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INDEX :

No	NOME	TITRE	PAGE
01	DR. INAS AL-KHALDI UMM ULQURA UNIVERSITY-SAUDI ARABIA	THE ROLE OF LAWYERS IN FAMILY MEDIATION: WHAT THE FUTURE HOLDS	01-28

The Role of Lawyers in family Mediation: What the Future Holds

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ABSTRACT:

ملخص:

The role of lawyers in mediation has become increasingly important as society views mediation as an effective alternative dispute resolution mechanism to litigation. This paper attempts to explore such a role in three phases of the mediation process – the pre-mediation, during the mediation meeting, and post-mediation. The second part of this paper discusses the role of lawyers in the future of mediation – the common pressures against lawyers' proper involvement in mediation.

أصبح دور المحامين في الوساطة متزايد الأهمية كما أصبحت نظرة المجتمع إلى الوساطة باعتبارها آلية فعالة بدلاً عن التقاضي في تسوية المنازعات. هذه الورقة تحاول استكشاف هذا الدور من خلال تسليط الضوء على دور المحامين في ثلاث مراحل من عملية الوساطة؛ ما قبل الوساطة، خلال اجتماع الوساطة، و بعد الوساطة. ويناقش الجزء الثاني من هذه الورقة دور المحامين في الوساطة مستقبلاً والضغط المتعارف عليها ضد مشاركة المحامين في الوساطة.

Introduction

The fundamental role of a lawyer at any time is that of a skilled adviser. In fact, the lawyer is a well-informed champion of the client, advising on the law and procedure, articulating the client's views to others, and above all, pursuing the client's best interests at all times.

By and large, the typical lawyer probably gives very little thought to the nature of the dispute or conflict in his client's case. Others are reluctant to advise the clients to seek alternative dispute resolution (ADR) mechanisms such as mediation. This reluctance could stem

from their unwillingness or inability to appreciate the advantages of non-adversarial proceedings.

To paraphrase psychologist, Abraham Maslow, 'if the primary tool you have is a hammer, you tend to see every problem as a nail!' However, there are some litigation lawyers who see it as their duty to seek an early resolution of a dispute outside of the court system, and to act in the best interests of their clients. Therefore, it follows that there is a role for lawyers in mediation.

In recent times, there has been much attention focused on the role of lawyers in the mediation process. Most lawyers are used to the requirements of their role in litigation, but few have grasped the different, and subtler, application of that role in mediation.

Elements in Mediation:

There are three essential pre-requisites to understanding the importance of the role of a mediator, and in evaluating the legal profession's influence on the mediation process.

Neutrality:

The mediator is a neutral third party. He is neither a representative nor an agent of the parties in dispute, nor an advocate for their interests. The mediator is simply a helper, i.e. a catalyst to the negotiations between the parties. The mediator exercises a wide array of inter-disciplinary skills involving communicating, listening, observing, analyzing, questioning, drafting, problem-defining and problem-solving. Hence, the mediator's behavior must be impartial.

Individual responsibility:

While the mediator must express neutral behavior, the parties to the dispute must express individual responsibility in a number of ways. One of the two ways is where the parties must illustrate a decision to 'stand up for themselves'. It is the mediator's responsibility to ensure that each party stands up for himself or herself.

The second way is where the parties take individual responsibility for decisions in the mediation process. Any ultimate substantive decision or agreement is the responsibility of the parties. The neutral mediator has no power to impose a decision on the parties.

Mutual fairness:

This is the third essential prerequisite. The objective of the mediation process is for the parties to reach an agreement that they each believe is mutually fair. The neutral mediator helps the parties reach this agreement but the parties have the responsibility for agreeing to what is fair. There are two factors which affect mutual fairness in the mediation process.

Firstly, mutual fairness demands that self-interests are not the only focal point. The needs of the other parties in the dispute must be understood and recognized. Fuller referred to this when he described the ‘central quality of mediation’¹.

its capacity to reorient the parties toward each other not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another’

Secondly, mutual fairness allows the parties to evaluate and weigh societal norms or values in reaching an agreement. Hence, mutual fairness may be affected by the parties’ perceptions of how an agreement affects human values. In evaluating societal norms and

¹ L. Fuller, Mediation, Its Form and Functions, (1971) 44 S. Cal. L. Rev. 305.

This is a similar concept to the problem solving approach to negotiation referred to in R. Fisher & W. Ury, *Getting to Yes*, (1981), and C. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, (1984) 31 U.C.L.A. L. Rev. 754.

values, the parties decide what is mutually fair. The neutral mediator does not impose his or her advice².

Extent of the Lawyer's Role:

A lawyer may be involved in mediation in a variety of ways. His role does not differ in either voluntary mediation or mandatory mediation. He may give advice on the subject of engaging in mediation as a mechanism to resolve the conflict or dispute at hand, or he could be told by the client that the client desires to mediate, or the lawyer could be the mediator himself. These will be discussed in greater length in turn³.

Where the lawyer represents the client:

Here the lawyer will be confronted with determining what his role will be. He could advise the client before and/or after the mediation, but not attend it himself, or he could attend but not actively participate, or he could attend and actively participate. These options are distinct roles which require different skills and a full and comprehensive understanding of the dynamics of mediation⁴.

In representing the client in mediation, the lawyer's basic duty, to act in the best interests of the client, does not change. However, the lawyer has to understand that there are differences in the way this duty can be effectively carried out.

Firstly, the lawyer must have regard to the fact that the client has chosen to resolve the dispute in a consensual, that is, non-adjudicatory, manner. This means that the lawyer needs to familiarize

² Goldberg, S, F. Sander and N. Rogers, *Dispute Resolution, Negotiation, Mediation and Other Processes* (2nd ed., Little Brown & Company, Boston, 1992), at p 435.

³ D Golann, *Seminar Notes: Lawyer's Role in Mediation*, CEDR, May 2000.

⁴ Noone, Michael, *Mediation*, Cavendish Publishing, London, 1996

himself with the mediation process and to work within its rules and principles⁵.

Secondly, the client has selected an approach which seems to have moved away from the adversarial mode of practice. Thirdly, the lawyer can still achieve results for the client in a way which does not necessarily mean defeating the other party, but by seeking solutions which are beneficial to all parties, as far as possible.

The main challenge facing the lawyer is how his legal advice to the client fits and interplays into the mediation process. Hence, the role of the lawyer can best be appreciated in three phases of the mediation process, namely

Phase One: Pre-Mediation

Phase Two: During Mediation; and

Phase Three: Post-Mediation

Phase One: Pre-Mediation:

It is here that the lawyer must first take into consideration with the client in selecting the mediation forum and the mediator, agreeing on the rules and procedures for the mediation and preparing for the mediation, including dealing with the documentation and preliminary exchange of information so that the dispute can be most effectively and appropriately addressed from the following aspects⁶.

Is the dispute suitable for mediation?

The first part of the lawyer's role is to ascertain which ADR mechanism is most appropriate for the dispute. Every case should be viewed on its own merits, and the ultimate decision should be based

⁵ Ed, Fisher, Ury & Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 1981.

⁶ Ibid.

on a spectrum of ADR mechanisms available, rather than a simple decision of whether it is mediation or litigation⁷.

The lawyer should be mindful of the trap of expecting a mediation to cure a bad case. Educating the client about the process is an important phase in the preparation for mediation. The lawyer is also required to explain the fundamental characteristics of mediation, for example, its ‘without prejudice’ nature.

At the same time, the lawyer should also warn that each party will know more about each other’s interests, aims and motivations as a result of the mediation. In the early stages of mediation, parties should be encouraged to be flexible about their expectations of the terms of the settlement.

In essence, the role of the lawyer here is to remind the client that successful mediations are the product of a compromised solution, and to encourage the client to have an open mind when submitting to mediation. There is no ability to mediate in good faith unless the client is willing to compromise. Hence the attitude of the parties is the overriding factor to determine whether a matter is suitable for mediation⁸.

Is the timing good for mediation?

Generally speaking, a dispute which has been referred to mediation at an early stage stands a better chance of being resolved. If the parties wait for too long before they decide to mediate, they may not be able to settle due to the amount of acrimony which has been generated, and the costs which have been incurred. On the other hand, opting for mediation at an early stage may have its drawbacks. The parties may

⁷ Ibid.

⁸ Pirie A.J., “The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems?” (1985) 63 Canadian Bar Review 378.

need a cooling-off period before they decide that they are ready for mediation⁹.

Hence, the lawyer must be able to assess the situation and, thereafter, to advise his client accordingly.

What kind of mediation is required?

The lawyer must advise the client on the many types of mediation available, and which of these types are suitable for the dispute at hand. It is a question of whether to use facilitative mediation - where the mediator tries to facilitate the settlement based on the parties' interests and needs rather than their rights, and will not express any views as to the merits of the issues but to leave it to the parties to obtain these views from the parties' respective advisers; or to use evaluation mediation - where the mediator provides formal evaluation to both or all of the parties, or an informal evaluation to either, both or all of the parties; or to use therapeutic mediation if the case involves family disputes. It is also important to consider whether the mediator will be willing to consider making settlement recommendations¹⁰.

Does the mediator need to be an expert:

It is important to have a mediator who is an expert in the mediation process. However, if there is a choice to be made between process expertise and expertise in the subject matter of the dispute, then the process expertise will prevail. Based on the lawyer's advice, it is also possible to engage a mediator who has expertise in the subject matter of the dispute as well as process expertise, if evaluation mediation is preferred by the client. Further, the client has to be made aware by the

⁹ Unlike the 1969 Code, the new Model Rules of Professional Conduct provide much more specific regulation of the lawyer as mediator. The 1969 Code (EC 5-20) specifically addressed the issue of lawyers as mediators

¹⁰ Opinion No. 80-23 (1981), 7 Family Law Report 3097

lawyer that mediation process expertise in one field may not necessarily indicate expertise in another field¹¹.

Whether a preliminary meeting is held:

In some situations where the mediator may hold a preliminary meeting with the lawyer, the lawyer plays a key role at this stage.

Firstly, such a meeting allows the lawyer to form a preliminary view about appointing the mediator to deal with the case, if this decision has not yet been made by the client¹².

Secondly, the lawyer could take this opportunity to discuss and agree with the mediator the procedural aspects such as preparing and submitting the parties' statements and bundle of documents, and the mediation schedule¹³.

Thirdly, if the case concerns commercial or civil issues, the lawyer will be able to obtain a brief outline of the kind and length of the presentation expected of him. He would be able to make preparations ahead of time. Lastly, the lawyer could advise the mediator on the preliminary sense of the issues in question and to outline any relevant personal or business considerations¹⁴.

According to Michael Noone, 4 at the outset, the lawyer's role is a consultative one which is quite different from the combative role in

¹¹ ABA Standards of Practice for Lawyer Mediators in Family Disputes, adopted by the House of Delegates of the American Bar Association, August 1984, and printed in American Bar Association, Summary of the Actions of the House of Delegates, Report of Sections 22-23.

¹² Denver, Colorado, May 22-23, 1984. The Standards approved at the symposium were adopted by the A.F.C.C. at its mid-winter meeting in December 1984.

¹³ Preamble to the Model Standards.

¹⁴ Rule II, B.

adversarial proceedings. It is always the parties who control the content and occupy the spotlight at the center of the mediation stage where the parties become the primary negotiators in mediation. Essentially, before mediation, the role of the lawyer involves the following tasks, namely. To thoroughly prepare to be a good legal consultant at the mediation. This involves knowing the client's case as well as it would be known for a courtroom trial, includes working out a tentative settlement range and gathering any detailed information about the case and about costs which may need to be consulted upon in working out an agreement To advise the client comprehensively about how mediation works and to encourage the client to fully participate in the process. This includes planning how to best prepare by discussing realistic alternative negotiating strategies, which the client may or may not decide to adopt.

To discuss with the client what aspects of the case should or should not be disclosed to the other side and to the mediator in private session. The client should be made aware that the chances for a successful mediation are optimized if he is frank in private session with the mediator, and does not withhold any important information. The lawyer also bears the responsibility to explain to his client the legal limits of confidentiality in mediation¹⁵.

Phase Two: During Mediation:

It is in this phase that we see lawyers and mediators play very different, yet complementary, roles in the mediation process. The mediator facilitates negotiations while the lawyer offers specific legal advice and counsel. Generally, during the mediation meeting, the role of the lawyer would cover the following areas, namely.

- To allow the mediator to conduct the process and to provide support to the mediator where appropriate¹⁶.

¹⁵ Rule II, B.

¹⁶ Rule VII, A

- To acknowledge the validity of the other party's real needs in settlement.
- To permit and encourage the client to participate fully and directly in the process.
- To focus the client upon the future, rather than upon the past, and on their real personal and commercial interests, as opposed to their legal rights¹⁷.
- To assist the client to communicate accurately and comprehensively and to negotiate constructively and productively.
- To participate in the generation of new ideas and options for settlement, giving ongoing realistic predictions about likely outcomes in court or other non-mediation processes and their relative advantage or disadvantages.
- To assist with the drafting of the terms of settlement, and the formalization of the mediation in appropriate ways.

Specifically, the role of the lawyer can best be seen in each of the following aspects during the mediation meeting.

Presentation of the case¹⁸

It is a safe assumption that, where the client is represented by a lawyer, the task of presentation of the case usually falls to the lawyer, though this practice is not highly encouraged as parties are empowered to present their original versions of the dispute. If at all, the lawyer is required to present the case, he must focus his presentation to the other party or parties, and not to the mediator, who is a neutral in the mediation meeting. This is quite unlike the adjudicatory process where the lawyer would aim his presentation to the judge or adjudicator who has the power of making decisions.

¹⁷ Rule VII, C.

¹⁸ Published in 1984, 2 O.A.F.M. Newsletter.

This shift in approach, from an adjudicatory process, means that the lawyer, while addressing the mediator, will have a more complex agenda. He must present the argument in such a way that it is persuasive but not aggressively contentious. The aim is not only to persuade the mediator of the rightness of the case, but also to raise sufficient doubts in the mind of the other party to create a climate for negotiations in which the other party will consider making reasonable concessions¹⁹.

In short, the approach used by the lawyer to the presentations should be to concentrate on the main issues and not to diffuse energy, time or attention in dealing with peripheral issues or technical procedural points, which can be reserved if considered appropriate²⁰.

Negotiating and communicating:

A key element in successful negotiation is for the lawyer to have an understanding of, and respect for, the client's position, concerns and interests, and for the client to trust the lawyer sufficiently. The lawyer will need to be fully prepared for the mediation by analyzing the case, understanding its strengths and weaknesses, and expressing a frank and honest opinion to the client²¹.

What is important is for the lawyer to be able to identify the client's aims and concerns, and try to achieve the best realistic results from the mediation meeting. What is equally important is for the

¹⁹ Rule 5 (c).

²⁰ Rule 8.

²¹ The Professional Standards Committee of the Law Society of British Columbia recommended a draft ruling on Family Mediation was added to the Professional Conduct Handbook and was subsequently approved, with revisions, by the Benchers of the Law Society on July 29, 1984.

lawyer to understand the other party's interests and issues. Fisher and Ury-5- offer two suggestions²².

Ask why. The lawyer has to put himself in the other party's shoes and ask why he or she would be taking a particular negotiating position. What could be the desires, concerns, fears, hopes behind it

Ask why not. Again, the lawyer has to put himself in the other party's shoes and ask why he or she has not embraced his client's negotiating position. What desires, concerns, fears, hopes are precluding it? Are they legitimate? If not, what can the lawyer do or say to help the other party see that they are not legitimate? If they are legitimate, what can the lawyer advice his client to modify the negotiating position so that the other party's needs and interests can be better satisfied.

During negotiation, the lawyer should not bargain on the basis of 'bottom lines' or 'final offers'. Such positional bargaining does not necessarily produce the best results as sometimes it may be difficult to move away from such positions taken.²³ Instead, parties may prefer to engage in principled negotiation which aims for a fair outcome using objective criteria.

Hence, the lawyer, as negotiator, is likely to have a negotiation strategy. The lawyer will know what the client's expectations are, what the other party's expectations are likely to be, how the next move may be envisaged, at what point the discussions should be called off, and generally, at what pace, and in what direction, the negotiation should move.

The lawyer should be aware of the problem-solving approach and should be willing to consider constructively, with the client, any approaches that would enable all parties to gain an advantage from a suggested outcome. When considering making settlement proposals,

²² Rule 2.

²³ Rule 5.3.

the lawyer and the client should examine these from the vantage point of all parties, and not just their own. A constructive and creative approach does not need to be at the expense of the client's best interests, and a problem-solving method can be mutually beneficial.

The lawyer and the client should test the workability of the suggested options by engaging in assessing the Best Alternative to a Negotiated Agreement (BATNA) or the Worst Alternative to a Negotiated Settlement (WATNA) or the Most Likely Alternative to a Negotiated Agreement (MLATNA).

The lawyer should advise the client's alternatives insofar as their BATNAs, WATNAs and MLATNAs should the mediation be called off or discontinued. In the event that the mediation is terminated, the lawyer should advise the client the likely outcome of adjudication. If the assessment points to a favorable outcome in adjudication, then the lawyer would advise the client to terminate mediation and abandon the negotiation process.

Lawyer's role in family mediation:

In family mediation, after the lawyer has given preliminary advice to the client, and the client has gone off to family mediation, there is likely to be a period of silence while the mediation takes place. Family mediation takes place with the couple directly, and the lawyer does not have a participatory role during this phase.

In the early days of mediation, it was unclear what the lawyer's role might be while the client was engaged in mediation. The lawyer needs to understand that family mediation involves an element of personal empowerment of the parties by working with them individually and without constant recourse to their professional advisers.

On the other hand, the client may not be choosing mediation in order to empower themselves, but rather to achieve the resolution of their issues in a fair, effective and expeditious way. The client may still wish to be supported by the lawyer through the process. In this

case, the lawyer has a duty to support the client in achieving this, and should be available to advise and support the client through the mediation process

Some mediators may recommend to the parties that both should get independent legal advice at certain points during the process, especially on important points such as a general indication of the position before embarking on mediation, and to consider whether mediation is appropriate.

The lawyer may be invited to attend mediation meetings though this is unusual and generally occurs only in an impasse between the parties, or where the lawyer has advised at the end of a mediation, which proposed terms are unacceptable. In such an event, the lawyer should check with the mediator as to what is expected of him at the mediation meeting. A short, non-contentious presentation might be required, or the lawyer might be invited to support the client without having a dominant role.

.Phase Three: Post-Mediation:

At the end of the mediation meeting, if total or partial resolution is achieved, the role of the lawyer is to ensure that some record of the terms will have to be prepared, that is, finalizing and formalizing any settlement arrived at. This is the Mediation / Settlement Agreement which the lawyer must draft with care and precision to ensure that there will be no misunderstanding amongst the parties as to the terms of the settlement.

The lawyer has the responsibility to reassure the client who has second thoughts, advising them of the options in dealing with problems in the implementation of the agreement, including through a return to mediation. The client must also be assured that confidentiality of the mediation meeting is maintained at all times.

In summary, the lawyer plays an integral role in mediation. The lawyer is central in deciding the strategy and tactics for mediation. The lawyer eases communication between both the client and the

mediator, and the client and the other party. This communication works both ways in that the lawyer helps to support the client and interpret the case to the other party, as well as to interpret the mediator's comments and questions to the client.

Lastly, the lawyer will be important in dealing with legal and procedural issues, including in drawing up the Mediation / Settlement Agreement.

Lawyer's role in family mediation:

One of the principles of family mediation is that parties will have the opportunity before finalizing any Mediation Agreement to obtain independent advice from their respective lawyers about the acceptability of the proposed terms. Where the lawyer has been involved in the mediation from an early stage, the proposed terms should not be a surprise, and the lawyer should be able to advise on them without difficulty.

On the other hand, it is more difficult for a lawyer who has had little or no role in advising the client during the mediation, to endorse the settlement terms. This can be seen from two aspects.

Firstly, the lawyer has not had the benefit of working through the process and understanding the reasons for the terms having been arrived at. Secondly, the lawyer has the legal responsibility for the terms, and may be liable in negligence if he allows the client to enter into a settlement on disadvantageous terms.

In essence, the whole point of deferring the finalization of these agreements, to allow parties to seek independent advice, is to give them a genuine opportunity to review their proposals. Having the lawyer vet through the proposed terms is the safeguard built into the family mediation process.

Hence, the lawyer should not shy away from challenging terms when they are inappropriate. Equally, the lawyer should support the

client who has gone through an arduous process and who has arrived at the accepted terms.

Where the lawyer is the mediator:

The lawyer may find himself functioning as the mediator himself. 'If he acts as a formal mediator in a dispute not involving present or past clients, there are few professional problems. He is required to clearly differentiate his role as a lawyer from that of a mediator.'²⁴ As a mediator, he is not to give legal advice. As long as the roles are kept separate, the lawyer may act as a mediator. However, the lawyer may find himself in a difficult situation where he seeks to mediate in a dispute which involves one of his clients. The issue of ethics then arises.

The issue of ethics:

There are numerous bodies and institutions in the legal profession which provide for rules and guidelines on lawyer mediators in the United States of America and Canada. From the ethical point of view, there would be grave consequences for the mediation process if there is an ethical rule that absolutely restricts the lawyer from practicing mediation. However, it can be seen that such absolute restrictions on the lawyer acting as the mediator is a major theme of many rules of professional conduct

Major developments can be seen in development of the American Bar Association (ABA) Model Rules of Professional Conduct (Kutak Commission)-9- where Rule 2.2 permits the lawyer to act as intermediary between clients with imposed conditions, namely.

The lawyer explains the advantages and risks associated with common representation and obtain each client's consent to the common representation.

²⁴ Spier R.G., "The Ten Biggest Mistakes Lawyers Make in Mediation," October 2000.

the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to interests of any of the clients if the contemplated resolution is unsuccessful; and the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

The lawyer must withdraw as intermediary if any of these conditions is not satisfied or if any client requests so. On withdrawal, the lawyer is prohibited from representing any of the clients unless it is clearly compatible with the lawyer's responsibilities to the other client.

The 1981 opinion of the New York City Bar Association Committee on Professional and Judicial Ethics¹⁰ absolutely restricted the lawyer from acting as the mediator when the lawyer was asked to exercise 'professional legal judgment.' The Committee stated.

... 'in some circumstances, the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolutions... make it virtually impossible to achieve a just result'.

In addition, the Standards of Practice for Lawyer-Mediators in Family Disputes, the Family Law Section of the ABA adopted six standards of practice for family mediators that were approved by the ABA in 1984. These six standards are as follows.

The mediator has a duty to define and describe the process of mediation and its cost before the parties reach an agreement to mediate.

The mediator shall not voluntarily disclose information obtained through the mediation process without the prior consent of both participants.

The mediator has a duty to be impartial:

The mediator has a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge.

The mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm one or more of the participants.

The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement

Yet another major source of rules used to regulate the lawyer as the mediator is the Association of Family and Conciliation Courts Model Standards for Practice: Family and Divorce Mediation²⁵.

These Model Standards, ‘intended to assist and guide public and private, voluntary and mandatory mediation’,²⁶ are made up of thirteen guidelines dealing with initiating the process, impartiality and neutrality of the mediator, costs and fees, confidentiality and exchange of information, full disclosure of information, self-determination, professional advice matters, the parties’ ability to negotiate, concluding the mediation, training and education, advertising, relationship with other professional and the advancement of mediation of key importance to the lawyer-mediator are the standards dealing with impartiality and independent legal advice. Firstly, the Model Standards require the lawyer-mediator to maintain impartiality towards all participants. However, the standards state that ‘a mediator’s actual or perceived impartiality may be compromised by

²⁵ Riskin, L.L., “Mediation and Lawyers” (1982) 43 Ohio State Law Journal 29, at p 43.

²⁶ The Academy of Family Mediation, Divorce Mediation: A Five Day Introductory Training Program, February 11-15, 1982.

social or professional relationships with one of the participants at any point in time²⁷.

Therefore, the standards provide two rules to deal with past and future relationships. The first rule states that ‘the mediator shall not proceed if previous legal or counseling services have been provided to one of participants’, and the second rule states that ‘the mediator should be aware that post-mediation professional or social relationships may compromise the mediators continued availability as a neutral third party.’²⁸ Here, it would be read that the second rule seems to strongly discourage future relationships with the parties involved in the mediation.

On professional advice, the Model Standards make a clear distinction between independent expert advice and independent legal advice. While the mediator is required to ‘encourage and assist the participants to obtain independent expert information and advice when such information is needed’²⁹, a separate provision is created for independent legal advice.³⁰

The Florida opinion also states that the guidelines provided by the ABA and many state bars indicate that it is permissible for a lawyer to act as a divorce mediator, including preparation of a settlement agreement reflecting the decisions made by the parties during mediation, if he adheres to the following precautions and standards

²⁷ Centre for the Development of Mediation in Law, *The Practice of Mediation, A Workshop for Lawyers and Other Professionals*, August 19-23, 1981.

²⁸ Kirshen, “Humanization of Lawyers at Harvard” (1975) 61 *American Bar Association Journal* 223.

²⁹ Redmount R., “Attorney Personalities and Some Psychological Aspects of Legal Consultation” (1961) 109 U.

³⁰ PA. L. Review 972, 974 where the other two personalities, “zealous, aggressive” and “coping, competitive” do not tend towards mediation.

Before undertaking mediation the lawyer must conduct an orientation session to explain the mediation process. He must explain the limitations of his role as a mediator; specifically that he does not represent either of the parties and will not be able to represent either of them in obtaining the dissolution of marriage or in any matter related to the mediation. He should explain the risks of proceeding without legal counsel. The mediator should explain that because he is not representing the parties, the lawyer-client privilege may not apply to communications between the parties and himself. The lawyer should proceed with the mediation only if he is satisfied that the parties understand the nature and risks of mediation and the significance of the fact that he represents neither party.

The lawyer must not undertake or continue mediation unless he is satisfied that he can be impartial. Thus, the lawyer should not undertake mediation if he previously provided legal representation to the parties.

The lawyer should not mediate if the issues are too complex and difficult for the parties to resolve prudently without independent legal counsel.

The lawyer should explain the fees payable, which should not be contingent on the outcome of mediation.

The lawyer may define the legal issues and advise the parties on the legal consequences of various courses of action, but only in the presence of both parties.

The lawyer may prepare a settlement agreement provided the parties are advised to consult independent counsel before signing it.

The Oregon Supreme Court amended its Code of Professional Responsibility in 1986 to provide as follows under DR 5-106: Mediation:

- A. A lawyer may act as a mediator for multiple parties in any matter if the lawyer clearly informs the parties of the lawyer's role and

they consent to this arrangement; and the lawyer gives advice to a party only in the presence of all parties in the matter.

- B. A lawyer serving as a mediator may draft a settlement agreement but must advise and encourage the parties to seek independent legal advice before executing it
- C. A lawyer serving as a mediator may not act on behalf of any party in court nor represent one party against the other in any related legal proceeding
- D. A lawyer shall withdraw as mediator if any of the parties so request, or if any of the conditions stated in DR 5-106(A) are no longer satisfied. Upon withdrawal, the lawyer shall not continue to act on behalf of any of the parties in the matter that was the subject of the mediation.

In 1991 the Oregon Bar Association issued an opinion regarding ethical problems presented if a lawyer and psychologist form a domestic relations mediation service. According to the Oregon opinion (Formal Opinion 1991-101), a lawyer who acts as a mediator under DR 5-106 does not represent any of the parties.

However, the mediator may be engaged in the practice of law if any part of the service involves ‘the application of a general body of legal knowledge to the problem of a specific entity or individual.’ The opinion states that the drafting of the settlement agreement constitutes the practice of law. Thus, if the mediators gives legal advice or drafts the agreement, a partnership or fee-splitting arrangement with the psychologist would be prohibited by the ethics code.

Outside of the United States of America, the Conduct Code in Mediation of the Ontario Association for Family Mediation was responsible for preparing a draft conduct code for family mediators in

1984.³¹ As the first of its kind in Canada, the Code is the legal profession's regulation of the lawyer as the mediator.

Of special interest are two relevant rules. The first rule which ensures impartiality prohibits a mediator from undertaking mediation 'if the mediator is a lawyer who has represented one of the party's beforehand.'¹⁹ the second rule which deals with independent legal advice imposes clear requirements. The mediator must advise clients 'of the availability of independent legal advice for each spouse' and 'the advisability of obtaining it from the outset of the mediation'.³²

In British Columbia, the British Columbia Family Law Mediation Ruling 21 comprises four key components, of which two are of relevance here, i.e. Disqualifications and Mediator's Duties.

The ruling on Disqualifications prohibits a lawyer from acting as a family law mediator if the lawyer, or a partner, associate or employee of the lawyer, has represented either party in relation to their matrimonial affairs, or in any matter which may reasonably be expected to become an issue in the mediation.

The ruling on Mediator's Duties, on the other hand, requires that the lawyer who acts as a family law mediator must ensure that 'he or she actively encourages each spouse to obtain independent legal advice before executing' any agreement reached by the parties.

Common mistakes made by lawyer-mediators:

It is also important for lawyers to avoid certain pitfalls or making common mistakes when carrying out this role.²⁶ Such mistakes can be seen in situations where the lawyer fails to communicate that he is willing, ready and able to go to trial if necessary; or where he makes aggressive 'opening statements' which would only be detrimental to the client's readiness to bargain in good faith; or where he advises

³¹ See website <http://www.isdls.org/projects>.

³² See website <http://www.piam.org.my/complain.htm>.

mediation to take place too early, or too late, in the case; or where he fails to adequately prepare the case, as he ought not underestimate the ground work necessary for a mediation to be successful; or even where he fails to adequately prepare the client as to the general nature of the mediation process, as well as its benefits before the mediation, of the lawyer's evaluation of the case.

The Future of Mediation:

In today's environment, most lawyers neither understand nor perform mediation to a great extent, nor do they seem to have a keen interest in this area. To a great extent, lawyers are bound by the 'lawyer's philosophical map'³³ where the lawyer makes two wrong assumptions, namely, that all disputants are adversaries: where one party wins, the other party must lose; and that disputes must be resolved by a third party through an application of some general principle of law.

These two assumptions are total opposites of what mediation is all about. It is unfortunate that lawyers use this 'map' to navigate themselves in their journey through the world of the legal profession

It is certainly undeniable that the legal education process and content today have, to a great extent, moulded the mindsets and souls of lawyers to practice the adversarial system of Act-oriented rules. In short, our legal education has institutionalized and instilled this 'battle of wits' mentality amongst lawyers.

Based on all that has been discussed above, there is a great need for the role of lawyers in mediation to be enhanced for the future of mediation. The challenge facing the legal profession today is to continue to promote mediation as an ADR mechanism and to deliver the highest standard of service in this area. It is not only for the benefit of the client, but also to enhance the reputation of the lawyer as dispute resolvers in today's society.

³³ See website http://www.pam.org.my/arbitration_mediation200203.asp.

In a nutshell, I am of the opinion that this challenge could well be overcome if two key areas are addressed, namely, the attitudes and mindsets of lawyers today, and the extent of their involvement in the processes of mediation. Let me elaborate further on both these points in turn.

In re-moulding the attitudes and mindsets of lawyers to view mediation in a positive light, the key lies in mediation education. It is a fact that lawyers have never been educated in mediation nor trained in mediation skills in law school. Until today, they have had little or no opportunity to do so.

The situation in America is starting to improve. There have been mediation workshops and programmes which offer training to lawyers such as by the Family Mediation Association's five-day program around the US²⁸, and the Centre for the Development of Mediation in Law²⁹ which organizes workshops designed primarily for lawyers.

There have also been increasing efforts at heightening awareness of non-adversarial perspectives of the law in the legal curricula of Harvard Law School under the Harvard Law School's Fellowship in Law and Humanities Program³⁴ and at Columbia Law School where human dimensions such as interviewing and counseling, human relations training, planning and negotiation have been taught alongside the more traditional law subjects.

Therefore, it is recommended mediation be made an optional / a compulsory subject in the legal education curriculum for all undergraduate law students before they embark into the world of the legal profession, as well as to postgraduate law students in their continuing legal education. Such a curriculum should be governed, and strongly supported, by the Bar Council as well as by the respective Law Faculties in our institutes of higher learning. It is indeed a warm and encouraging welcome to have Mediation Skill

³⁴ See website <http://www.aseanbankers.org/aba>.

Workshops incorporated in the post-graduate law programs in higher institutes of learning.

But then again, even if this is strictly practiced, the role of the MMC remains crucial insofar as to how mediation can be promoted. Needless to say, the true and correct messages about mediation must be communicated effectively to lawyers – that mediation is not an alternative to speed up the litigation process in the backlog of court cases, nor should mediation be seen in the light of being the solution to cases which command low legal fees.

Hence, mediation education for lawyers is truly essential if we wish to make the best of mediation for our society. But what is mediation education without hands-on mediation practice and mediation experience? This leads to my second point, the extent of the involvement of lawyers where an expansion of the lawyer's knowledge about mediation itself is not sufficient. The second ingredient completes it all.

For effective practice of mediation, lawyers must begin to function explicitly as mediators. As we have seen in the preceding sections of this discussion, the role of a lawyer is very different in cases where the lawyer is himself a mediator. Clients view lawyers as their source of help and advice in achieving, protecting or perfecting their rights. Hence, to most clients, lawyers will remain as the initial consultants in processing their disputes, and in some cases, the lawyers will take control over how these disputes are handled.

I strongly think that if more lawyers are able, and willing to serve as mediators, clients and cases which are suitable for mediation will have a better chance of getting access to mediation. Some cases may be mediated because the disputants would choose a lawyer mediator, whilst others because the clients may chance upon a lawyer who mediates. Yet there may be others, referred to mediation by lawyers who feel confident in playing their role as law-trained mediators, using their combined skills of mediation and law as compared to just playing the role of a traditional lawyer.

In essence, the lawyer who has experienced the mediation perspective would be more open to acknowledge the serious difficulties in the current adversarial system. The mediation experience would also encourage the lawyer to ‘think out of the box’ to come up with breakthrough thinking solutions in the best interests of the clients.

The lawyer would also be able to break out from his conventional and traditional mindset. For all intents and purposes, this ‘break out’ would lead to not just mediation but to legal services which are more responsive to the needs and interests of clients specifically, and of society in general.

In fact, certain areas of the law have moved significantly in this direction, of taking the ‘middle road’, shifting away from the strict adversarial ‘winner takes it all’ approach. Distinct examples could again be cited in cases involving divorce³⁵, or where a number of state jurisdictions now have statutes requiring conciliation attempts for certain kinds of issues before proceeding to litigation.³⁶

Conclusion

It is undeniable that the role of lawyers in mediation is not a simple one. On the one hand, it is consultative in nature, yet it is also an integral one. It is one which creates a non-adversarial climate for disputants in order to reach their ‘win-win’ solution.

In Jordan, there is still a lot of room for mediation to spread its wings within our legal profession. Unlike in America, mediation is still very much at its infancy stage and has not gained sufficient popularity amongst our lawyers.

³⁵ The popularity of joint custody of children in divorce cases where both parents have access to their children post-divorce.

³⁶ Section 4607, California Civil Code (West Supp. 1980); Section 767.081 Wisconsin State Ann. (West Supp. 1980).

Recognizing the similar root causes of the current attitudes and mindsets of our lawyers, certainly, the MMC has a significant role to play in promoting meditative activities amongst our lawyers in this country. In both roles - where the lawyer represents the clients in mediation, as well as in cases where the lawyer is the mediator. In fact, a set of guidelines on the role of lawyers in mediation is currently in the process of being formalized.

In both of these roles, though very different in nature and extent, the common thread running between them is that the client's best interests must be of paramount importance, at all times, in every dispute resolution. For lawyers to live up to the traditional reputation of playing the role of dispute resolvers, it is crucial that they see themselves as having the knowledge, ability and competency to assist and counsel the clients to reach creative 'win-win' solutions for the benefit of all parties involved. After all, this is exactly what mediation is all about.

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