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Making Mediation a Profession

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The Oxford dictionary defines profession as “a paid occupation, especially one that involves prolonged training and a formal qualification.” (The Oxford Dictionary, accessed at http://oxforddictionaries.com/definition/english/profession on 11 June 2013.).

Note the emphasis on prolonged training and formal qualification. One of my colleagues in discussing that definition stated that the definition is fairly minimalist and non-expansive; the definition is by no means exhaustive. It is indeed a challenge to define the word profession as it is somewhat opaque and yet can be arbitrary and in some instances overlayed with elitism. For instance Architects in the Australian state of Victoria when building designers/draft persons were first regulated in the early nineties said “we are the real design professionals” but non architecturally trained building designers are not “real design professionals”.

Yet if one applies the Oxford Dictionary`s minimalist definition to the “discipline” of mediation the discipline would fail the professional test because there is no uniform requirement that there be a *prolonged course of training* nor is there a uniform requirement that one has a *formal qualification*. To hold out as being a mediator one need not be qualified nor need one have any experience.

It is very much the fashion to ensure that one quotes from various sources on the topic of one`s choice to give credence to the paper. Accordingly I have compiled some quotes from learned individuals and institutions that illustrate some of the reservations and deficiencies in the world of mediation.

“Experienced in-house counsel increasingly recognise the utility of mediation, and share a concern about how the field is positioned to grow globally. The main challenges facing mediation are evident to anyone who seeks to use it to resolve disputes today. In most countries – even those where mediation is widely practiced - it is only barely self-regulated, the requirements to entry are non-existent or low, and anyone can practice as a mediator. As a result, quality and experience levels of those calling themselves mediators are variable. While mediation will undoubtedly grow, the pace of its growth will in large measure depend on the building blocks of a supporting infrastructure.” (Deane P, Wolf von Kumberg, Leathes M, et al, in Arnaud Ingen-Housz (ed.), “*ADR in Business: Practice and Issues Across Countries and Cultures*”, Vol 2, Kluwer Law International, October 2010. Accessed athttp://imimediation.org/cache/downloads/8ftlhiq6504cwk48cwkk4ok8/making-mediation-mainstream-1-article.pdf on 11 June 2013. P.1).

“What in-house counsel are essentially seeking, from the user side, is for all parties to have access to mediation service providers as they would for any profession. Indeed, users perceive a need for mediation to develop beyond being an ad hoc, unregulated, inconsistent practice popularized largely through its few star mediators, and to evolve into a globally-recognized, highly-respected profession, populated by many well-regarded practitioners.” (Deane P, Wolf von Kumberg, Leathes M, et al, p.2).

“Harold J. Wilensky, Professor Emeritus of Political Science at UC Berkeley, captured it well in his seminal piece *The Professionalization of Everyone?*[2]: *Any occupation wishing to exercise authority must find a technical basis for it, assert an exclusive jurisdiction, link both skill and jurisdiction to standards of training and convince the public that its services are uniquely trustworthy and tied to a set of professional norms.”* (Deane P, Wolf von Kumberg, Leathes M, et al, p.2).

"Users need access to practitioners who are recognized not just as generic professionals, but as mediation professionals." (Deane P, Wolf von Kumberg, Leathes M, et al, p.2).

"A fundamental first step is for those who hold themselves out as mediators to subscribe to a common professional community that sets high practice and ethical standards and establishes clear criteria for what it takes to gain admission as a mediator, and maintain the status of a mediator." (Deane P, Wolf von Kumberg, Leathes M, et al, p.3).

"Because mediations happen behind closed doors and in confidence, checking a mediator's competency is a major challenge." (Deane P, Wolf von Kumberg, Leathes M, et al, p.3).

"Mediators should publicly declare the code of ethics they subscribe to, beginning with their own websites, and provide a link to a copy of that code, and explain what redress is available in the unlikely event of a breach of that code." (Deane P, Wolf von Kumberg, Leathes M, et al, p.3).

"There is so much that we mediators and service providers can do to help our clients and our profession. I suggest that we exchange our thoughts and ideas and foster collaborative initiatives. Participation makes national government regulation and control on mediation unnecessary. In some countries in the world government regulation and control is the last thing mediation needs. It would differ in character and degree from one state and country to another and cause a lot of confusion. However, governments will only apply mandatory rules mediation if we mediators fail to self-regulate[11]." (Deane P, Wolf von Kumberg, Leathes M, et al, p.14).

Extrapolations and the ingredients of Professionalism

If one synthesises the seminal pointers from the above authors with the view to identifying the ingredients that serve to make mediation a profession, the following elements present themselves:-

- A clear and uniform criteria for the admission into the mediation fraternity

- Prolonged training

- Formal training
- A linking of the skill with the jurisdiction
- Adherence to a code of ethics
- A move away from the adhoc unregulated paradigm
- Uniformity and harmonisation

Mention is made by a couple of authors that government will be of a mind to regulate if mediators don't up the anti of self-regulation. Admittedly there are certain reputable mediation institutions that nominate mediators that do self-regulate. But that only concerns their membership, their 'rank and file' so to speak. Short of there being legislative intervention to corral the fraternity into a uniform and harmonised profession there is little to suggest that the fraternity of mediators as a whole will ever as a collective group self-regulate. There are some jurisdictions like the Australian Capital Territory that have introduced a Mediation Act of Parliament, but the Act as it stands is fledgling as it is primarily concerned with establishing a register for mediators, which although a good start is little more than that.

If one looks at the more established and mature professions such as lawyers and doctors and some of the more recent "coming of age" professions such as financial advisers there is a history of professional metamorphosis. Groups such as the legal fraternity may have started out as a cartel of sorts. In the fullness of time society identified that the fraternity was sufficiently important to demand regulation. The criteria for importance had a lot to do with consumer protection because those whom are charged with responsibility for the management or protection of another`s affairs or whom alternatively could by their acts, errors or omissions have either a deleterious impact or a positive impact on another's affairs were considered paramount. So it seems that it gets to a point where there is both a critical mass and a sufficient level of prominence or notoriety of the members of a given sector to mobilise the forces of parliament and regulation. It could be argued that regulation and codification of the rules that govern a vocational fraternity go a long way to evolving a discipline or a vocational leaning into a profession.

If there is one thing that is clear there are many that are of the view that mediators now perform a critical role and are principal actors in the

dispute resolution theatre and somewhat like a rite of passage, the question now has to be asked is it now time to codify and regulate?

As it stands mediation is not a profession and it is my strongest contention that absent the hand of the regulator it will not become a profession. The above quotes draw attention to the fact that mediation at the moment is a fledgling art, or as some I have heard say a "dark art". Competency levels, accountability levels and ethical standards are indeed variable and in some instances variable in the extreme and yes as stated in the opening paragraph of the paper "anyone can call themselves a mediator". Why just last week I was involved in an argument of sorts with a mediator in Melbourne when making mention of the fact that the mediation arena is unregulated, to which he said "not so, "such and such" a body has rules of membership and accreditation if one wants to become a member of the "such and such body". To which I said I have never heard of the body that you are talking about. There are so many mediation institutions, some are reputable, some are qangos, some enjoy established reputation and some disappear. Some mediators do 3 day training courses some do none. Ad hoc is the word to describe the current paradigm and the net effect is

- Variable competency
- Variable levels of experience
- Variable levels of ethical decorum
- Variable levels of sophistication
- Variable levels of reputation
- Variable levels of outcome
- No accountability

The need to legislate

It is the writer's strongest contention that mediation will only become a profession when legislation is brought to bear to regulate and professionalize mediation. In a paper by Clapshaw and Freeman-Greene, *'Do We Need a Mediation Act?'*, the authors stated in the case for an Act of Parliament that "consumers are at risk from incompetent,

unethical and dangerous mediators. Legislation would improve the quality of mediation services and provide protection for consumers. It would regulate mediators by a process of registration and uniform standards as well as establishing a clear, and certain approach to definition and process issues. Legislation would also remove a number of taxing ethical dilemmas for mediators." p.1.

The writer totally endorses the above sentiments. If mediators are intent upon becoming professionals mindful of the critical role that they perform in the dispute resolution dynamic then like lawyers who are also principal actors in the dispute resolution dynamic they should be regulated for the following reasons.

1. Competence
Absent any uniform and prescribed qualifications for mediators the "discipline" of mediation will remain fluid and opaque. Competency levels will vacillate between the outstanding to the ordinary, to the hopeless. Absent binding legislation that mandates minimum level qualification criteria albeit through recognition of established and reputable ADR courses consumers will be afforded no confidence in the institution of mediation insofar as uniform competence is concerned.

2. Experience
Absent legislation that insists upon a given level of experience or traineeship consumers will have no knowledge nor be afforded a comfortable level of confidence in the capacity of a given mediator to satisfy the consumer as to their appropriate level of experience.

3. The question of ethics
There is nothing that compels a mediator to comply with any ethical code or creed. Consumers would live in naïve hope that 'mediators that grace their path' are compelled to pay homage to conventional ethical imperatives. Although the overwhelming majority of mediators that have graced the writer's path have displayed sound ethical reverence, the writer's experience could not be construed universally apposite for all mediators.

Legislation is the mechanism that can on the one part articulate relevant ethical imperatives and on the other part jettison from the ranks of the profession all those who happen to harbor inclinations that are at odds with ethical imperatives. The legal fraternity is worthy of mention as most jurisdictions regulate the conduct of lawyers, promulgate ethical creeds

and discipline those that are not interested in having regard to such creeds.

4. Defining mediation, its raison d'etre and its constraints

Whilst mediation is a young industry, whilst it is at an early stage of its professional metamorphosis the purview or job description of the mediator will remain fluid.

The conventional body of wisdom considers that mediators must be:

- impartial
- 'facilitatory'
- dispassionate
- ill inclined to exert any pressure upon either party
- impassionate
- unflappable
- ethical;

Yet there is no universal creed that either compels or dictates that the above virtues be deployed. Hence some mediators have a reputation for being "head bangers", "settlement scalp hunters" yet others enjoy a reputation of insipid impotence. The majority of consumers would want neither end of the predilection barometer, they want a professional with all of the "garnishing's" that come with being a professional.

It is only through legislation that the job description of the mediator can be better clarified and more universally understood.

5. Accountability

The best mechanism to generate accountability is legislation because black letter law dictates what one can do, what one cannot do and what the codified consequence of breach are. Important vocational industries inevitably find themselves going down the path of regulation be they the industries of law, medicine, financial advisers and in more recent times immigration agents.

Mindful of the power of mediators and their ability to end the conflict or conversely through their failure inadvertently stoke the fires of conflict; mediators like lawyers and judges perform a critical role and are increasingly vital to the fabric of dispute and conflict resolution.

It follows that accountabilities that are enshrined in Acts of parliament need to be considered.

6. Compulsory Insurance

For there to be real accountability there has to be the capacity to account or make good. The instrument that for better or for worse provides the best guarantee for the making good of a problem is insurance. The best mechanism for making insurance compulsory is invariably legislation. Mediators like lawyers or doctors are capable of doing things courtesy of their negligence or ethical dereliction that culminate in misfortune and indemnifiable misfortune for that matter. For there to be true accountability insurance must be mandatory because there are always ‘professionals’ that resent the financial impost of paying insurance premiums and it is best if they are relieved of that choice.

Conclusion

Mediation is not yet a profession enjoying the conventional connotations or understanding of the term profession. As a form of dispute resolution mediation is rapidly becoming a mainstream mechanism for solving disputes. Mindful of the escalating significance of mediation as an integral part of the dispute resolution process it is rapidly coming of age. Well-credentialed and venerated academics and advocates of mediation opine that its importance requires professional harmonisation, uniform qualifications, adherence to ethical creeds, adherence to consistent standards of professional rigour. In the writer’s view it is naïve to think that the fraternity of mediators will of its own volition self-regulate. The profession is too fragmented, inavertedly rather than design it is too polarised and adhoc for this to occur in many jurisdictions. Short of legislative compulsion such aspirations for professionalism show all of the hallmarks of being pipe dreams, optimistic but misconceived.