

Summary of Dialogue Sessions June 2015

Topic: Mediators, the Law Society of BC and the "Unauthorized Practice of Law"

Mediate BC hosted three dialogue sessions (one in Victoria, one in Vancouver and a teleconference) in June 2015 to provide information and encourage discussions about the concept of the "unauthorized practice of law" (UPL) and mediation. Kari Boyle facilitated the sessions and Mike Kleisinger, Unauthorized Practice Counsel with the Law Society of BC, participated as our special guest.

The sessions were well attended with 52 mediators participating in total. The sessions followed (roughly) the following agenda:

1. Opening and introductions
2. Information from Mike Kleisinger
3. Questions for Mike
4. Open discussion on UPL and brainstorming of ideas to improve access to justice
5. Next Steps for Mediate BC

The purpose of this document is to provide a summary of the discussion, highlighting the key themes and ideas raised in all of the sessions.

Introduction:

Kari welcomed everyone to the sessions and asked each participant to briefly state their name, their primary area of practice and their reason for attending the session. This provided a very rich context for the discussion.

Kari noted that approximately half of the mediators on the Civil and Family Rosters come from a legal background and the remainder come from a wide diversity of backgrounds. All have a common passion for helping people to manage/resolve/deal better with conflict. She confirmed her personal decision not to use the phrase "non-lawyer mediator" – using the negative implies that mediators with other backgrounds are deficient in some way. We don't use the phrase "non-engineer" or "non-doctor". Instead we need to celebrate the rich ecology of theory, styles, goals and backgrounds that makes up the field of mediation. Why? Because our clients have a wide variety of needs and this is a party-centred field.

Mediate BC has been receiving many inquiries about the role of the Law Society in the mediation field and we are grateful that Mike is participating to help us to understand the Law Society's role, purpose and goals and to provide information about UPL in the context of mediation.

Mike Kleisinger: A Primer on the Unauthorized Practice of Law in BC

Mike Kleisinger opened the sessions with a discussion about UPL:

- 1) Mike has been the "Unauthorized Practice Counsel" with the Law Society of BC for 5 years. He described himself as a "non-mediator lawyer" :). He is very interested in mediation (having taken courses from Sharon Sutherland at UBC law school). He has a deep interest

in mediation and acknowledged that mediation is an important tool and is often better for people than the court system.

- 2) His primary mandate is to stop people from "pretending to be lawyers" and to ensure that people who provide legal services are regulated, insured and educated. His main mandate is the protection of the public.
- 3) He deals with a wide range of people falling between two extremes:
 - a) pure "fraudsters"; and
 - b) those who are well meaning but mistaken...and everyone in between.
- 4) The *Legal Profession Act* was first passed in 1895 and the provisions relevant to this discussion have not changed much since then. Applying those provisions to today's world creates many grey areas, especially when there is a need to address access to justice
- 5) Issues come to his attention through complaints made to the Law Society. There are relatively few complaints about mediators - keep up the good work! There were a few that arose two years ago - mostly about family mediators preparing agreements and that is what led to discussions between Mike and Kari.
- 6) He takes an educational approach first - if he explains to someone that their actions are UPL they usually stop. It is only when they persist in performing those services (and there is a danger to the public) that more definitive steps are taken including court action.
- 7) The basic rules in the Act are:
 - a) people may not falsely represent themselves as lawyers if they are not licenced to practice law in BC;
 - b) they cannot commence, prosecute or defend proceedings; and
 - c) they can't engage in the "practice of law" for or in expectation of a fee or reward (paraphrasing)
- 8) The definition of "**practice of law**" is set out in section 1 of the Act. The primary sections that potentially relate to mediation are:
 - (a): appearing as counsel or advocate (in court)
 - (b)i: drafting corporate documents and wills
 - (b)ii: drafting a document for use in a proceeding, judicial or extrajudicial
 - (b)iv: drafting a document relating to a proceeding under a statute
 - (e): giving legal advice
- 9) There are some exceptions to these rules:
 - a) notaries, insurance adjusters
 - b) set out in other statutes - Family Justice Counsellors, Child Protection Program mediators, real estate agents
 - c) if the services are provided without the expectation of a fee, gain or reward from the parties (Court Mediation Program mediators)
- 10) The Law Society has the discretion not to enforce the unauthorized practice provisions of the Act even if there is a breach when it is not in the public interest to do so. In some cases, if a person is a professional who is regulated, insured and educated and provides services that are the practice of law, the Law Society may not enforce the UPL provisions because the threat to the public is reduced.
- 11) The Law Society has confirmed that mediation is not the practice of law. However, if a mediator engages in any of the aspects noted above (including giving legal advice) the mediator will be found to be practicing law.

- 12) Drafting agreements: Mike explained that this is an area that creates the most complaints. Mike said that if mediators are creating a document (usually called a Memorandum of Understanding or MOU) which simply chronicles that the parties agreed to and no legal advice was provided then there is no problem.
- 13) The Law Society is very aware of the access to justice problem in BC and is actively looking for ways to address it effectively. The Legal Services Providers Task force, for example, is expanding the scope of "legal service providers" regulated by the Law Society to include Notaries and paralegals. Mediators are not being considered under that umbrella for now.

Questions for Mike:

- 1) What does "giving legal advice" mean?
 - a) Mike explained that the courts have interpreted this very broadly. It can apply to advice on BOTH substantive and procedural law. Procedural law includes an explanation of how to commence a proceeding. Mike's test is: if someone takes a particular person's facts/situation, applies the law to those facts/situations and provides advice about what the person should do then they are giving legal advice. This is different than providing legal information which does not apply it to the person's problem. Admittedly, this is not a bright line. This is even more complex in the case of mediation services.
 - b) Mike confirmed that (as in the [Targosz](#) case) the court will consider the behaviour of the person and not what they said i.e. it isn't enough for the mediator to say "I'm not a lawyer" or "I'm not providing you with legal advice".
- 2) Is raising an issue for consideration by the parties giving legal advice?
 - a) Mike explained that the test is "what is the effect on the party"? More vigilance/caution is required when dealing with people who are not represented by counsel.
 - b) In some cases, raising an issue for consideration may, by necessity, involve the provision of legal advice (it may imply to the party that you, the mediator, have applied the law to their situation and concluded that this issue/term needs to be dealt with).
 - c) Some participants objected to this characterization since they believe that setting the agenda for the mediation and "nudging" the parties to certain types of discussions are exactly what a mediator should do.
 - d) It was noted that people often don't know what they don't know. This is especially true with the new [Family Law Act](#). The law is still developing in many areas.
- 3) Are lawyer mediators who retire from the Law Society subject to UPL rules?
 - a) Mediation is not, by itself, the practice of law. If a mediator who is also a retired lawyer engaged in activities that are the "practice of law" there may be UPL issues. That they were once a practicing lawyer does not raise the bar further.
 - b) be cautious in marketing - clarify that you have legal training & experience but cannot provide legal advice
- 4) What does a good MOU look like?
 - a) Mike confirmed that a good MOU chronicles what the parties have agreed to during the mediation. The mediator should expressly suggest that the parties seek legal advice on those terms. As long as it is not prepared to be filed in court or under a statute then it is OK.

- b) If the MOU contains terms that must have required some legal advice there is risk.
 - c) It is also a good practice for the mediator to encourage the parties to seek legal advice before the mediation process begins to ensure that they know what topics/issues should be covered in the mediation and to seek legal advice. In the end, this will keep costs down.
 - d) A participating family lawyer strongly supported the view that mediators should encourage parties to seek legal advice before and after as well as agreement-writing services from a lawyer. She noted that if the MOU looks like a full agreement the parties will be confused, believe that the mediator gave legal advice and may refrain from obtaining legal advice from a lawyer.
 - e) One participant noted that the Justice Institute has a helpful course on MOU drafting.
 - f) Mediators should explain that the MOU is not a binding agreement (but it could be held later to be a binding agreement under the FLA...)
 - i) Include wording to this effect in the MOU itself
 - ii) They should not have the parties sign the MOU
 - iii) They should encourage the parties to seek legal advice (plus information about how to find a lawyer etc.)
 - iv) They could provide the parties with a checklist about how to handle their ILA consultation
 - g) Consider using a waiver - a document signed by each party confirming that they have been advised to seek legal advice (and have declined to do so).
- 5) What about agreements crafted in a workplace conflict setting? Mike explained that these are usually not prepared for a court or other proceeding but are usually agreements to govern the future behaviour of two or more employees. Unless the terms involve some form of legal advice, drafting the agreement and having the parties sign would likely not constitute UPL. An exception might be where the terms resolved a claim for damages. A risk exists when the behaviour forming the subject matter of the agreement later becomes grounds for dismissal. Mike also pointed out that it is not UPL if the mediator is not paid by the parties. However, this exemption does not apply if the employer is a party and pays the mediation fee.
- 6) How could checklists assist?: in both Victoria and Vancouver participants suggested that "sanctioned" checklists could be very useful for parties, counsel and mediators at all stages of the mediation process:
- i) At the outset to list the kinds of issues that will be dealt with during the mediation process;
 - ii) During and after the mediation - things to discuss with your/a lawyer (including how to handle their ILA consultation)
 - iii) At the end of the mediation - things that could be included in your MOU or agreement.
- b) Use of these checklists could lessen the risk that raising an issue with the parties could be characterized as legal advice. They would also improve the ability of the parties to participate effectively.
 - c) A number of participants kindly shared their family checklists. They will be distributed with this summary.

- 7) How to assist parties to find lawyers who are prepared to provide ILA or prepare agreements on an unbundled basis?
- i) While the Law society has approved unbundled services, it appears that few lawyers are willing to provide affordable services on this basis.
 - ii) It was suggested that mediators need to explain to parties the value of this investment - particularly in family matters the issues they are negotiating are some of the most important they will make in their lives.
 - iii) It was also suggested that it would assist mediators and their clients to have a list of "mediation friendly" lawyers in their community who were willing to do this. This could be something that Mediate BC could assist with.
 - iv) Not everyone felt it was appropriate for the mediator to suggest lawyer names.
 - v) A participant asked whether family justice counsellors require parties to seek and obtain ILA for agreements within their mandate.
 - vi) Others suggested that in family matters parties be legislatively required to obtain ILA on agreement terms. Note that in Alberta parties who enter agreements dealing with division of property issues are required by statute to obtain ILA.
 - vii) Consider taking steps to improve the relationship between mediators and lawyers in the community. Admittedly, this is simpler in smaller communities than in larger urban centres.
- 8) What is the difference between legal advice and legal information?
- i) see Mike's definition of legal advice above
 - ii) legal information is whatever is available about the law or process
 - iii) legal advice takes that information and applies it to a specific fact scenario
- 9) What is the difference between legal advice and reality checking?
- i) see Mike's definition of legal advice above
 - ii) it was suggested that posing questions for the parties to consider was less likely to be legal advice. However, it was the experience of participants that parties might interpret the questions as legal advice. There are few bright lines.

We thanked Mike very warmly for his participation in the three sessions. His comments and patient responses to our many questions were MOST appreciated! The next section of these notes relates to discussions of the groups which followed Mike's participation and should not be attributed in any way to Mike or to the Law Society.

Bigger picture discussion:

A very wide-ranging discussion in each of the three sessions raised the following themes:

- 1) Big picture - how are we going to get the system to work better for the public/citizens/clients/users? This is about access to justice and workable Consensual Dispute Resolution ("CDR") options are a key part of the future.
- 2) The current system is not working for most people. Change is unlikely to come from lawyers, most of whom have too much invested in the current system to be effective change agents.

- 3) The system must focus on what is best for the public/citizens/clients/users:
 - a) How to help people who have made a deliberate choice not to engage lawyers, who insist they can't afford lawyers, who are afraid of lawyers or who have had a terrible experience with a lawyer and don't want to escalate things
 - b) What tools can we provide to them?
- 4) At the same time, there is a perception that the current model puts mediators who are not practicing lawyers at a distinct disadvantage in the marketplace. People want some finality. In family matters, clients are often reluctant when they find out that the mediator cannot produce a fully binding agreement at the end. It also seems incongruous that an arbitrator or tribunal adjudicator does not need to be a practicing lawyer but they make decisions affecting the rights of people every day.
- 5) Part of the solution involves a better working relationship of trust and collaboration between mediators and lawyers (between the legal community and the mediation community). Some people are in both communities.
 - a) This can be done at the local community level through relationship building sessions AND through practical training events (or conferences). A relationship of trust is essential to avoid duplication, additional cost and an efficient process for the clients.
 - b) Nanaimo has hosted a multi-disciplinary CBA ADR section meeting series for many years. It has really helped to build relationship and trust, provide useful professional development and spur referrals between participants.
 - c) We could also build on the "mediator lounge" concept from Victoria.
 - d) Lawyers and mediators each bring different but equally valuable parts of the puzzle for the public. There needs to be more public information about the key role of mediators (not as well known).
- 6) Mediators need to do a better job explaining what value they bring to the table, compared to what lawyers bring.
- 7) The legal advice/drafting services must be affordable - sliding scale?
- 8) The Law Society UPL issues are part of the picture but really a small part. Solving that issue will not be a sufficient approach to improving access to justice for citizens BUT will give significant comfort to mediators while still protecting the public
- 9) It would be helpful to have the definition of "practice of law" brought up to date to reflect modern day process options and client needs (access to justice) OR a strategic workable exemption for mediation.
- 10) Consider the use of checklists - sanctioned by the Law Society and mediator organizations:
 - a) for clients to help them know about mediation, how to prepare for mediation, the role of the mediator and the important role of legal advice
 - b) for lawyers to help them prepare clients for mediation including identifying all of the issues they need to deal with
 - c) for mediators to provide to clients to review all of the issues (how much is this important to you?)
 - d) for lawyers re ILA (make it practical and reasonable)
 - e) for mediators preparing MOUs (what format, what basic terms, need for ILA etc.)
 - f) participants were very willing to share their existing checklists
- 11) There is also a need for a central, trusted place for family law information (Mary suggested Clicklaw, JP Boyd's website (also a wikibook by CLBC) and LSS family law website).
- 12) It would also be helpful to have a list of family lawyers to do ILA - by local community - who are mediation friendly (could Mediate BC do this?)

- a) We were advised that, currently, a family lawyer cannot provide ILA in less than 1.5 to 2 hours (based on the Law Society checklists).
- b) Even then, the liability risk is seen to be significant.
- 13) The focus seems to be family (not workplace or civil or commercial etc.). The reason may be that this is the growing area with 'market share' considerations. It was pointed out that there is an almost unlimited market for family mediation services - a situation of abundance not scarcity. There should be enough work for everyone and we can grow the pie.
- 14) The other part of the solution may be structural. We could consider different practice models depending on the context that expand the scope of allowable services but still provides protection for the public. Examples include:
 - a) Model A: parties represented
 - i) mediator engages with parties' lawyers before mediation begins
 - ii) mediator does "heavy lifting" with the parties
 - iii) mediator produces MOU chronicling what the parties talked about during the session(s)
 - iv) one of the two lawyers creates the agreement
 - v) both lawyers provide their clients with ILA on the agreement.
 - b) Model B: parties unrepresented
 - i) mediator meets with parties
 - ii) mediator prepares draft agreement
 - iii) mediator consults with experienced lawyer who reviews agreement and provides feedback - and signs off
 - iv) mediator gives agreement to parties and recommends ILA - gives list of local options
 - c) Model C: Family mediators who meet the FLA criteria be empowered to produce full agreements limited to child issues (parenting arrangements, child support and guardianship) - similar to Family Justice Counsellors (with built-in policy and practice safeguards).
 - d) All of the models must be "affordable".
- 15) It was suggested that mediation should be a regulated profession. This would elevate the field to a more credible and trustworthy level (similar to social work). Others expressed concern about this approach.

Next Steps Suggested by the Groups:

Participants were invited to make suggestions as to what Mediate BC might do to move forward with the key ideas raised during the brainstorming exercises. The following list is a combination of ideas from all three sessions, not in any priority order.

Mediate BC will be analyzing the potential of all of these ideas for moving forward and look for opportunities where we can take additional steps. The following were identified as possible next steps for Mediate BC:

- 1) Widely distribute this summary of the discussions and seek further feedback.
- 2) Continue active participation at various access to justice tables and seek new opportunities as they arise.
- 3) Research various models and meet with Law Society to discuss. Ideas include:

- a) Encouraging effective, accessible and affordable ILA services for all kinds of mediation services including family mediation.
- b) Authorizing an expanded scope of practice for mediators to prepare agreements for child-related issues similar to FJCs.
- c) Sanctioned checklists.
- 4) Work with the family bar:
 - a) to create a list of "mediation friendly" lawyers prepared to provide ILA
 - b) to create a "sliding scale" for ILA fees
- 5) Support better working relationships between the mediation community and the legal community (particularly in, but not limited to, the family area) including:
 - a) Local community "lounges"
 - b) Educational and relationship building events
- 6) Gather and share various forms of checklists.
- 7) Consider developing and offering "model MOU" formats.
- 8) Increase efforts to explain and promote the value of mediation to the public.
- 9) Make recommendations for amendments to the Legal Profession Act (and, in particular, the definition of the "practice of law").
- 10) Consider proposing legislative amendments requiring ILA for property matters in family mediation (as in Alberta).