



THE ROSTER REPORT

Issue X, September 2004

MEDIATOR SELF-EVALUATION

Hard Questions that Should be Asked: Lessons Learned from Real Life

This past spring, the Society received its first complaint from a member of the public (“the client”) about the mediation services offered by a Roster member. While the complaint did not proceed through the Society’s formal Complaint Process, the client’s written commentary was highly informative and provided a detailed look at the experience with the mediator and the mediation process, as seen through the client’s eyes...

Here, in brief, are some of the issues identified in the client’s commentary:

- For the pre-mediation sessions, the mediator met with the client in a public place and with the other party in the premises whose ownership was being disputed. This latter choice was not acceptable to the client.
- Despite the client’s concern that the other party would require outside expertise in negotiating through the mediation, the mediator met with the two parties on their own, without such assistance.
- There were several months of telephone and e-mail communications, but only one face-to-face mediation session.
- The bill for the mediation session was for an entire day, yet the session had ended in the early afternoon.
- To create the draft plan, the mediator used a template document which contained incorrect information. The information appeared to have been from a previous mediation, and the template simply photocopied for use.
- The mediator succeeded in obtaining disclosure of information from only one of the parties.
- Some of the substantive issues of the dispute, such as property division and the residence of the children, were neither raised nor resolved.
- Changes to the *status quo* were made during the mediation process without the consent of both parties.
- The client felt that the mediator’s approach was too passive. The client wanted a mediator who would make recommendations to the parties.
- The mediator did not seem impartial to the client. The client felt that the mediator assumed that the other party, who was from a different cultural background, was weaker and needed to be protected.
- After several months of “delays and postponements”, the mediator terminated the mediation process without explanation as to why it had failed.
- The client felt the mediator’s bill was excessive given the level of service provided.

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THE SOCIETY AND ITS PROFESSIONAL LIABILITY INSURANCE REQUIREMENT

As Roster members know, mediators' professional liability insurance coverage of \$1 million (aggregate) is a fundamental requirement for being admitted to the Civil and Family Rosters, as well as for maintaining membership. Following are some of the most common questions the Society office receives about this requirement.

Considering that a mediator does not make any decisions or give advice to the parties, why does the Society require professional liability insurance coverage? The possibility of a claim being made against a mediator, while seemingly remote, is real enough that the Society has deemed it prudent to ensure all of its Roster members are adequately insured. In point of fact, claims *have* been made against mediators. The number of claims is small but it is not unreasonable to anticipate that, as the mediation process is used more frequently, the likelihood of such claims will increase. Mediators using a rights-based approach may be particularly open to liability.

Claims against mediators have rarely been successfully made, and the Society is not aware of one being successful in Canada. The process costs in defending some of the claims have, however, proven to be very high. Considering the relatively low cost of mediators' professional liability insurance, being adequately insured provides sensible, inexpensive protection for Roster members as well as the Society, which could be named as a defendant should a claim be made against a Roster member.

What are the most likely areas for claims against mediators? With so few claims having been made against mediators, there is little claims history to rely on for this information; however, the literature has identified the following areas as the most likely areas: negligence, breach of confidentiality, and breach of contract. Conflict of interest, and liability for procedural or substantive defects in the mediation process causing loss, have also been identified as possible areas for liability.

Further information about this topic can be found on the Society website in "Hazards and Pitfalls: Avoiding Mediator Liability" by M. Jerry McHale, Q.C., posted on the webpage entitled *Information about Conflict Resolution: Articles and Papers by British Columbia's Mediation Community* in the section "Mediation in BC".

Why does the Society require a minimum of \$1 million in insurance coverage? This amount is considered by the Society to be a conservative estimate of what would adequately cover many commercial and family claims.

Where can mediator's professional liability insurance be obtained? Economical professional liability insurance group rates are available through a number of ADR membership

organizations. The insurance can also be obtained through some private brokers. For detailed information on the various insurance options, Roster members may contact the Society office. ✍

New Members

The Board of Directors are pleased to welcome the following recently admitted Roster members:

CIVIL ROSTER:

Dr. Mark DeVolder (Vernon)

Paul Jacks (Abbotsford)

Gerry Kelly (Ladysmith)

Daniel A. Miller (Kamloops)

Mark W. Sager (West Vancouver)

Gabriel M. Somjen (Vancouver)

FAMILY ROSTER:

Paul Jacks (Abbotsford)

✍ ✍ ✍

The Board of Directors

Jane Morley, Q.C. (President)

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Cheryl Mustard Berry

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Bob Finlay

M. Jerry McHale, Q.C.

Carole McKnight

Doug Robinson, Q.C.

The Honourable Mr. Justice David Vickers

Catherine Morris

(Chair of Roster Committee –
Not on Board of Directors)

The Roster Report is published twice a year by the B.C. Mediator Roster Society.

Editor: Susanna Jani, Roster Administrator

Additional copies of the Roster Report are available on request from the Society office. A copy of this, and previous issues of the Roster Report, are posted on the Society website at: www.mediator-roster.bc.ca/whatsnew.html

The client's final assessment of the mediation was that it had exacerbated rather than resolved the issues in dispute: "As it turns out, we [the client and related others] would have been in a much better financial situation today had I initially taken the dispute to court – which I ironically declined to do in hoping to minimize the emotional and financial costs." The client concluded that it is critical for individuals seeking a mediator to be correctly matched with the mediation style and philosophy best suited to their needs.

In response to this feedback the Society has added information about how to select a mediator to several areas of the website. It has, in particular, highlighted the need for potential clients to consider mediator style when making the decision as to which mediator to retain. The Society has also taken steps to ascertain that Roster members ensure the information they provide in their professional profiles is accurate. This has been done in recognition of the fact that many members of the public - including the one who provided this written commentary - rely heavily on this information when choosing a mediator.

For Roster members, this client's commentary provides valuable insight into the kinds of performance and process questions that all mediators should pause to ask themselves:

- What location(s) am I using for mediation work? Are they professional, private, neutral, and agreed to by the parties?
- When one party anticipates that outside expertise may be necessary to assist the other in mediation, what steps do I take to explore those concerns?
- If I am wondering, or unsure of, what role culture might be playing in the parties' dynamics and in my relationship as mediator with either of them, what steps am I taking to increase my "cultural fluency"?
- When one party in the mediation seems to need to be treated with "kid gloves" and yet is not disclosing information or seemingly ready to address substantive issues, what steps am I taking to ensure that appropriate supports are in place? What assessments am I doing to ensure readiness for mediation? What steps am I taking to ensure that delay is not prejudicing the process?
- What does my Agreement to Mediate say about changes to the *status quo* and how do I respond when one party makes such changes unilaterally?

- How careful am I about using precedents from other mediations and documents containing irrelevant "boilerplate" in my draft plans or settlement agreements?
- How clear am I about my mediation style at the outset? If I sense that a party is seeking an evaluative mediator who will make recommendations and my style is more facilitative, am I careful to explain my preferred approach to the party and ensure we understand one another?
- If I sense that I am not the mediator best suited to meet the parties' interests, due to financial constraints, process expectations or mediator style, do I decline the work?
- Am I acting in a genuinely impartial manner, or am I making assumptions and bringing my biases to the mediation? Do I withdraw if I sense I am not impartial?
- If I withdraw from the mediation, what is my ethical duty to give reasons and what is my ethical responsibility with respect to my account?
- What is my responsibility about billing? If my hourly rate is included in my Agreement to Mediate, may I charge for a full day despite early termination? How clear am I with clients about my billing practices?

These, of course, are only some of the hard questions mediators should ask themselves. High ethical standards and ongoing self-assessment are critical aspects of a mediator's work. This client's experience offers an important reminder that every mediation is unique and, particularly when families in crisis are involved, mediators need to ensure they are "doing no harm".

Mediators tend to be isolated in their work due to confidentiality constraints. Networks for support and process advice are invaluable. Often the best learning can come from another's negative experience, and the Society appreciates the willingness of this client to provide opportunities for learning. Active mediators need to continually reflect upon and deepen their work, whether that be through small discussion groups with colleagues, ongoing training, personal therapy for unfinished business, or further reading.

The field of mediation is rich with challenges, the greatest of which is the challenge of looking deeply into ourselves and understanding fully who we are so we can assist others to become, as Ken Cloke says, "more authentically who they really are". ✍

By Sally Campbell and Susanna Jani

Update on Society Activities

December 2nd reception in Vancouver: The Society will be hosting its next social for Roster members and directors in downtown Vancouver on Thursday, December 2nd. Details regarding the time and location will be provided to Roster members closer to the date of the reception. Last year's gathering was a great success and we look forward to an even better one this year!

Roster Society website traffic reaches record numbers: The Society experienced a record number of visitors during the past year. Approximately 57,000 visitors have browsed the Society's website since September 2003. More than 136,000 pages have been viewed during this time.

Since the launch of the website in May 1999, there have been nearly 110,000 visits to the site. The pages in the "Directory of Mediators" have consistently remained the most frequently visited ones on the site.

Directory of Child Protection Mediators launched: The Society launched its new, searchable on-line Directory of Child Protection Mediators during the summer of 2004.

The Directory was developed as a result of a recent affiliation between the Society and the province's Child Protection Mediation Program Roster. The mediators listed in the new Directory mediate disputes relating to a child or a plan of care for a child pursuant to Section 22 of the *Child, Family and Community Service Act*. Social workers and parents must choose a mediator listed in the Directory of Child Protection Mediators to conduct a child protection mediation. The Directory is located at: <http://www.mediator-roster.bc.ca/select-cp.cfm>

Information campaign: The Society's annual information campaign, targeting Court Houses, Government Agent offices and Legal Services Society offices, took place during the summer of 2004. This year, Family Justice Centres and community information services were included in the campaign.

The campaign aims to provide British Columbians around the province with information about mediation and the Civil and Family Rosters. Details about the Child Protection Mediation Program Roster were also distributed in this year's campaign.

Listings purchased for Roster members in the *Lawyers Directory 2005*: For the fourth year in a row, the Society has purchased a listing for individual Roster members in the Canadian Bar Association's (BC Branch) *Lawyers Directory*. Every member admitted to the Civil and Family Rosters prior to July 2004 will have their name, community of residence, phone number, fax number and e-mail address appear in the publication (provided the member has agreed to make these contact points "public").

The listings will appear in both the hard copy and on-line version of the Directory, in the "Professional Services" section. The cost of being included in the *Lawyers Directory* for individual mediators is normally \$40 plus G.S.T., per listing.

This year, the Society also offered interested Roster members the option of purchasing a "live" e-mail link for their listing in the on-line version of the Directory at a discounted rate. The usual cost for such e-mail links is \$40.00. Roster members were able to purchase the enhancement through the Society at a cost of \$20.00.

Listings and Advertisements in *Provincial Directory Cross-Canada*: The publishers of *Provincial Directory Cross-Canada* included 21 complimentary listings and 4 complimentary advertisements about the Society in the Spring/Summer 2004 edition of the directory. The publication is distributed to lawyers, courthouses, legal support service companies, and other related businesses across the country.

For the past year, the publishers of the directory have also included information about the Society in their website's searchable database. The website is located at: <http://www.processserverscanada.com>

The Society gratefully acknowledges the generosity of Joan Bennett of Karma Publications, publisher of *Provincial Directory Cross-Canada*.

Thank you, Coline Neilson: The Society bid a fond farewell to Coline Neilson in July 2004. Coline, who provided part-time support services to the Roster Administrator, retired to enjoy time with her family. The Board of Directors and Roster Administrator thank Coline for all her hard work over the past one-and-a-half years. ✍