

Dispute Resolution Symposium

Saturday 28th April 2007

Presentation by Karen Erwin

Whether legislative change is needed in the area of dispute resolution

Mediation – what is it – “a process by which an impartial third party helps two (or more) disputants work out how to resolve a conflict. The disputants, not the mediators, decide the terms of any agreement reached. Mediation usually focuses on future rather than past behaviour (Liebmann, 2000:10)” The process is voluntary and the fact of it, what happens in it and what happens in private sessions within it are confidential unless otherwise agreed by the disputants. While the process is on-going no agreement reached is binding but when agreement has been reached, it is written down and signed by the disputants and then is binding on them.

Why might we need regulation – to protect the public

Question 1 Can we / should we consider all “types” and “sectors” of mediation together or should we carve it up.?

One size doesn't fit all – the “public” can be a child in school, a teacher, a patient, a doctor, an insurer; a client , an engineer, an architect, a business, a company; a partnership; a board member, a family member, an employee, a boss, a victim, a neighbour; a community; a partner.

Mediation doesn't come in neat boxes – what is commercial or workplace or family mediation – where does one speciality start and end? Until in a mediation you have outed all of the issues you don't really know what type of mediation it is.

Which speciality would you put the Coman's dispute into. Was it family; was it commercial; was it employment;

For the purposes of the public can you divide mediation into sectors and can you or should you have different rules depending on the sector?

Question 2 Is it more beneficial to the public to have formal processes governing mediation or should it be more flexible?

Regulation of the process – Should we regulate the process of mediation? – for example imposing time limits for bringing and processing claims; regulation in relation to documents and witnesses; rules in relation to the conduct of the actual mediation.

Is mediation a reaction to the existing rigid systems much as equity and arbitration were in their day?

Should we remove one of the basic tenets of mediation – i.e. that it is voluntary – should we force parties into mediation in certain circumstances i.e. in employment contracts.; in Court annexed mediation?

Would a mandatory information meeting with a Mediator to explain the process suffice?

How should we protect confidentiality -another basic tenet fundamental to mediation.

How do we deal with reporting to a Court or Tribunal other than the bare minimum information that the mediation took place and that the parties did or did not arrive at an agreement.

Should information have to be given whereby blame for the failure of the mediation can be attributed?

Question 3. Should we regulate mediation trainers and / or training courses and, if so, how?

Regulation of the trainers / training courses

On an assumption that we believe that all Mediators should be trained to a particular level and that that they have to pass an assessment of their skills before being allowed to practice, how do we regulate the trainers or the training courses.

The Mediators' Institute of Ireland (the MII) has grappled with this for the last year. We have conducted international research to establish what the norms are – the international standard is 40 hours training but that is increased to 60 hours with the addition of pre and post course work. Using the research, we have established a list of competencies that Mediators should have and from that have devised a template that can be overlaid on courses to see if participants on the course would be able to achieve the competencies.

Following from that we have devised an assessment procedure and requirements to enable assessment to be standardised, open and transparent. The templates can be used for MII courses and for non MII courses to assess for equivalence.

There will be a review of each course on a cycle basis and on a risk assessed basis if appropriate.

Should trainers and / or training courses be regulated?
If so, by whom?

Question 4 Should we regulate Mediators and, if so, how?

Regulation of Mediators

A person who has done an approved or equivalent training course and passed the assessment should be an approved / accredited Certified Mediator. However this only shows the Mediator's skills in a role play situation and so is only predictive as to how the Mediator will be in practice.

The MII encourages Mediators to further their expertise by attaining Practitioner status which requires numbers of hours of actual mediation experience, some reflective practice, CPD and an assessment of advanced skills. To attain Practitioner status is voluntary not compulsory.

Many mediation bodies dislike the accreditation of Mediators as it leaves them exposed to claims by those who don't pass the assessment.

Again as a protection of the public, CPD should be a requirement for a practising certificate— MII provide for a 2 year cycle for a Certified member and 3 year cycle for a Practitioner member. Mediators should be made to keep up their skills.

Mediators also need to practice only in their area of competence and should sign a Code of Ethics that includes this. Whether the competence is the subject matter of the dispute, the complexity or value of the dispute the Mediator should not act unless they are within their competence.

Regulation of Mediators could be by legislation or, more usually, by a professional body or bodies. The professional body would have rules in relation to training, accreditation, CPD, ethics and code of conduct, and independent complaints, appeals and disciplinary procedures.

There could be one professional body (as in the Law Society or the Bar Council) or a number of bodies (as in the Accountancy profession where there are 9)

Provision of details of accredited MII Mediators are made available to the public on the website so that the member of the public can make an informed choice of Mediator.

Should there be legislation introduced to protect the term "Mediator" and to govern how Mediators are regulated?

Should all Mediators have to be members of a professional body of Mediators?

Should joining a professional body be encouraged but not compulsory?

Question 5 Should we regulate Service Providers and, if so, how?

Regulation of the service providers. The MII have not yet grappled with this issue – we would hope in the interim that the accreditation of training courses

and Mediators would cover those operating in service provision entities. Further, in practice, I understand that clients are more likely to select an individual Mediator rather than go through a service provider.

Should there be an organisation which oversees service providers – who should this body be? Could it fit within the framework of an existing professional body?

Question 6 Should there be different “rules “ for different types of Mediator?

There are basically three categories of people interested in mediation

- Those who have made it their career and are full time Mediators
- Those who have mediation as an adjunct or speciality to their main professional activity i.e. lawyers, engineers, accountants
- Those who want the skills to represent their clients in mediation .

Is it appropriate that the same rules apply to all or should they only apply to those who act as a Mediator.

Question 7 Should there be more than one professional body and how would they be established?

One of the things levelled at the MII in the past has been that it is a body comprised of self appointed Mediators and who are they to judge what the standards should be and which Mediators and which training courses should be accredited.

Presumably all such professional bodies start in this way – people interested in their profession beyond their particular practice. A desire to have high standards, to recognise the training that has been undertaken by members and a wish to enable the public to differentiate between someone who has taken the trouble to train and to continue professional development as opposed to someone who, without training, just starts to practice. There is, of course, a fine line between altruistic motives and restrictive practice.

The MII has been established as a not for profit organisation for 9 years and has now been incorporated as a company limited by guarantee. It has applied for Charitable status from the Revenue.

To overcome the concerns raised above it has, in the last year, had a complete review of its practices and procedures and these are to be found on its website. Some items like fine tuning its complaints and disciplinary procedures are work in progress and it is being advised by Senior Counsel in relation to these.

The philosophy of the organisation is to work on the basis of openness and transparency and a structure to deal with complaints and discipline which has a

majority of non Mediators on its panels. All Certified and Practitioner Mediators are required to have a practising certificate and to achieve this they must sign up to the Code of Ethics, they must have insurance and they must commit to CPD.

The Government has recognised the MII as a professional body for Mediators and the MII has been asked to nominate a Mediator to speak at a European conference on mediation. The MII has also been asked to nominate a Mediator to a particular commission.

Apart from its activities with Mediators and trainees, the MI has a public service remit and we achieve this with affordable courses, education of groups on the use and benefit of mediation, an annual conference, providing information on mediation, and providing an easy method of finding a Mediator with information provided to enable the public to make an informed choice.

As with the Accountancy profession there is the possibility of having more than one professional body.

Should there be more than one professional body?

If so- how should it be established and what regulations might apply to it?

Karen Erwin

Declaration of relevant interests

Mediation Qualifications: CEDR; ADR Group; Diploma Mediation Studies UCD.

President: The Mediators' Institute of Ireland

Council member: The Irish Commercial Mediation Association

Founder: Erwin Mediation Services

Full time Mediator specialising in commercial and employment / workplace mediation

Chairperson of The Irish Auditing and Accounting Supervisory Authority

Solicitor and a former litigation partner in A&L Goodbody