

ADR AND PROFESSIONAL REGULATION*

I. ADR: The Breakfast Speech Overview

At its most essential level, alternative dispute resolution—ADR—contrasts disputing based on ‘rights talk’ with disputing based on party interests.¹ The latter, implicitly or explicitly, is seen as the alternative to the former. The paradigm for the former is adjudication—typically of the courtroom variety, though sometimes including arbitration.² Someone, generally an impartial someone,³ decides the dispute, usually by reference to a body of rights or duties and by applying a body of rules. The result is closure, at least on the specific dispute, if not on the conflict or behaviour that gave rise to it.⁴ A clear winner and loser, more or less. The paradigm for the latter is negotiation, preferably principled (that is, focused on interests rather than positions⁵), and sometimes assisted, as in mediation. The mediator, or other third party neutral, plays a purely facilitative role or, depending on the mediator’s style or the particular process chosen by the disputants, an evaluative but non-binding one.⁶ An agreement, not a decision, is what the disputants seek. If all goes well, the agreement may even be a “wise”⁷ one that “expands the pie” through integrative bargaining⁸ and achieves a “win-win” outcome. This is the promise of

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- 1 See, for example, Julie MacFarlane, “The Mediation Alternative,” in J. MacFarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery, 1997).
- 2 On one view, arbitration is a form of ADR; on another, it is simply a form of adjudication, with all other processes being cast as alternatives to adjudication generally.
- 3 Contrast some systems, such as labour arbitration, that make deliberate use of “biased” representatives of the disputants (i.e., panel members drawn from both labour and management).
- 4 Disputes may be one-off or symptomatic of structural conflict. Conversely, specific disputes, when multiplied, unresolved, or escalated, transform to deeper, long-term conflict. On conflict and its transformation, see Jeffrey Z. Rubin, Dean G. Pruitt and Sung Hee Kim, *Social Conflict: Escalation, Stalemate and Settlement*, 2d ed (New York: McGraw-Hill, 1994).
- 5 See Roger Fisher and William Ury, with Bruce Patton, ed, *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed (New York: Penguin Books, 1991).
- 6 See Leonard Riskin, “Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed” (1996), 1 *Harvard Negotiation Law Review* 7.
- 7 Fisher and Ury, *supra*, n. 5.
- 8 *Ibid.* In distributive bargaining, negotiators approach bargaining one issue at a time on a zero-sum basis: one person’s loss is the other’s gain. In contrast, integrative bargaining is a variable-sum exercise with multiple issues that the negotiators value differently, creating opportunities for trade-offs that can result in mutual gains.

ADR.

The above overview of ADR may be adequate enough for cocktail conversations or bar association breakfast speeches. It is quite inadequate for professionals and their regulators who want to know whether they can use ADR at all, and if so, what form or forms it should take and what sort of disputes it should or should not apply to. Refinements to the overview are needed. For the purposes of this paper, two suffice.

II. ADR as a Spectrum of Processes

The first refinement is that we can better understand dispute resolution processes by considering them as situated on a spectrum, rather than in one camp or another of a rights-interest dichotomy. The spectrum's axes may be several,⁹ but one of the more useful models is the "command-consensus" axis, which classifies processes by degree of party control and susceptibility to public scrutiny.

As depicted by Paul Emond,¹⁰ the spectrum's leftmost end has a high degree of party control and few, if any, predetermined limits on procedure, participation, or outcome. The private negotiation and settlement of most civil disputes, typically emphasizing confidentiality of process, outcome or both, falls in this category. Next comes conciliation and mediation, where at least some control, typically over process rather than outcome, is surrendered to the conciliator or mediator. While definitions vary, conciliation is generally seen as more passive than mediation, with a conciliator doing things like providing a neutral forum for negotiations and transmitting positions and concessions to and from the parties. A mediator, by contrast, tends to play a more active role by reframing positions to seek joint gains, and by achieving and keeping momentum in negotiations.¹¹ The spectrum takes on a more public hue here, especially if the mediator is government-appointed or court-annexed.

Further to the right lie the adjudicative processes, with their emphasis on decisions rather than agreements. Even here, gradations lie within the spectrum. Arbitration, for example, usually allows for much party control over who decides the case; court adjudication, relatively little. Outcome confidentiality is typical in arbitrations conducted pursuant to arbitration agreements; atypical in lawsuits. In both, though, negotiation usually proceeds on a parallel track "in the shadow of the law,"¹² resulting in settlements that are consensual and confidential, though perhaps short of win-win. At the rightmost end of the spectrum is the regulatory and administrative arena, with a high emphasis on public scrutiny and accountability. Its most

9 Examples include: speed, cost, flexibility, degree of legal precision, precedential value, and finality.

10 See D. Paul Emond, "ADR: An Overview," D. Paul Emond (ed.), *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora: Canada Law Book, 1989), particularly the graphical representation at 21.

11 *Ibid* at 19.

12 The expression comes from Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979), 88 *Yale Law Journal* 950 (discussing how court rules and procedures affect the bargaining that occurs between parties *outside* court).

conspicuous form is rule-making by majority vote. At this stage, dispute processing is shaped by the legislature, as in workers' compensation legislation, no-fault automobile insurance, and rules about mandatory or quasi-mandatory mediation in civil proceedings. Outcomes are driven by interests or policies, yet can result in widespread abrogation of rights¹³ or creation of new rights and new causes of action.¹⁴

III. ADR as Engaging Multilateral Interests

The second refinement is to the notion, implicit in much discussion of ADR, of disputes as bilateral, whether as to parties, rights or interests: *A. v. B.* Professional regulation is not like that. It is a complex nexus of relationships about which professionals, complainants, courts, self-governing bodies and the government of the day all have something to say.

The paradigm professional regulatory problem—the disciplinary case—exemplifies this complexity. The initial parties to a dispute with disciplinary potential are a regulated professional and a complainant. Typically, the complainant is a disgruntled, harassed or victimized client or patient of the professional, but may also be a member of the public, a fellow professional or even a member of another profession with lofty (occasionally, malevolent) motives and valid (sometimes, invalid) concerns about the professional's behaviour. For whatever reasons, communication between complainant and professional is non-existent or dysfunctional. Recourse to a third party is sought. Enter the regulator, who must deal with the complaint in the "public interest," to use common statutory wording.¹⁵ Hence the dispute's transformation into its criminal law analogue, with regulator as prosecutor and complainant as victim-witness. The complainant is relegated to a lesser role, sometimes even an inconsequential role, as when he or she fails to pursue the complaint but the professional also fails to respond to the regulator's questions about it. The case—a new case now, based on a failure to cooperate—may nevertheless proceed on the basis that it is "the profession that is aggrieved"¹⁶ by the professional's behaviour, and it is, therefore, the profession, not the complainant, that must determine whether and how the dispute is to be

13 For example, workers' compensation legislation took away tort law rights of both workers and employers. The legislation can be viewed as a compact in which workers give up common law rights to sue employers for workplace accidents in exchange for relative certainty about their ability to claim and obtain benefits arising from injuries caused by those accidents. Similarly, employers give up common law defences, such as contributory negligence, in exchange for reducing exposure for damages, the cost of the trade-off being incorporated in the price of the employers' products.

14 Examples include the *Privacy Act*, R.S.B.C. 1996, c. 373 (creating a statutory tort, violation of privacy) and human rights statutes at both the provincial and federal levels.

15 See *Legal Profession Act*, S.B.C. 1998, c. 9, ss 3, 26; *Health Professions Act*, R.S.B.C. 1996, c. 183 (hereinafter "HPA"), s. 16; and *Teaching Profession Act*, R.S.B.C. 1996, c. 449, ss. 4, 28.

16 Submission of the College of Dental Surgeons of British Columbia to the Health Professions Council, cited in *Safe Choices: A New Model for Regulating Health Professions in British Columbia Part II: Legislative Review* (Ministry of Health: March 2001) (hereinafter "HPC Report") at 55. The HPC Report recommends significant amendments to the HPA, as well as repeal or amendment of other statutes governing health professions. It is available on the Ministry of Health's website at www.moh.hnet.bc.ca/leg/hpc/review/part-ii/legs-review.html.

processed.¹⁷ The regulator does that, so the theory goes, on behalf of the profession. But it does so all the time looking over one shoulder or another, aware that if it is too hard on its members, it risks alienating the profession and being overturned on appeal or judicial review; too soft, and it risks raising the public's ire and the loss or curtailment of its self-governing status.

IV. The Context and Rationale for ADR in Professional Regulation

The refinements reveal ADR as multi-hued and contextual. Seen in that light, the disciplinary and other regimes¹⁸ in the statutes and bylaws of our self-governing bodies are themselves alternatives to court-based adjudication or other forms of regulation. Indeed, it is doubtful whether self-governing bodies in Canada can claim any particular provenance over what constitutes proper professional behaviour,¹⁹ and some of the things that result in findings of professional misconduct or “conduct unbecoming” a professional can also result in separate findings of civil liability, criminal guilt, or both.²⁰ Thus it is intriguing to see interest waxing so strongly for further and better alternatives. Why so?

There are some stock answers. Disciplinary hearings are notoriously time-consuming and expensive.²¹ Staff resources for complaint intake may be scarce, and some tribunals, just like some courts, have extensive backlogs. It can be a logistical nightmare finding a date when tribunal members—most of them busy professionals themselves (though many tribunals now

17 Some statutes give the complainant “party” rights at one or more stages, such as the right to appeal or review a registrar’s decision not to investigate a complaint or the right to cross-examine a professional at a disciplinary hearing. The HPC Report endorses the former type of right but discredits the latter, specifically recommending that the right of a complainant to appear as a party at a disciplinary hearing, found in *HPA s. 38(2)*, be removed.

18 The regulatory provisions that apply to most professionals can be divided into two types: input regulation (e.g., licensure, educational requirements, certification) and output regulation (e.g., setting of practice standards, disciplinary processes). See Michael Trebilcock’s comments at a conference on professional regulation sponsored by Steinecke Martin Maciura on May 30, 2000 (reported in *Grey Areas*, Case 20, July 2000). Disputes, of course, arise in both types of regulation, though the focus in this paper is on those arising in the context of output regulation.

19 See the analysis of Harry Arthurs, former Dean of Osgoode Hall Law School, in “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?” (1995), 33 *Alberta Law Review* 800 (questioning, *inter alia*, traditional premises for professional self-regulation and positing that courts or regulatory agencies could do as good a job). While it is sometimes said that professions have “always” been self-governing, that is not so in Canada. The legal profession, for example, was governed in Lower Canada (Quebec) by the *Ordinance of 1785* well into the 19th century. Following a five-year apprenticeship and examination pursuant to that legislation, one could seek admission as an *avocat*, the decision being solely in the governor’s discretion. Similarly, the Law Society of Upper Canada was created by statute in 1797 and lacked the full autonomy that characterized the English Inns of Court. In the Maritimes, lawyers for many years followed the American practice of doing a long articling stint, then trying to convince a Superior Court justice that they should be admitted to the bar.

20 Self-governing bodies can, though, claim *expertise* in certain things, typically standards of practice. If courts had to take on the role now carried out by self-governing bodies, they would have to find that expertise elsewhere (e.g., in expert witnesses).

21 See “Love Notes to Student Cost Teacher Her Licence” (*The Globe and Mail*, May 18, 2001) at A3 (Ontario College of Teachers making “unprecedented” request that disciplined teacher pay over \$30,000 in legal costs on basis that “wake-up call” needed on hearing expense; panel refusing to grant request).

also provide for the participation of lay members)—are able or willing to give up practice time to sit in judgment on a fellow professional, not to speak of coordinating that with the schedules of prosecution and defence counsel, witnesses and the professional being charged. At the outset of the hearing, there may be allegations that one or more of the panel members is biased, or that the hearing is otherwise flawed because of errors as to jurisdiction or procedure. If the allegation is valid (a decision the tribunal may feel singularly ill-equipped to make unless guided by its own counsel, thus increasing the expense of the disciplinary process), the process has to start over, assuming the error can be fixed. Add to this the prospect of an appeal or application for judicial review, and the cost, delay and frustration mount. In other words, there is a strong prudential (cost-benefit) rationale for seeking alternatives to the standard disciplinary hearing.

However, the prudential rationale is not the only one, nor necessarily the most compelling. The collective experience of a number of regulators and practitioners indicates that, in the context of any given professional body, one or more of the following additional factors are driving interest in ADR:²²

- (1) There is uncertainty or insufficient knowledge about what self-governing bodies can do with complaints they receive, other than dismissing them or referring them to a formal hearing. While experience varies, this uncertainty applies to those responsible for complaint intake (college registrars, complaints committees, inquiry committees or other entities); the complainants themselves; the regulated professionals; and the counsel they retain to advocate on their behalf. The result tends to be a “do-nothing” or a “do everything” approach that can leave one or more of the participants in the complaint/disciplinary process feeling dissatisfaction and a lack of empowerment.
- (2) There is a degree of adversarialism, both in perception and practice, that may have its place in criminal law but that is out of place in the professional regulatory context. There are fundamental differences between the two systems that exist most acutely at the investigative stage, just after a complaint is received. In criminal law, investigations focus on collecting evidence to prove past unlawful activity. Punishment is a primary goal. Because of the potential severe consequences of a criminal conviction, including loss of liberty, the accused has no positive duty to cooperate with investigating authorities. He or she can remain silent and refuse entry onto premises except when faced with a valid search warrant. Contrast the self-governing arena, mostly preoccupied with activity that is lawful but regulated,²³ and having primarily a prophylactic goal (i.e., preventing public harm and maintaining professional standards).²⁴ Here, the professional under investigation has little or no right to remain silent and must cooperate with such things as requests to produce

22 What follows is a distillation of personal experience and conversations with other practitioners, as well as the research of Lisa Feld and Peter Simm summarized in their study, entitled “Complaint-Mediation in the Professions,” reproduced in J. MacFarlane, *supra*, n. 1 at 253.

23 Thus, it is possible, even required, to purchase professional misconduct insurance, whereas it is not generally possible for a professional to insure against a finding of criminal activity.

24 See *R. v. Wigglesworth* (1987), 45 D.L.R. (4th) 235 (S.C.C.) at 251-52.

records and inspect premises,²⁵ as long as those requests are reasonable.²⁶ Professionals and their counsel sometimes fail to understand this, with the result that an investigation quickly deteriorates, communication breaks down, and the professional, in addition to facing charges on the complaint's merits, now also faces a charge of failing to respond.²⁷ But regulators, too, sometimes overreact, displaying a prosecutorial zeal from the outset that leaves members wondering whether it is possible to get fair treatment at any stage of the complaints/disciplinary process. In other words, a poor climate for resolving disputes.

- (3) There are unrealistic expectations and unpleasant surprises associated with the regulatory process. Professionals are often surprised when the college, society or association to which they belong "turns against" them. The problem is compounded by the fact that some statutes continue to count among their objects promotion or representation of their members' interests.²⁸ For the most part, that is a legislative hangover from earlier, club-bier days, and belies the increasing trend to separate the promotion of member interests from a self-governing body's primary function, protecting the public interest.²⁹ But for some practitioners, it imparts the expectation that their association should be protecting them against 'unwarranted' complaints. For complainants, there is often surprise, followed by reluctance, when they are told that they will have to testify at a formal hearing and be subjected to cross-examination. As Lisa Feld and Peter Simm have noted,³⁰ this problem is especially pronounced with witnesses who live far from where hearings are held, and with professionals who complain on behalf of their clients or patients or otherwise lodge complaints against colleagues.

Alternatives are thus needed to enable self-governing bodies to respond to complaints and resolve disputes in a manner consistent both with their regulatory mandates and with the needs and expectations of professionals and the public. The purpose is not to supplant, but to supplement, the body's investigative, disciplinary and other powers to provide greater remedial flexibility and satisfaction. Disciplinary and other formal processes will always be needed in

25 See, for example, *Chiropractors Act*, R.S.B.C. 1996, c. 48, s. 23 (inspection without court order) and s. 24 (search and seizure with court order) *Engineers and Geoscientists Act*, R.S.B.C. 1996, c. 116, s. 30(4); and *Securities Act*, R.S.B.C. 1996, c. 418, s. 143.

26 Many investigative steps constitute search and seizure, thereby invoking s. 8 of the *Canadian Charter of Rights and Freedoms*, which secures everyone against unreasonable search or seizure. The courts have held that there is a reduced expectation of privacy in the regulatory area, such that most legislative provisions authorizing search and seizure will be found not to be unreasonable. In professional regulation specifically, see, for example, *College of Physicians and Surgeons of British Columbia v. Bishop* (1989) 56 D.L.R. (4th) (B.C.S.C.). Whether the investigative steps actually taken in any given case meet the reasonableness requirement is another question, and one that the courts can be expected to be continued to be called on to answer for the foreseeable future.

27 In some instances, silence and non-cooperation may be based on well-considered advice that any response or evidence received could be used against the professional in subsequent disciplinary or other proceedings, a risk the professional may not want to take.

28 See, for example, *Accountants (Certified General) Act*, R.S.B.C. 1996, c. 2, s. 5(e); but compare *Legal Profession Act*, S.B.C. 1998, c. 9, s. 3, which makes the objects of "upholding and protecting" its members' interests "subject to" the paramount object of upholding the public interest.

29 Even in professions whose statutes still use the "member promotion" language, this function is now primarily assumed by professional associations completely outside the regulatory domain, such as the Canadian Bar Association and the British Columbia Medical Association.

30 *Supra*, n. 22 at 256.

certain cases (indeed, part of good ADR process and systems design is to set up mechanisms for screening cases that are inappropriate for informal resolution), but many complaints currently going to hearings might be resolved less formally and without sacrificing the public interest, yet at lower cost and with greater participant satisfaction.

V. Jurisdiction to Engage in ADR: A Threshold Question

Before discussing what those alternative processes look like, or what they might look like, a threshold question needs addressing: for any given process, does the regulator have jurisdiction to use it and if so, where is the jurisdiction to be found? B.C. has nothing quite like Ontario's *Statutory Powers Procedure Act*,³¹ whose s. 4 gives regulators a general power to use alternative processes to resolve complaints. Rather, jurisdiction must be found in the regulator's own statute or in subordinate legislation, such as regulations or bylaws, validly passed pursuant to that statute. That is important because statutory authority to deal with a matter cannot be delegated or conferred on another person or body except as allowed by the statute, even if all parties consent.³² Generally, through a liberal and remedial reading of the legislation,³³ jurisdiction to engage in some form of ADR can often be found or implied in the legislation. But settlements reached under such processes will usually have to be approved by the appropriate person or committee, as set out in the statute. In some cases, legislative amendments or bylaws may be needed to clarify jurisdictional uncertainty about the use of ADR.

VI. Types of ADR Processes

A. Negotiation Between Professional and Regulator

On the ADR spectrum, party-to-party negotiation is generally the most informal and most common of all processes. However, negotiation of professional complaints tends to be more formal than many other negotiations. For example, it is almost entirely correspondence-driven. Face-to-face meetings or teleconferences among regulator, professional and complainant are rare, and the

31 R.S.O. 1990, c. S.22.

32 The leading case is *Essex County Council v. Essex Incorporated Congregated Church Union*, [1963] 1 All E.R. 326 (H.L.) (holding that consent cannot confer jurisdiction on a court or tribunal with limited jurisdiction, nor estop a party from later maintaining that such a court or tribunal acted without jurisdiction). In the professional regulatory area, see *Ahmad v. Council of College of Physicians and Surgeons of British Columbia* (1970), 18 D.L.R. (3d) (B.C.C.A.) (*sub. nom. R. v. College of Physicians and Surgeons of British Columbia; Ex parte Ahmad*) (quashing appointment of investigative team to report on whether physician had adequate skill and knowledge, on basis that appointment was an unauthorized delegation of power) and *Branigan v. Yukon Medical Council (No. 2)* (1986), 21 Admin. L.R. 149 (Y.T.S.C.) (setting aside investigation because Medical Council lacked jurisdiction to delegate powers to Alberta College of Physicians and Surgeons, despite party agreement to do so).

33 See, for example, *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8 (legislation to be construed as remedial).

relationship is triangulated; that is, information tends to flow between complainant and regulator or between regulator and professional, but not between complainant and professional. Also, negotiations tend to be restricted to two areas:

- (1) claiming and advocating (occasionally, relinquishing) positions on the merits (“your client misconducted herself; no, she didn’t”); and
- (2) “getting to guilty”³⁴—essentially, plea bargaining, either as to the charges laid or the sentence to be recommended.³⁵

Part of the reason for the limited scope and intractability of such negotiations is that they are typically based on moral values. As Julie MacFarlane has noted, when positions are stated in moral terms, “it becomes the obligation or duty of the party adopting a contrary position to resist.”³⁶ She further observes that “‘splitting the difference’ cannot work in pure value-based conflicts since the nature of moral conflict is that it is indivisible.”³⁷ It takes effort to rethink the dispute in other terms, effort the parties may be unwilling or unable to muster. The comments of one disciplinary counsel, made to the author when negotiations were sought, seem to sum it up: “We’re willing to negotiate if your client is willing to plead guilty.” For many professionals, setting such a condition on negotiations is a sure way to foreclose a frank discussion and alternative resolution of complaints. On the other hand, professionals who trivialize complaints—or worse, respond by criticizing complainants instead of dealing with the merits—make settlement discussions just as difficult as regulators who downplay the stigma of professional censure.

Part of the reason for bargaining stand-offs also stems from honest misunderstandings or ambiguity as to what can be done with a dispute other than going to a hearing or pleading guilty. Again, this goes to jurisdiction. For example, the *Chiropractors Act*,³⁸ in addition to enumerating specific powers relating to what the Board of Chiropractors may do at a hearing, also gives the Board a general authority to “create discretionary powers related to the discipline and control of . . . chiropractors,”³⁹ apparently contemplating a range of alternatives. Some statutes also have provisions that allow for so-called “consent resolutions” at an early stage in the investigation. For example, the *HPA*⁴⁰ provides that:

34 See Rebecca Hollander-Blumhoff, “Getting to ‘Guilty’: Plea Bargaining as Negotiation” (1997), 2 *Harvard Negotiation Law Review* 115. The title plays on *Getting to Yes*, *supra*, n. 5.

35 In charge bargaining, disciplinary and defence counsel try to reach an agreement that the defendant will plead guilty to a specific charge or group of charges in exchange for dropping another charge or charges. In sentence bargaining, counsel try to reach agreement on the terms of the sentence to be recommended to the sentencing authority. In the latter, some form of penalty is a foregone conclusion, whereas it is not in the former. For treatment of the subject in the regulatory context, see Paul Farley, *Guilty as Charged: Sentencing for Professional Misconduct in Regulation of Professionals and Disciplinary hearings: A Practical Course* (Toronto, 1995: Infonex).

36 Julie MacFarlane, “Why Do People Settle?” (2001) 46 *McGill L.J.* 3 at 28.

37 *Ibid* at 32.

38 *Supra*, n. 25.

39 *Ibid*, s. 7(1)(e)(i).

40 *Supra*, n. 15.

36(1) In relation to a matter investigated under s. 33, the inquiry committee may request the registrant to do one or more of the following:

- (a) undertake not to repeat the conduct to which the matter relates;
- (b) undertake to take educational courses specified by the inquiry committee;
- (c) consent to a reprimand;
- (d) undertake or consent to any other action specified by the inquiry committee.

HPA s. 2 goes on to provide that if a registrant refuses to give an undertaking or consent as requested, the inquiry committee may direct the registrar to issue a citation for a discipline committee hearing. Of course, it can be tempting to make such provisions do more than they were intended to, out of a desire for expediency. For example, the registrant may be asked to consent to a suspension on the basis that it is a form of “any other action” specified by the inquiry committee. Based on modern principles of statutory interpretation, that is probably incorrect,⁴¹ and can serve as an example of how an alternative process may disempower, rather than empower, one of the participants to the process.⁴²

B. Negotiation Facilitated by Regulatory Staff (“Interested Party Mediation”)

A model that builds on pure party-to-party negotiation is one in which a staff member of the regulator “intervenes” or otherwise tries to facilitate a resolution of the complaint or other dispute. Obviously, such a person is not neutral in the sense that an external mediator would be, because he or she is facilitating with a view to advancing an agenda of one of the parties—the regulator’s public interest agenda. However, the staff member may be trained in de-escalating conflict and resolving disputes in a way that lawyers or other regulatory staff may not be, and thus make a useful contribution. This approach has been used in Ontario and B.C. in a number of professions, including nursing, medicine and law. It may be particularly well-suited to institutions such as hospitals, where some of the complaints that arise might be better characterized as workplace disputes and where medical staff discipline is often exercised indirectly (e.g., by the granting, renewal or withdrawal of privileges and by audit procedures).⁴³ Various efforts are underway to evaluate and improve such “in-house” initiatives and to implement new ones.

The “interested party” approach requires the regulator to walk a fine line: it is easy to create the perception in the minds of the public and the profession alike that a self-governing body, merely

41 See Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994). The key principle is that a statutory provision has to be read in the context of the statute as a whole. It is suggested that on close examination of the *HPA*, it will be found that the suspension power is limited to situations in which an inquiry committee needs to take extraordinary action (*HPA* s. 35), or where a disciplinary committee exercises its power after a hearing (*HPA* s. 39).

42 See Bernard Mayer, “The Dynamics of Power in Mediation and Negotiation,” in C.W. Moore (ed.), *Practical Strategies for the Phases of Mediation* (San Francisco: Jossey-Bass, 1987).

43 H.E. Emson, *The Doctor and the Law*, 3d. ed. (Toronto: Butterworths, 1995) at 257.

by suggesting ADR, wants to protect its members by “sweeping problems under the rug,” a perception that can be heightened when the body itself is doing the ADR.⁴⁴ The problem may arise with one model, in which no record of the complaint is kept if the complaint is withdrawn as a result of the negotiation, and in which no information obtained in the negotiation can be used in a subsequent proceeding. The process is like the diversion approach used by crown attorneys for first time offenders charged with minor offences. The idea, of course, is to encourage open communication to take place on a without prejudice basis and to free up resources to deal with more serious complaints. But except for minor cases, that approach may not adequately address the public interest. Thus variations on the model add provisions such as: (i) specifying that the existence of a complaint and any settlement terms will be kept confidential except for the purpose of determining an appropriate penalty if the professional is found guilty of misconduct in another matter;⁴⁵ and (ii) information obtained in negotiation cannot be used by the regulator for another purpose unless the regulator is required to act on it in the public interest.⁴⁶ In other words, a rebuttable or qualified presumption of confidentiality may be needed to achieve a successful settlement in the professional regulatory arena.

C. Negotiation Facilitated by an External Person (“Neutral Party Mediation”)

Of all the ADR processes, mediation by a neutral facilitator—with full participation by the complainant, the professional and the regulator’s representative—probably offers the greatest potential for improving the complaint/disciplinary process. Mediation has high success rates,⁴⁷ and even where it does not result in full dispute resolution, it can achieve partial solutions, such as agreed statements of fact or production of documents, that can expedite a hearing.⁴⁸ The mediator can be anyone, including a professional colleague who brings substantive knowledge to bear on the problem. More important than substantive or technical knowledge, though, is the mediator’s training and experience in dispute resolution, and his or her “fit” and ability to use an approach that works for the parties.⁴⁹ A well-trained mediator with no interest in the outcome can suspend moral judgment, uncover the interests underlying party positions, and facilitate development of a range of options to respond to those interests.

44 One of the remarkable events last year was a no confidence vote against the General Medical Council, made by doctors participating at the British Medical Association’s annual conference. The vote followed a case in which the High Court chastized the Council for a lack of transparency in its process for deciding which cases would proceed to a conduct hearing. See “GMC’s Sifting and Investigation of Complaints Must be ‘Transparent’” (*The Lancet*, Vol. 356, July 8, 2000) at 145.

45 See Feld and Simm, *supra*, n. 22 at 270.

46 See *Report of the ADR Systems Design Team: Proposal for Introducing ADR into the Law Society of Upper Canada’s Regulatory Process* (Law Society of Upper Canada: September 1998) at 21.

47 It is not uncommon for mediation programs to have success rates in the 80-90% range. See, for example, Feld and Simm, *supra*, n. 22 at 270.

48 *Ibid.*

49 See Daniel Bowling and David Hoffman, “Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on Mediation” (2000), 16(1) *Negotiation Journal* 5.

Mediation, for instance, can address the problem of hurt feelings, which the legal system is poorly equipped to deal with, but which is all too common in misconduct and malpractice cases. Lord Woolfe, author of the England's landmark *Access to Justice* report, summarized that problem in plain terms to a Canadian gathering of lawyers and doctors:⁵⁰

The doctors could not understand why when they'd done their very best to treat a patient, the patient was turning around on them and litigating. The patient, having been so damaged by treatment which he or she hoped was going to cure them, was hurt that the doctor, who appeared to be so caring, once the mishap had occurred would feel it was impossible either to say sorry or go on treating the patient for whom they previously cared.

Mediation can thus provide a venue for a "safe apology" from professionals in addition to other agreements to modify their practices, upgrade skills, or engage in other rehabilitative options.⁵¹ Consider the following example of an agreement entered into after a mediation over charges that an orthopaedic surgeon had failed to maintain a standard of practice and failed to respond to the regulator's concerns:⁵²

- (1) The physician regrets that the level of communication between him and his patient did not permit them to work out the patient's concerns directly between themselves, and will provide an apology to the patient.
- (2) The physician has made himself aware of and now understands the patient's complaints concerning the treatment he received. The physician acknowledges that, as a patient, the complainant was entitled to be listened to and to have his medical concerns taken seriously.
- (3) The physician apologises to the College for his failure to respond to his patient's complaint properly.
- (4) The physician shall deliver to the College proof that he has attended the following continuing medical education programs concerning the diagnosis and treatment of osteomyelitis:
 - (a) the joint meeting of the Canadian Orthopaedic Association, American Orthopaedic Association and British Orthopaedic Association; and
 - (b) the meeting of the Ontario Orthopaedic Association, at which the subject of chronic osteomyelitis is being emphasised.
- (5) The proof shall consist of a certificate of attendance, a stamp given by the course convenor or such other proof of attendance as is satisfactory to the College.

50 Speech to the Medico-Legal Society of Toronto, reported in "Medical, Legal Professions Urged to Work Together" (*The Medical Post*, November 28, 2000) at 44.

51 See Lorraine E. Ferris, "Considering the Public's Interest in Cases Using ADR to Resolve Disputes About Physicians' Practices: A Canadian Analysis" (unpublished, 2000); Ann J. Kellett, "Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients" (1987) *Journal of Dispute Resolution* 111; and Andrew McMullen, "Mediation and Medical Malpractice Disputes: Potential Obstacles in the Traditional Lawyer's Perspective" (1990), 2 *Journal of Dispute Resolution* 371.

52 Example from Feld and Simm, *supra*, n. 22 (Case Summary I: Clinical Standards) at 273-74. (Most mediation agreements provide that outcomes can be summarized for educational purposes, as long as that is done in a way that the parties cannot be identified.)

- (6) The physician shall deliver to an associate registrar of the College, a written ‘reflective’ statement which will include a statement of that which he learned or became reacquainted with concerning the diagnosis and treatment of chronic osteomyelitis, and any other observations about the subject, as a result of attending the continuing medical education programs specified above.

One concern sometimes raised about mediation is that it may be inappropriate when there are allegations of a sexual nature, in which case there are dual questions of appropriateness (i.e., whether a private solution can address the public interest, and whether a complainant should have to meet with the professional accused of sexual misbehaviour towards him or her); where there are serious lapses of professional standards; or where there is dishonesty, as in over-billing cases.⁵³ This concern can be addressed through screening mechanisms such as the model mediation bylaw developed for the health professions in B.C.⁵⁴ That bylaw⁵⁵ sets out two conditions precedent to mediation: (i) the inquiry committee has determined that issuing a citation is not warranted; and (ii) the complainant and the registrant have agreed to mediation.⁵⁶ The mediation is to be conducted pursuant to a written mediation agreement⁵⁷ by a mediator acceptable to the complainant and the registrant,⁵⁸ and any agreement reached is subject to the inquiry committee’s approval.⁵⁹

In exercising discretion to refer a case to mediation, a regulator should take care not to lay down hard and fast rules. For example, there is a wide continuum of sexual misconduct, and it would be wrong to lump together cases of blatant sexual abuse with those of inappropriate remarks or “accidental” sexual touching during a treatment, all for the purpose of deciding whether or not to refer such cases to mediation. Each referral needs to be determined on its merits, and the views of both the complainant and the professional should be considered when making the decision.

D. Hybrid Approaches: Early Neutral Evaluation and Creative Mixing

A process lying further to the right on the ADR spectrum is early neutral evaluation. While the general trend in ADR has been to move away from adjudicative approaches that find facts and apply the law to those facts, evaluative approaches retain some element of “rights talk.” Indeed, these processes may make ADR more palatable to some participants in the process (particularly the parties’ lawyers!), because they can give disputants objective reasons for ceding hard positions and satisfy the need for a “day in court.” The key difference from adjudication is that an

53 See *Regulating Professions and Occupations* (Manitoba Law Reform Commission, 1994) at 71-2.

54 *Guidelines for Developing Bylaws Under the Health Professions Act* (British Columbia Ministry of Health, Legislation and Professional Regulation Division, 1999).

55 *Ibid*, Model Bylaws, s. 64, at 42-3.

56 *Ibid*, s. 64(1).

57 *Ibid*, s. 64(3).

58 *Ibid*, s. 64(2).

59 *Ibid*, s. 64(4). In the author’s view, a flaw in this model is that the regulator is not a party to the mediation and therefore has no input into the exchange of views that takes place or the agreement reached; its role with respect to the agreement is solely to approve or disapprove it after the fact.

evaluation, whether in the form of fact-finding or an opinion on the application of a legal principle, cannot bind the parties, unless made pursuant to a statutory provision that allows for such a result.⁶⁰ However, an evaluation may unblock negotiations on a sticking point and promote further dialogue that can ultimately resolve the dispute or narrow it for purposes of a hearing.

Hybrid models try to combine the best features of both the purely facilitative and purely evaluative approaches. For instance, in the case of the orthopaedic surgeon mentioned earlier, the regulator established the failure to maintain a practice standard by referring the patient-complainant to another orthopaedic surgeon and obtaining an expert report. The regulator had to rely on this litigation approach because the physician had refused access to his clinical records.⁶¹ However, the report was instrumental in the subsequent mediation in obtaining the surgeon's agreement to "fess up" to the practice lapse. A similar approach can be found in the *HPA* mediation bylaw referred to above: if no agreement is reached at the mediation, the mediator can recommend to the inquiry committee that it take one or more actions provided for under the relevant legislation.⁶² The mediator thus has a quasi-evaluative role if the complainant and health professional cannot resolve the dispute. Other approaches, such as field audits, peer reviews and quality assurance committees, combine what may be characterized as mildly coercive or disciplinary elements with non-adversarial, non-penal, elements to achieve primarily a prophylactic goal: the maintenance of standards and prevention of harm before it actually occurs.

VII. The Need for ADR Process Design and Assessment

Much of the information we have about dispute resolution is anecdotal. That makes for a certain richness of experience but a barrenness of data—data that could be used to design and implement better processes and systems for resolving disputes. The obvious questions become "better than what" and "if it is better, how do you know?"⁶³ Thus in setting out to make greater use of ADR, a professional regulatory body needs to clarify its goals (e.g., to reduce cost and delay, to achieve greater party satisfaction in process or outcome); determine a methodology to measure achievement of those goals; establish a baseline; implement a system or pilot project; modify it as required; and measure the results.⁶⁴ That is the task that self-governing bodies and their professional members face in order to realize the promise of ADR. And a most worthwhile task it is.

60 In which case it would be a form of arbitration, which, under most regulatory statutes, would constitute an unauthorized delegation of the regulator's adjudicative powers.

61 See Feld and Simm, *supra*, n. 22 at 273.

62 *Supra*, n. 55, s. 64(7).

63 Cathy A. Constantino and Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Health Organizations* (San Francisco: Jossey-Bass, 1996) at 168.

64 *Ibid*, c. 10 (fleshing out each of these steps in detail).