PEER REVIEW

Commentary and information on issues affecting professional regulation and tribunal practice in British Columbia

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COMPLAINT RESOLUTION

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This first issue of Peer Review contains a feature article, which discusses the use of alternative resolution processes for the management and disposition of complaints against professionals. It includes a brief checklist of critical points to be considered in establishing a structured mediation process.

Resolving complaints without a Hearing: Issues and Opportunities

Hearings are very costly, are often of uncertain outcome and may end in appeals or judicial review, not to mention dissatisfied Complainants. For these reasons among others, many self-regulating professional bodies have begun to seek ways to reduce hearing costs and arrive at more certain outcomes in the disposition of complaints. The alternative to adversarial hearings that is gaining favour among professional organizations is, of course, alternative dispute (complaint) resolution. It is noteworthy, for example, that the R.N.A.B.C. has changed the title and function of its "Hearings Coordinator" to "Complaint Resolution Consultant", signaling its readiness to give priority to non-adversarial approaches to complaint resolution.

Alternative complaint resolution is a term which describes a process which can run the gamut from informal negotiations to structured mediation or mediation in combination with some form of arbitration. Regulatory bodies still have to be aware to accommodate alternative, non-adversarial approaches to complaint resolution within the statutory framework of their profession. Unfortunately, there is little in these statutes which expressly supports alternative approaches to

complaint resolution. Section 36 of the *Health Professions Act,* however, does offer the opportunity for "undertakings" or "consents". The "undertaking" or "consent" could result from a negotiated or mediated process. An additional challenge in adopting these new approaches is to ensure that the statutory duty to protect the public is not only well served but is also perceived as such by the community.

Who are the parties?

One of the first issues for consideration is to be clear about the identification of the parties. The *Health Professions Act,* R.S.B.C. 1996, Ch. 183, section 38(2), for example, affords a Complainant the status of a party to the proceedings. However, even in a case such as this, where the legislation affords the Complainant the status of "party", this cannot mean that the Complainant can settle the complaint without reference to the professional's governing body.

Uncertainty about the role of the Complainant in the dispute resolution process can create considerable complexity. The complexity is compounded when the Complainant is represented by counsel. The professional organization therefore has to be careful not only in the management of the legal issues which can arise in this context, but also in the management of the nature and extent of the Complainant's involvement in the overall process.

Framing the issues for resolution

It remains the responsibility of the governing body to frame the complaint in accordance with its own particular jurisdiction by identifying those ethical and practice considerations, which are raised by the nature of the complaint. Clearly, the presenting issues are not necessarily as set out in the complaint itself. Complainants are not usually conversant with the governing body's code of ethics and practice standards.

Pre-conditions

It should go without saying that, with few exceptions, none of these approaches should be embarked upon unless a written agreement has been entered into between the parties. The agreement should make it clear what aspects of the process are to be treated without prejudice. In addition, the "agreement to mediate" should address issues such as disclosure, ground rules for the conduct of the sessions and "immunity" for the mediator. This "immunity" would include an agreement not to subpoena the mediator or any notes of the mediator in any future proceedings.

Some professional bodies have adopted the approaches, and terminology, of the criminal law, to require Members to firstly "admit" their error before allowing them to be "diverted" from the hearing or formal discipline process. Pre-conditions are a matter for the professional body to determine. If pre-conditions are too onerous for the Member then the new process may not result in fewer hearings. At a minimum

the parties to the process have to be amenable to resolving the complaint in a non-adversarial manner.

Is the complaint "mediatable"?

A critical aspect of the process is deciding whether the complaint is "mediatable". This is less a concern about the feasibility of using a mediated or negotiated approach and more a concern about the larger public interest and perception issues that a complaint may present. The decision-making factors that enter here are very similar to those the regulatory body faces in determining whether or not a case should proceed to a hearing. The following questions may help in focussing the issues:

1. Do the facts of the case, primarily, present issues of incompetence, misconduct, impairment or "poor practice"?

2. How serious is the complaint? Does it clearly raise issues of protection of the public?

3. Would the outcome sought fall under the heading of "sanction", "deterrence", "remediation" or education"?

4. What outcome is most likely if the complaint went to a hearing and there was a finding adverse to the Member?

5. What interests will the Regulatory body need to address in resolving the complaint? How can these most effectively be addressed?

6. What is the time frame for resolution of this complaint?

7. Is the Member amenable to resolving the complaint without a hearing?

The nature of disputes

It is important to bear in mind that in shifting from adversarial to non-adversarial approaches that other factors will now assume a relevance that was not accommodated by the adversarial approach. In the adversarial context all that really matters are the "relevant legal facts". People's feelings, views, interests and needs usually are not relevant factors for consideration. It should be remembered that all disputes are a mixture of substantive, procedural and emotional issues. It should follow that those who are assigned the role of intervening to resolve complaints in a non-adversarial manner should have the skills and knowledge necessary to be able to effectively respond to all of the dimensions of the complaint.

Alternative Approaches

When speaking of alternative complaint resolution one tends to think only of mediation. There are other options, which may serve the interests of the Regulatory body just as well, depending on the circumstances.

What are the options?

There are various avenues that professional organizations can consider for the effective resolution of any complaint. No one of them has to be used independently or exclusively of the others. You will know from your own context and experience which complaints are most amenable to non-adversarial resolution.

I set out a brief description of these alternative approaches. In considering the applicability of any of these options for your own complaint process you obviously have to decide how, or whether, the particular approach can fit within your governing legislation:

Neutral fact finding. The parties to the conflict agree in advance to be bound by the results of a fact-finding report prepared by a neutral third party. The parties agree on the selection of the neutral third party.

Neutral evaluation. The parties jointly agree on the name of a neutral third party and that he or she will evaluate the complaint and provide an analysis and make findings with regards to whether or not there has been an ethical breach or otherwise on the part of the professional. The results of a third party neutral evaluation can be used in various ways. The parties can agree to be bound by the neutral evaluation and act in accordance with the neutral evaluator's findings. The findings could also form the basis for a complaint resolution agreement.

Negotiation. The parties agree to enter structured and time delimited negotiations in order to achieve resolution.

Mediation. The parties agree to the involvement of a neutral third party who either assists in the management of the negotiations or conducts a structured mediation session.

Med-arb. The parties agree to the involvement of a neutral third party who acts, initially as a mediator. Failing resolution of the complaint within the time-frame agreed upon for mediation, the parties agree that the mediator may now arbitrate the complaint relying upon information disclosed during the mediation process.

Based on the information now before the "arbitrator" the parties agree that the arbitrator may either make a binding decision, which depending on the particular statutory framework, would be ratified by the appropriate body, or provide written recommendations to all parties concerning the resolution of the complaint.

Mini-hearing. The parties agree to reduce the complaint to one or two issues and limit the hearing to calling evidence and deciding those issues alone, which issues would be determinative of the case.

Intervention for alternative complaint resolution can occur at any point along the complaint management continuum.

If the complaint does not appear to be amenable to immediate non-adversarial resolution there are various stages in the process when that issue can be revisited. These stages can include after issuing of the citation or hearing notice, disclosure, pre-hearing conferences, or even before the conclusion of the hearing.

Entry-Point Mediation

One of the most effective points of intervention is right at the beginning of the process, before positions have hardened or steps have been taken which may result in escalation of the conflict. Entry-point mediation is an attempt to resolve the complaint as soon as it is filed with the regulatory body. Since many complaints arise from a failure to communicate adequately and respectfully these are amenable to early resolution, particularly if an apology is made.

Complaints which involve no serious issues related to public protection or reputation of the profession and where the Respondent has no previous complaint history may be amenable to entry-point mediation.

The procedure may look something like this:

1. The Registrar, or his or her designate, contacts each party to attempt resolution over the telephone.

2. If telephone resolution is not possible then the Registrar, or his or her designate, arranges a meeting with the Complainant and the Respondent separately in order to attempt to arrive at settlement of the issues. These meetings are conducted on a "without prejudice" basis. There should be some written record of this agreement between the regulatory body and the Complainant and the Respondent.

3. If resolution is not possible, after the Registrar or his or her designate has met with both Respondent and Complainant, then the matter is referred to a formal mediation process involving a third party neutral with the consent of the Respondent and the Complainant.

4. Resolution of the matter takes the form of written agreement between the Regulatory body and the Respondent and is "signed off" by the Complainant. The Inquiry Committee, or its equivalent agrees to the terms of the agreement.

The Agreement

Any agreement that results from a negotiation or mediation should be between the regulatory body and the Member. Depending on the stage at which resolution of the complaint is achieved, this agreement should be in writing. One way of enabling the involvement of the Complainant in this process, is to provide a place at the end of the agreement, perhaps in a separate brief document, in which the Complainant can acknowledge having reviewed the agreement and is personally satisfied with the resolution of the complaint.

While this "signing off" process is largely symbolic, its value should not be underestimated as it may assist in bringing "full closure" to the issues of the complaint. There seems little point, for example, in having the complaint resolved to the satisfaction of the regulatory body and the Member only to have to spend another year dealing with complaints now made by a dissatisfied Complainant against the regulatory body to the Ombudsman, other public officials, or the media.

Language of the agreement should be enforceable

It is a frustrating waste of effort to arrive at an agreement that satisfies the requirements and interests of all those involved only to discover later that the terms of the agreement cannot be enforced. Therefore, the agreement has to be drafted so as to ensure enforceability and, from the professional organization's point of view, contains provisions to facilitate a short and prompt hearing in the event of its breach.

Mediation and Justice

One of the concerns about the use of mediation relates to the issue of justice and the perception that somehow a lesser form of justice is afforded by mediation. This concern may stem from the apparent lack of legal rules and principles that govern the proceedings and their outcome. This concern, while valid on its face, bears greater scrutiny.

In the professional regulation context the legal rules and principles that are brought to bear in the mediation context are those which are found in the profession's governing legislation. Any complaint resolution should therefore be "principled" in the sense that the agreement reflects consideration of the relevant governing ethical and practice standards.

MEDIATION CHECK POINTS

Here are some check points which may be of assistance:

Before instituting a mediation process for your profession obtain legal advice about the status of any resulting mediated agreement.

Have a written agreement in advance of the mediation that covers all aspects of the mediation.

Place a time limit on the mediation and strictly adhere to it.

Ensure the confidentiality of the process.

Ensure mediator "immunity".

Ensure that any final agreement is consistent with the procedural requirements of your governing legislation.
