED

In the January, 1994, issue of Grey Areas, we discussed the use of Alternate Dispute Resolution ("ADR") by regulators to resolve complaints. The College of Physicians and Surgeons of Ontario ("CPSO") has pioneered the use of ADR in the context of professional regulation. The Ottawa Citizen newspaper recently commented on the CPSO's ADR program. The Citizen and everyone interviewed for the article agreed that there was a role for ADR in professional regulation. However, Ms. Steckle of the Patients' Rights Association stated "We're not convinced that plea bargaining privately between the complainant and the health-care professional serves the public interest". On the other hand, a lawyer who defends practitioners said that the practitioner gives up his or her right to be vindicated by agreeing to mediation.

In an editorial entitled "Too Secret", the Citizen suggested that there should be the following minimum safeguards to the ADR process in the public interest:

- There must be clear, written guidelines for the kinds of cases that may be sent to mediation. Serious cases, such as incompetence or sexual abuse, should not bypass discipline or process.
- The regulator must give participants a comprehensive, plain language account of the mediation process. He or she must have a choice as to whether to participate in ADR. He or she must clearly understand the advantages and disadvantages of selecting the mediation route.
- The Citizen agreed that the mediation process itself could not be public. The procedural safeguards of the discipline process did not exist in ADR. However, the Citizen felt that since a regulator's primary function is to protect the public, if a practitioner's right to practise is restricted, the public has the right to know.

Dr. Sutton of the CPSO responded in a letter to the editor. He stated as follows:

- cases sent to ADR were carefully screened as to their appropriateness and guidelines were being developed;
- the CPSO did explain the options in plain language both orally and in writing to complainants; and
- a summary of mediated cases was published to the public once the matters were resolved.