The Law Society of British Columbia

QUALIFICATIONS FOR LAWYERS ACTING AS ARBITRATORS, MEDIATORS, AND/OR PARENTING COORDINATORS IN FAMILY LAW MATTERS

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Family Law Task Force

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TASK FORCE PROCESS

The Family Law Task Force was formed in 2006 with a mandate to develop best practice guidelines for lawyers practicing family law. While discharging its work on the original mandate, the Task Force was charged with a series of additional responsibilities, including developing qualifications for lawyers acting as family law arbitrators.

The Ministry of Justice[1] approached the Law Society about whether it would be prepared to establish qualifications for lawyers acting as family law arbitrators. The reason for this request stemmed from the Ministry's efforts to modernize the *Family Relations Act.* Bill 16, the *Family Law Act*[2] embodies several principles, including a culture shift to try and resolve more family disputes out of the court system when appropriate. In order to ensure the public is properly protected, the issue of qualifications for family law arbitrators needed to be addressed.

As its work progressed the Task Force realized it also needed to consider qualifications for lawyers acting as family law mediators and/or parenting coordinators (qualifications for lawyers acting as family law arbitrators, family law mediators, and parenting coordinators are collectively referred to as "Family Law ADR Qualifications"). At the July 13, 2012 meeting the benchers approved the following, amended, mandate for the Task Force:

> *The mandate of the Family Law Task Force is to develop for recommendation to the Benchers practice standards for lawyers who are acting as family law arbitrators, family law mediators, and/or parenting coordinators.*[3]

In addition to consultations with staff at the Ministry of Justice, the Task Force sought input from other Law Societies in Canada to ascertain the approach in each province of regulating lawyers acting as family dispute resolution professionals.

The Task Force consulted with the following external organizations and individuals: Glen Bell (of

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[1] At that time it was the Ministry of the Attorney General.
[2] The *Act* comes into force March 18, 2013.
[3] Although the mandate used the language "practice standards" what was meant is minimum entry level requirements for a lawyer to engage in family law arbitration, family law mediation, and/or parenting coordination. It does not refer to best practice guidelines or rules necessary for performing the work on a day to day basis.

the British Columbia Arbitration and Mediation Institute), Trudi Brown, Q.C., Lawrence Kahn, Q.C.; Peter Altridge and Renee Collins Goult (of Mediate BC); John-Paul Boyd, Craig Neville and Stephanie Fabbro (of BC Parenting Coordinators' Roster Society); Phillip Epstein, Q.C. and Lorne Wolfson.

The Task Force also consulted with various Law Society staff, committees and task forces, including: Ralston Alexander, Q.C. (Chair), John Hunter, Q.C., Jerry McHale, Q.C. and Jeff Hoskins, Q.C. (in their capacity as members and staff of the ADR Task Force); Jan Lindsay, Q.C. (Chair), Kensi Gounden and John Nalleweg (in their capacity as Chair and staff supporting the Practice Standards Committee); Thelma O'Grady, Q.C. (Chair) and Alan Treleaven (in their capacity as Chair and staff supporting the Lawyer Education Advisory Committee); Andrea Brownstone, Manager, Investigations, Monitoring and Enforcement; Michael Lucas, Manager of Policy and Legal Services; and Lesley Small, Manger Credentials and Licensing.

From the inception of this project the Task Force has enjoyed very helpful discussions with staff at the Ministry of Justice, including Nancy Carter, Darryl Hrenyk and Jodi Roach. The family law reforms that the government has undertaken are the product of many years of hard work and throughout this process the policy group at the Ministry of Justice has engaged in comprehensive and meaningful consultation. The Task Force commends them for their efforts and their openness to input along the way.

The constituency of the Family Law Task Force has changed since its inception. The Task Force gratefully acknowledges the participation of former bencher, The Honourable Judge Patricia Bond,[4] and life-bencher Patricia Schmit, Q.C. for their contributions to the development of this topic.

EXECUTIVE SUMMMARY

In 2009 the Law Society was approached by the Ministry of the Attorney General to determine whether the Law Society would create Family Law ADR Qualifications.[5] The request formed part

[4] Judge Bond's contributions pre-date her appointment to the Provincial Court of British Columbia.

of the government's reform of the family law system in British Columbia, which included modernizing the *Family Relations Act* with Bill 16, the *Family Law Act.* The *Family Law Act* will allow for regulations to be established for family dispute resolution professionals.

This report provides an analysis of what the appropriate Family Law ADR Qualifications are, in light of the government reform in the area of family law. The report recommends that before lawyers are permitted to act as family law arbitrators, family law mediators and/or parenting coordinators they satisfy certain criteria. The criteria in each area include specific alternative dispute resolution skills training, training in recognizing and dealing with family violence, and targeted continuing professional development. In addition, the report recommends experience requirements for family law arbitrators and parenting coordinators, while eliminating the existing three year experience requirement for family law mediators under Law Society Rules, rule 3-20. The report recommends that the oversight function of Family Law ADR Qualifications be moved from the Practice Standards Committee to the Credentials Committee, and that rule 3-20 be amended to reflect that change. In addition it is recommended that Law Society Rules, rule 3-20, be expanded to include family law arbitration and parenting coordination.

[5] While the initial request related to family law arbitration, the topic expanded to include mediation and parenting coordination.

RECOMMENDATIONS

Recommendation 1: Lawyers acting as family law arbitrators must meet the following qualifications:

1. 10 years of current practice experience, or experience as a judge or master;

2. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the arbitral function in a fair and competent manner;

3. A minimum of 40 hours approved training in how to conduct an arbitration. Course work should include:

    a. Theory and skills training;

    b. Drafting;

    c. How to conduct an arbitration;

    d. The statutory framework of arbitration;

    e. Family dynamics;

    f. Administrative law principles governing arbitrations.

4. A minimum of 14 hours of approved training in family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process;

5. Relevant courses taken to meet the current rule 3-20 requirement and any relevant courses taken since qualifying count towards these requirements

Recommendation 2.1: The Task Force recommends that the current approved course requirements for lawyers acting as family law mediators be amended to require the following:

1. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the mediatory function in a fair and competent manner;

2. A minimum of 80 hours of approved mediation skills training. Course work should include:

    a. Theory and skills training;

    b. Drafting;

    c. How to conduct a mediation;

    d. The statutory framework of mediation;

    e. Family dynamics;

    f. A minimum of 10 hours of role playing scenarios.

3. A minimum of 14 hours of approved training in screening for family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process.

Recommendation 2.2: Abolish the Law Society Rules, rule 3-20(1)(a) requiring three years of legal practice to qualify as a family law mediator.

Recommendation 2.3: The Task Force recommends the following approach to grand parenting existing family law mediators:

1. Lawyers who, as of the date the new rule 3-20 is approved, meet the family law mediator requirements under the current rule 3-20 will have until January 1, 2014 to ensure they meet the training requirements for family law mediators recommended in this report;

2. Courses taken to meet the current rule 3-20 requirement and any courses taken since qualifying count towards these requirements;

3. As of the adoption of this report, all lawyers who wish to qualify in the first instance to act as family law mediators must meet the requirements contained in this report;

4. Staff will determine how to implement the reporting requirement and the Law Society will provide notice to the profession regarding the required standards and how to report compliance.

Recommendation 3: The Task Force recommends that lawyers acting as parenting coordinators must meet the following qualifications:

1. 10 years of current practice experience, or experience as a judge or master;

2. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the parenting coordination function in a fair and competent manner. This family law experience must include considerable experience dealing with high conflict families with children;

3. A minimum of 40 hours of approved parenting coordination training, which must include:

    a. Parenting coordination skills training and theory;

    b. Dealing with high conflict families and individuals;

    c. Child development, interviewing children, and the effects of separation and divorce on children;

    d. The effects of separation and divorce on adults.

4. The minimum approved training qualifications of a family law arbitrator, which include:

    a. A minimum of 40 hours training in how to conduct an arbitration. Course work should include:

        i. Theory and skills training;

        ii. Drafting;

iii. How to conduct an arbitration;

iv. The statutory framework of arbitration;

v. Family dynamics;

vi. Administrative law principles governing arbitrations.

5. The minimum approved training qualifications of a family law mediator, which include:

    a. A minimum of 80 hours of mediation skills training. Course work should include:

        i. Theory and skills training;

        ii. Drafting;

        iii. How to conduct a mediation;

        iv. The statutory framework of mediation;

        v. Family dynamics;

        vi. A minimum of 10 hours of role playing scenarios.

6. A minimum of 14 hours of approved training in screening for family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process;

7. Relevant courses taken to meet the current rule 3-20 requirement and any relevant courses taken since qualifying count towards these requirements

Recommendation 4: The Credentials Committee can set criteria for approved courses for lawyers acting as family law arbitrators, family law mediators, or parenting coordinators. In exercising its authority to assess courses the Credentials Committee should be guided by the substantive minimum requirements set out above.

Recommendation 5: The Task Force recommends that the Law Society should alert lawyers of

the obligation in s. 8 of the Family Law Act to screen for family violence. Lawyers who will be "advising a party in relation to a family law dispute" should be strongly encouraged to take courses in screening for family violence.

Recommendation 6: The Task Force recommends that lawyers acting as family law arbitrators, family law mediators, and/or parenting coordinators be required to record a minimum of six hours of continuing professional development per year in dispute resolution skills training and/or theory.

Recommendation 7: The Task Force recommends that the Act and Rules Subcommittee assist the benchers in seeking a consequential amendment to the Legal Profession Act to make it clear that the Law Society may make rules for the governing of lawyers acting as alternative dispute resolution professionals.

Recommendation 8: The Task Force recommends that the Ethics Committee be asked to develop for inclusion in the BC Code the requirements for written agreements for lawyers acting as family law arbitrators, mediators and/or parenting coordinators. These provisions will include the present protections regarding avoidance of conflicts of interest, recommendations regarding the need for independent legal advice, and the requirement for a written agreement as are now set out in Appendix 2 in relation to lawyers acting as mediators.

An additional point to be added to this new provision is that if a lawyer's role changes from one where the lawyer acts as a facilitator of consensual resolution to one where the lawyer acts as a decision maker, the lawyer must clearly specify in writing the nature of the change in function and when the lawyer will begin to exercise the change. The written agreement between the lawyer and the parties must confirm that such changes in function will be specified in writing. For example: a lawyer may conduct a process designed to be a mediation-arbitration. When the mediation portion of the process fails, the lawyer puts on the arbitrator hat and the lawyer should confirm that shift in role in writing.

The Ethics Committee should attempt to have the amendments to the BC Code in place by March 18, 2013.

BACKGROUND AND FORMAT OF THIS REPORT

The Law Society has a history of developing policy with respect to alternative dispute resolution. In 1984 the benchers established a series of rules for lawyers acting as family law mediators. Those rules are embodied in Law Society Rules, rule 3-20. Over the years the Practice Standards Committee, with the assistance of the Family Law Mediation Subgroup, has reviewed applications of lawyers seeking standing as family law mediators, making rulings on the approved course of studies and assessing equivalencies. More recently, the Alternative Dispute Resolution Task Force produced a consultation paper in May 2007 that contains 38 recommendations regarding ADR.[6]

In this report the Family Law Task Force analyzes and makes recommendations regarding Family Law ADR Qualifications. The report starts with a general overview of criteria used by the Task Force and then explores in separate sections the question of the appropriate qualifications for family law arbitration, family law mediation and parenting coordination.

THE ISSUE

The government of British Columbia is in the process of reforming the family law justice system. The reforms include modernizing the *Family Relations Act* with the new *Family Law Act*, which comes into force March 18, 2013. The reforms embody a policy shift designed, amongst other things, to diffuse the adversarial nature of family law disputes and to see more family law disputes resolved out of court. The *Family Law Act* allows the government to set education and training requirements for family dispute resolution professionals by way of regulation.[7] The government will establish qualifications for non-lawyer family dispute resolution professionals.

As part of the object of fostering greater use of alternative dispute resolution, the Ministry of the Attorney General requested that the Law Society consider developing qualifications for lawyers acting as family law arbitrators. As noted, the scope of the project grew to include consideration of family law mediation and parenting coordination. The issue considered in this report is whether the Law Society should create Family Law ADR Qualifications, and if qualifications are to be

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[6] Available at http://www.lawsociety.bc.ca/page.cfm?cid=99&t=Committee-and-Task-Force-Reports ("ADR Task Force Report").
[7] Section 245(1)(c).

created, what they should be.

EVALUATION CRITERIA

In evaluating the merit of implementing Family Law ADR Qualifications there are a range of factors the benchers should consider. This section of the report details evaluation criteria considered by the Task Force.

Public Interest

The main question the Task Force considered is whether Family Law ADR Qualifications are in the public interest.

In some respects, family law arbitration and parenting coordination are still in their infancy in British Columbia. This provides an opportunity to consider qualifications from the view of what should be built, rather than what needs to be fixed, in order to protect the public interest in the administration of justice. With respect to family law mediation, in 1984 the Law Society was the first law society to establish rules relating to family law mediation. Family law mediation has evolved considerably over the past 28 years, and in light of the impending legislative change and general reform in family law, it is time to review the Law Society's qualifications and consider whether they remain appropriate.

When the public retains a professional they expect several things including that the professional is competent to provide the services that are offered. Lawyers are trained through law school, admission programs, and articles, to develop base line competencies to practice law. Generally, this training does not teach one how to perform ADR functions, however. So while experience in practicing law can be important, it is an insufficient criteria on which to ensure a lawyer possesses certain essential information to conduct family law arbitrations or mediations or to act as a parenting coordinator. The public interest suggests that additional, targeted training is necessary.

When the benchers adopted qualifications for lawyers acting as family law mediators they recognized that mediation differs from the traditional practice of law, and that family law

mediation in particular requires discrete qualifications in order to protect the public. Although arbitration and parenting coordination differ from mediation, there is value in being consistent with respect to the need for qualifications to better protect the public.

Although the focus of the Task Force was to consider Family Law ADR Qualifications for lawyers, it believes it is important to make some observations about qualifications for non-lawyer family law arbitrators.

The Task Force understands that the government will consider what education and training requirements non-lawyer family law dispute resolution professionals must possess. The Task Force views this as important. The public interest factors that justify the need for standards for lawyers acting as family law arbitrators apply as much, if not more so, to non-lawyers. Non-lawyer dispute resolution professionals are not uniformly regulated[8] or covered by mandatory insurance. While some individuals will possess backgrounds that are relevant to matters that can arise in family disputes, others will not. As such, it is critically important that non-lawyer dispute resolution professionals are subject to rigorous education and training requirements. The government may also wish to consider what dispute resolution processes are available to people who are not pleased with the competence of their non-lawyer dispute resolution professional, including requiring membership in certain organizations.

The Task Force also understands that the British Columbia government may be precluded, to some degree, by the Agreement on Internal Trade ("AIT"), to impose such restrictions on non-lawyer arbitrators when similar restrictions do not exist in other provinces. It encourages the government to resolve any ambiguity regarding application of the AIT with its other signatories prior to March 18, 2013.

Cost and Benefit

Because the Law Society will investigate complaints against lawyers acting as dispute resolution

[8] While family law arbitrators in Ontario are required to meet the Ministry of the Attorney General standards, there is not a dedicated regulatory body for which mandatory membership is required. It is also possible to obtain membership in organizations such as Mediate BC and Mediation Canada, which would require compliance with membership standards of those organizations.

professionals, the presence of qualifications should not increase operational costs of the Law Society. The analysis of complaints may vary in the presence of a set of rules that establish qualifications (e.g. if a lawyer was acting as a family law mediator without having met the requirements), but the extent to which that would affect budgeting (if at all) is difficult to quantify.

Whereas the issue of potential costs is ambiguous, the Task Force is of the view that the benefits that flow from qualifications are more tangible and therefore more determinative of the value of adopting qualifications. The Task Force raised the general issue of regulatory oversight of lawyers performing ADR roles and understands that staff in the Professional Regulation and the Policy and Legal Services Departments will review the issue. That topic lies outside the Task Force's general mandate, however, so it is raised but not explored in this report.

Public Relations

The Task Force is of the view that establishing Family Law ADR Qualifications will have positive public relations implications. This is somewhat speculative, as it may be the case that the public assumes the Law Society already sets such requirements. It is also possible that as family law ADR continues to develop, particularly where there are both lawyers and non-lawyers occupying the field, the public will expect lawyers to be held to entry requirements that are as high (if not higher) than the entry requirements of non-lawyer family dispute resolution professionals. The Task Force is of the view that positive public relations is a potential benefit, but the more important question is whether it is in the public interest to set Family Law ADR Qualifications.

Government Relations

The Task Force anticipates adopting Family Law ADR Qualifications will result in positive government relations. The government has invested considerable time and resources in developing reforms in the area of family law, and has identified the need for entry level qualifications. The benchers have identified the importance of finding ways to work with government, when and as appropriate, to address matters of shared concern. The Task Force is of the view that the recommendations in this report are responsive to a government need and are consistent with Initiative 3-1(a) of the 2012-2014 Strategic Plan: *Identify, establish and build on relationships with the Ministry of the Attorney General and other government ministries, the Courts, and non-*

governmental stakeholders.

Program Impacts

Developing Family Law ADR Qualifications will impact existing departments and programs. The most likely impact is on the Credentials Department. This is predicated on the benchers accepting that the oversight of Law Society Rules, rule 3-20 more properly rests with the Credentials Committee than the Practice Standards Committee (as discussed later in this report). Staff will have to develop systems and processes to implement these changes. As with any such systems changes the impact will likely be greater at the beginning of the implementation process and eventually become the normal part of operations.

It was recognized that if the Practice Standards Committee's jurisdiction to consider applications for standing as a family law mediator were expanded to include lawyers acting as family law arbitrators and parenting coordinators that the Practice Standards Committee would see an increased workload. At present the Practice Standards Committee receives assistance from the Family Law Mediation Subcommittee regarding applications for an exemption to the entrance requirements under rule 3-20. If family law arbitration and parenting coordination are included, then it would be necessary to either reconstitute the Family Law Mediation Subcommittee to ensure it also had expertise in the areas of family law arbitration and parenting coordination, or to create additional subgroups. An alternative is that the Credentials Committee might establish the general criteria and leave the operational application to staff to administer, similar to the CPD process. This would require the Act and Rules Subcommittee to structure a revised rule 3-20 to authorize such an approach.

During this discussion consideration was also given to the feasibility of requiring family law experience as a qualification for acting as a family law arbitrator and/or parenting coordinator. The Task Force considered a range of options, including a certain amount of hours per year or a percentage of practice requirement (discussed in more detail later). A concern about the practical application of such a requirement arose and it was strongly suggested that it would be administratively impractical to review applications and determine how much family law experience was enough (both qualitatively and quantitatively). The preferred approaches are set

out in the sections on arbitration and parenting coordination.

The consultation ultimately led to a wider discussion amongst staff and managers about shifting the administration function from the Practice Standards Committee to the Credentials Committee because the qualifications are entry level requirements and not "practice standards" *per se.*

Legality

In analyzing the issue of Family Law ADR Qualifications, the legal issue the Task Force identified is the potential application of the AIT to the establishment of standards.

The AIT is an agreement signed by the provinces and the federal government to eliminate barriers to the free flow of goods and services and people throughout Canada. The AIT limits the ability to impose "material additional training, experience, examinations or assessments as part of the certification process." In order to impose such requirements, a party would have to have evidence that an individual who is certified in another province "lacks a critical skill, area of knowledge or ability required to perform" those services in British Columbia.[9]

The Task Force was concerned about proceeding to develop Family Law ADR Qualifications that differ materially from standards in other provinces, without first getting a sense of how the Ministry of the Attorney General views the application of the AIT to the issue of qualifications for lawyers acting as family law arbitrators.

The feedback the Task Force received was that it should not be a problem for the Law Society to establish Family Law ADR Qualifications that varied materially from requirements in other provinces.

Equity and Diversity

The Task Force does not believe the creation of Family Law ADR Qualifications directly implicate the Law Society's Equity and Diversity initiatives. That having been said, the Law Society should remain mindful of whether the qualifications have the unintended consequence of creating

[9] See, AIT Article 708.

systemic barriers to equal participation by lawyers based on prohibited grounds of discrimination. In particular it is important that the qualifications do not create barriers to equal participation by women lawyers, members of minority cultural groups and Aboriginal lawyers.

The Task Force consulted with Susanna Tam (former Equity and Diversity staff lawyer). With respect to education in family dynamics and domestic violence, Ms. Tam noted the importance of ensuring such training was also sensitive to cultural factors, in particular at the intersection of culture and domestic violence. Education service providers should be mindful to ensure their training includes current thinking regarding minority groups and Aboriginals with respect to family dynamics and domestic violence.

Transparency and Disclosure

The proposed Family Law ADR Qualifications are not expected to affect the Law Society's approach to transparency and disclosure.

OPTIONS

There are two main options available to the benchers:

1. Adopt the recommended qualifications in this report;

2. Suggest alternative qualifications for adoption;

ANALYSIS OF THE ISSUE AND OPTIONS: FAMILY LAW ARBITRATION

The Task Force makes the following recommendations regarding lawyers acting as family law arbitrators:

Recommendation 1: Lawyers acting as family law arbitrators must meet the following

qualifications:

1. 10 years of current practice experience, or experience as a judge or master;

2. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the arbitral function in a fair and competent manner;

3. A minimum of 40 hours approved training in how to conduct an arbitration. Course work should include:

    a. Theory and skills training;

    b. Drafting;

    c. How to conduct an arbitration;

    d. The statutory framework of arbitration;

    e. Family dynamics;

    f. Administrative law principles governing arbitrations.

4. A minimum of 14 hours of approved training in family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process;

5. Relevant courses taken to meet the current rule 3-20 requirement and any relevant courses taken since qualifying count towards these requirements

An overview of family law arbitration

There are several ways to view the issue of entry level qualifications for lawyers acting as family law arbitrators.

The Task Force started considering this issue by acknowledging that it was the intention of the government to modernize the *Family Relations Act.* It was understood that a likely consequence of the legislative reform is that a regulatory framework for individuals acting as family dispute

resolution professionals would be developed. Because the Law Society regulates an independent legal profession, the initial analysis led the Task Force to the conclusion that the Law Society is the appropriate organization to determine whether Family Law ADR Qualifications are required and, if they are necessary, to set those qualifications.

The practice of family law arbitration is largely unregulated. By this the Task Force means that there is not a dedicated regulatory body that oversees and sets qualifications for family law arbitrators. In the absence of such a body, there is no regulated baseline that establishes the *indicia* of competency, nor is there a mandatory insurance program. The cost and the risks associated with picking the wrong arbitrator are borne solely by the public and in the case of family law disputes, often by people who are facing considerable emotional and economic hardship. Consequently, members of the public cannot turn to a single source to resolve problems with their arbitrator.

The courts have jurisdiction to review arbitral decisions. Theoretically, the market (if operating efficiently) can lead to competent arbitrators getting work while weeding out less competent arbitrators.[10] Organizations that set requirements for *certified* arbitrators can establish coursework and criteria for people who wish to hold themselves out as *certified* and meet a higher standard. The development of voluntary certification requirements has the potential to influence market forces and over time become the *de facto* requirements.

The issue of regulatory oversight is complicated by the fact that the Law Society will regulate lawyers acting as family law arbitrators, whereas non-lawyer family law arbitrators are not necessarily regulated. There are a range of potential consequences to this.

If the Law Society establishes qualifications for lawyers acting as family law arbitrators, such qualifications will provide guidelines for the profession to assist them in discharging their arbitral function in a competent manner. This will be beneficial to both the public and the legal profession.

Qualifications will allow the public to ensure lawyer-arbitrators they choose for family disputes

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[10] If the resolution of family disputes is eventually going to play out with greater frequency outside the court room, however, the Task Force suggests that greater certainty of public protection is desirable.

have met criteria designed to establish entrance level competency. Qualifications will also allow the public to better compare the services of non-lawyer arbitrators and lawyer-arbitrators. The presence of qualifications also reduces the chance of confusion because the Law Society sets requirements for lawyers acting as family law mediators; the absence of requirements for lawyers acting as family law arbitrators might appear inconsistent.

Family law is a somewhat unique area of law, in which several areas of law intersect. Family law disputes can involve issues of property, family dynamics and violence, and require consideration of the best interests of children. Family law disputes are often emotionally charged. Having specialized training can assist lawyers to ensure they have the proper tools to act as arbitrators of family disputes. In addition, not all lawyers will come to family law arbitration with the same background, so having a level of uniform training would ensure that all lawyers acting as family law arbitrators have been exposed to certain concepts.

The presence of qualifications also assists government in developing qualifications for non-lawyer arbitrators. This has several potential benefits. It may facilitate positive government relations by assisting the government in developing policy in an important area of public need. It can also have a positive impact on the public perception of the administration of justice, which is a matter of importance to government and the Law Society.

If family law arbitration is to function as an alternative to court proceedings, it needs to deliver on more than the promise of lower cost – it must also be delivered by competent professionals who are accountable for the quality of their services. The public will not necessarily distinguish the discrete area of family law arbitration from the broader justice system context. As such, public confidence in the system as a whole can be positively or negatively affected by the public perception of family law arbitrators.

As a starting point the Task Force explored the requirements for lawyers acting as family law mediators.[11] Before a lawyer can practice as a family law mediator he or she must meet the

[11] Law Society Rules, rule 3-20. The analysis of family law mediation is set out in greater detail in the next section of the report.

education and experience requirements of rule 3-20. The Task Force viewed this rule as informative but not binding on the approach to take with respect to arbitration. Instead the Task Force asked the following questions:

1. Should there be an experience requirement for lawyers wishing to act as family law arbitrators? If yes, how much and why?

2. Should there be an educational requirement for lawyers wishing to act as family law arbitrators? If yes, what and why?

A. Should there be an experience requirement for lawyers wishing to act as family law arbitrators? If yes, how much and why?

Determining whether to apply an experience requirement was a difficult part of the Task Force's analysis. Although there is a 3 year practice requirement for lawyers acting as family law mediators, there have been calls in the mediation community for the elimination of that requirement.[12] Some will argue that one develops competency as a mediator or arbitrator through carrying out mediations and arbitrations. It is suggested that engaging in the regular practice of law does not, through the mere passage of time, imbue a lawyer with the necessary competencies of a mediator or arbitrator. Others will argue that the experience of practicing law will provide a lawyer a greater understanding of procedural and substantive law that may be relevant to taking on an arbitral role. There is an analytic discipline that takes time to develop and, given arbitrators' responsibilities, experience provides an additional safeguard for protecting the public.

The Task Force observes that other Law Societies do not set special qualification requirements for lawyers acting as family law arbitrators. The Task Force consulted with the discipline administrators at other Law Societies and was advised that complaints against lawyers acting as arbitrators would likely be dealt with through the lens of conduct unbecoming a lawyer and that

[12] Including the Law Society's ADR Task Force. This is discussed in more detail in the section on family law mediators.

there were not special requirements.

The absence of qualifications in other Law Societies is not determinative of whether qualifications are appropriate in British Columbia. In some instances, such as unbundling of legal services, the Law Society of British Columbia has led the call for reform. In other instances the Law Society has embraced approaches taken in other provinces.

The arguments in favour of an experience requirement include:

1. Arbitration requires skills similar to acting as a judicial officer. Judges require 10 years of experience as a lawyer before being able to sit as a judge.[13] If family law arbitration is to function as a viable alternative to court, arbitrators should face similar requirements;

2. An experience requirement allows time for a lawyer to develop legal skills;

3. Specific family law experience is also desirable, given the complex issues that can arise in family law disputes as well as the high value society places on protection of children;

4. With experience comes a heightened understanding of professional ethics and judgment.

The arguments against an experience requirement include:

1. Just because a lawyer has practiced for a certain number of years it does not mean the lawyer has developed competencies relevant to family law or administrative law. A lawyer who spends five years solely practicing family law may be better suited from an experience perspective to act as a family law arbitrator than a lawyer with 10 years experience who merely dabbles in family law.

2. An experience requirement restricts the pool of available lawyer arbitrators. The restricted pool may have several unintended consequences, including:

   a. The potential to drive up the cost of the services;

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[13] *Judges Act*, R.S.C. 1985, c. J-1, s. 4.

b. The potential to make the pool of available family law arbitrators less diverse (to the extent women and lawyers from minority groups might leave the profession before their 10th year of practice in greater numbers);

c. The restriction may create distortions between the market for lawyers acting as family law arbitrators and non-lawyers. A non-lawyer arbitrator cannot have an experience requirement, unless non-lawyer arbitrators are limited to defined categories of professionals. A potential consequence is that a much larger pool of non-lawyer arbitrators could exist, and it would be more difficult for lawyer arbitrators to offer competitive services with non-lawyer arbitrators, thereby limiting the public's choice of services.

3. The AIT might restrict the Law Society's ability to impose an experience requirement because an experience requirement leaves a lawyer with no proactive steps to develop competence as an arbitrator other than waiting for time to pass.[14]

4. Some lawyers who have practiced for less than 10 years may already be providing family law arbitration services, and the imposition of this requirement would adversely affect their practice.

5. With respect to requiring lawyers to have family law specific experience, if the requirement was set too high it could prevent lawyers who operate a general practice from participating. This might have unintended consequences, particularly in smaller communities where lawyers tend to have more diverse practices than their counterparts in large urban centres.

The Task Force considered recommending specific experience in family law and explored how such experience might be defined and measured. The Task Force considered recommending an hour requirement in family law spread out over five of the past seven years in order to provide flexibility to lawyers who were on parental leave and/or subject to a disability that prevented them from working full time. An alternative was to require a certain percentage of time dedicated to the

[14] Conversations with Ministry of Justice staff led to the conclusion that this was not likely a problem.

practice of family law. The more the Task Force discussed these concepts, the more concerned it became about the practical application of such measures. A real concern arose that the application and vetting process would get mired in an analysis of how much of a lawyer's practice was dedicated to the type of family law that would have likely exposed the lawyer to the relevant issues. Ultimately the Task Force preferred an approach similar to Chapter 3, Rule 1 of the *Professional Conduct Handbook* which requires:

> 1. With respect to each area of law in which a lawyer practices, he or she must acquire and maintain adequate:
>
>   a. Knowledge of the substantive law;
>
>   b. Knowledge of the practices and procedures by which that substantive law can be effectively applied.[15]

The Task Force recommends that family law experience be required but the mechanism for assessing it should be left to the individual lawyer to determine whether he or she possesses the adequate skills, knowledge and experience in family law to arbitrate disputes in a fair and competent manner.

On balance, the Task Force recommends an experience requirement for the following reasons:

1. Acting as an arbitrator should require similar experience requirements as acting as a judge;

2. To the extent an object of the new *Family Law Act* is to direct family disputes to settlement through processes outside the court, and arbitration is encouraged, it becomes important to ensure the quality of arbitrators is comparable to the quality of judges;

3. The public is unlikely to distinguish a lawyer as arbitrator from a lawyer as lawyer, and therefore incompetent lawyer arbitrators can reflect poorly on the legal profession as a whole and have an adverse impact on the public confidence in the administration of justice;

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[15] 1(c) refers to "skills to represent the client's interests effectively"

4. A lawyer acting as a family law arbitrator must be satisfied he or she has acquired sufficient knowledge, skills and experience relevant to family law to carry out the arbitral function in a fair and competent manner;

5. Public protection – on balance, decisions will be more skillful, balanced and of greater benefit to the public.

B. Should there be an educational requirement for lawyers wishing to act as family law arbitrators? If yes, what should the requirement be and why?

The Law Society does not set any special education requirements for lawyers acting as arbitrators. So the question of whether lawyers acting as family law arbitrators need special education required the Task Force to ask whether family law arbitration should be treated differently from commercial arbitration.

As a general proposition, once lawyers are called to the Bar the Law Society does not restrict areas of practice. The *Professional Conduct Handbook* flags the professional obligation of lawyers to be satisfied of their competence to take on matters, but no specialized training is required. There are some notable exceptions:

1. The small firm practice course. Lawyers who are entering a firm of four or fewer lawyers are required to take the small firm practice course.[16] The course is designed to assist small firm practitioners in setting up their practices in a manner that better serves the public. The course serves the dual purpose of protecting the public through targeted training, while helping lawyers identify the pitfalls and challenges that are prevalent in operating a small firm or sole practice;

[16] See Law Society Rules, rules 3-18.1 and 3-18.2.

2. Continuing professional development. The continuing professional development program requires each lawyer to take at least 12 hours of professional development each year, including at least 2 hours of ethics and professional responsibility;

3. Lawyers wishing to act as family law mediators are subject to the following course requirements:

   1.Completion of the five-day Family Law Mediation course of the Continuing Legal Education Society of BC (prior to 2009); or

   2.Completion of the Family Mediation Level I and Family Mediation Level II courses of the Continuing Legal Education Society of BC (starting 2009); or

   3.Completion of the following:

   (a) Mediation Level I at the Justice Institute, and

   (b) any one of the following Family Dynamics courses held at the Justice Institute:

   (i) CORR 605: Family Violence

   (ii) FAM 103: Effects of Separation and Divorce on Adults

   (iii) FAM 104: Effects of Separation and Divorce on Children,

   and

   (c) Day V of the Family Law Mediation Course (prior to 2009), or the Law Society requirements day of Family Mediation Level II (starting 2009), each provided by the Continuing Legal Education Society of BC.[17]

The Practice Standards Committee may allow a lawyer with special qualifications or experience to act as a family law mediator without the practice experience requirement.

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[17] Courses approved by the Practice Standards Committee April 2, 2009.

In the case of qualifications for lawyers acting as family law arbitrators, the Task Force believes qualifications are going to be developed so the real question is who should develop the requirements and what they should be. There are three main reasons the Task Force has come to this conclusion:

1. The Ministry of Justice asked the Law Society to consider developing qualifications for lawyers acting as family law arbitrators. The Ministry has expressed an intention to establish requirements for dispute resolution professionals. The Ministry has indicated it expects the Law Society to establish requirements that are consistent with the requirements that will be developed for non-lawyers.

2. In Ontario the Ministry of the Attorney General sets qualifications for family law arbitrators. The Ontario qualifications include a requirement that lawyers acting as arbitrators take 14 hours of training in screening for domestic violence and power imbalances.[18] Apart from the issue of whether the requirements in Ontario are adequate, the fact is that the government set the requirements for lawyers, rather than the Law Society of Upper Canada. As noted above, the Task Force is of the view the Law Society of British Columbia should set qualifications for lawyer arbitrators. While the benchers may reject the recommendation of the Task Force that such qualifications are desirable, it is possible the government would then feel obligated to set requirements. In light of this, the Task Force does not believe the option of maintaining the *status quo* is desirable.

3. Family law dispute resolution presents challenges that are either unique to family law or more prevalent and which require special sensitivities. These include: the heightened emotional nature of family disputes; the potential presence of children and the attendant concerns that arise in such circumstances; the potential existence of domestic violence and power dynamics in a family that can affect the proper resolution of a dispute. For much the same reason as the Law Society recognized special rules for family law

[18] See http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/training.asp. Non-lawyer family arbitrators must also complete 30 hours of training in Ontario family law.

mediation are justified, the Task Force believes that qualifications for family law arbitration are justified.

With respect to screening for domestic violence it is important to note that Bill 16 (the *Family Law Act*) establishes the following requirements for family dispute resolution professionals:

> 8 (1) A family dispute resolution professional consulted by a party to a family law dispute must assess, in accordance with the regulations, whether family violence may be present, and if it appears to the family dispute resolution professional that family violence is present, the extent to which the family violence may adversely affect
>
> (a) the safety of the party or a family member of that party, and
>
> (b) the ability of the party to negotiate a fair agreement.
>
> (2) Having regard to the assessment made under subsection (1), a family dispute resolution professional consulted by a party to a family law dispute must
>
> (a) discuss with the party the advisability of using various types of family dispute resolution to resolve the matter, and
>
> (b) inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.

The definition of "family dispute resolution professional" includes:

> (a) a family justice counselor;
>
> (b) a parenting coordinator;
>
> (c) a lawyer advising a party in relation to a family law dispute;
>
> (d) a mediator conducting a mediation in relation to a family law dispute, if the mediator meets the requirements set out in the regulations;
>
> (e) an arbitrator conducting an arbitration in relation to a family law dispute, if the

arbitrator meets the requirements set out in the regulations;

(f) a person within a class of prescribed persons;

Section 8 of the *Family Law Act* required the Task Force to consider the necessity of training in family violence for lawyers acting in any of the capacities listed above. With respect to lawyers acting as family law arbitrators, mediators or parenting coordinators, the issue of training in domestic violence is addressed in each section of the report. With respect to lawyers practicing family law in general, domestic violence training is addressed in the section "Other Matters". The Task Force did not discuss training for family justice counselors as they are employees of government and as such may be subject to additional training requirements by their employer.

Recognizing that the *Family Law Act* requires screening for family violence the Task Force considered whether the present level of coverage under Rule 3-20 is sufficient. While the Task Force is of the view that the 21 hour CORR 605 Family Violence course would be adequate it does not believe that the approximately 5 hours of family violence training obtained through the Continuing Legal Education BC Family Law Mediation I and II are sufficient in length. The Task Force understands, however, that Continuing Legal Education BC will be exploring a longer training session that addresses issues of family violence.

After much consideration the Task Force concluded that 14 hours of training in family violence should be required. The Credentials Committee should have the discretion to identify other acceptable service providers and courses. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process. As noted, in Ontario lawyers acting as family law arbitrators are required to take 14 hours of training in screening for domestic violence and power imbalances. Requiring British Columbia lawyers acting as family law arbitrators to take 14 hours of training in family violence is consistent with that requirement.

ANALYSIS OF THE ISSUE AND OPTIONS: FAMILY LAW MEDIATION

The Task Force makes the following recommendations with respect to lawyers acting as family law mediators:

Recommendation 2.1: The Task Force recommends that the current approved course requirements for lawyers acting as family law mediators be amended to require the following:

1. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the mediatory function in a fair and competent manner;

2. A minimum of 80 hours of approved mediation skills training. Course work should include:

    a. Theory and skills training;

    b. Drafting;

    c. How to conduct a mediation;

    d. The statutory framework of mediation;

    e. Family dynamics;

    f. A minimum of 10 hours of role playing scenarios.

3. A minimum of 14 hours of approved training in screening for family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process.

Recommendation 2.2: Abolish the Law Society Rules, rule 3-20(1)(a) requiring three years of legal practice to qualify as a family law mediator.

Recommendation 2.3: The Task Force recommends the following approach to grand parenting existing family law mediators:

1. Lawyers who, as of the date the new rule 3-20 is approved, meet the family law mediator requirements under rule 3-20 will have until January 1, 2014 to ensure they meet the training requirements for family law mediators recommended in this report;

2. Courses taken to meet the current rule 3-20 requirement and any courses taken since qualifying count towards these requirements;

3. As of the adoption of this report, all lawyers who wish to qualify in the first instance to act as family law mediators must meet the requirements contained in this report;

4. Staff will determine how to implement the reporting requirement and the Law Society will provide notice to the profession regarding the required standards and how to report compliance.

In 1984 the Law Society adopted rules for lawyers acting as family law mediators. Those rules reflected what were held to be acceptable minimal standards at the time, taking into account the fact that family law mediation was a fledgling field of practice. In the years that followed, family law mediation has developed considerably: much more mediation is occurring; its value as part of a network of solutions for family law disputes is better understood and accepted and the sort of training that is available has grown. Along the way there have been the additional developments, such as the founding of organizations dedicated to the training and certification of family mediators.[19]

For its part, the Law Society struck an ADR Task Force in 1998. The ADR Task Force produced a consultation paper in 2007 that identified 38 recommendations in the area of ADR, with particular focus on the area of mediation. The ADR Task Force also made recommendations regarding relationship mediation. While the Task Force recognizes that the report has not been adopted by the benchers, it gave full consideration to the depth of research, consultation and thought that went into the drafting of the report. The Task Force considered the history of family law mediation and its evolution since 1984 and asked whether the requirements set out in Law

[19] Such as Family Mediation Canada (1985) and Mediate BC Family Roster (2002).

Society Rules, rule 3-20 are sufficient or if they need to be changed to better reflect the prevailing standards.

An important distinction to bear in mind when comparing the Law Society's requirements for lawyers acting as family law mediators and the standards of Family Mediation Canada or the Mediate BC Family Roster is that the Law Society requirements reflect minimum qualifications for lawyers to engage in family law mediation, whereas the requirements of the other organizations reflect minimum entrance requirements to rosters or certified rosters. In addition, Family Mediation Canada and Mediate BC also have non-lawyer mediators as part of their rosters. This provides ground for distinguishing between the standards of the three organizations as the qualifications serve different functions.

An example of the distinction between qualifications can be found in the entrance requirements for the Mediate BC Family Roster, which can be achieved through one of two streams.[20] Applicants to the Roster who are certified by Family Mediation Canada can gain admittance through the first stream. Other applicants require a mix of training and experience. The experience requirement is 200 hours of mediation over 20 or more family mediations in the past five years (as a mediator, co-mediator, or co-mediator in an approved practicum). What this means is that one has to have mediated family disputes before one can become a roster member. The Law Society Rules, rule 3-20 does not require lawyers to have mediated family disputes. In fact, rule 3-20 is the prerequisite to be able to perform family mediations in the first place.[21]

Despite the different functions of the requirements of the Law Society and Family Mediation Canada and the Mediate BC Family Roster, the Task Force analyzed the requirements of each organization to consider what the appropriate qualifications are for British Columbia lawyers. In doing so, the Task Force considered a range of factors including:

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[20] See http://www.mediatebc.com/Resources-for-Mediators/About-the-Rosters/Family-Roster-Admission.aspx.

[21] The Task Force alerted staff at the Ministry of Justice to the paradox that would be created by making membership in the Mediate BC Family Roster a qualification to acting as a family law mediator when membership in that roster can require as a qualification completion of 200 hours of acting as a mediator in at least 20 family law mediations. A similar paradox is created with respect to Family Mediation Canada which requires either completion of an approved mediation practicum or completion of at least 10 fee paid private family mediations or 10 family mediations in an approved structure (see, Family Mediation Canada, "Practice Certification and Training Standards" section 5.3(c)(i) and (ii)). This is a matter Mediate BC, Family Mediation Canada, and the Ministry of Justice may wish to discuss.

1. What is the appropriate level of training to establish minimum practical knowledge to conduct a family mediation?

2. Should training in assessing domestic violence be required?

3. What experience requirement, if any, should apply (either as a practicing lawyer or as a mediator of non-family disputes)?

4. Should targeted continuing professional development in mediation be required?

5. If the Law Society changes its existing requirements for family law mediators, how should the issue of grand parenting existing family law mediators be dealt with?

Throughout the discussion the Task Force considered what is the proper balance between fostering access to mediators while reducing the risk of harm to the public? The Task Force was concerned with maximizing access to justice while ensuring the quality of the dispute resolution process was not compromised.

1. *What is the appropriate level of training to establish minimum practical knowledge to conduct a family mediation?*

When the Law Society initially explored qualifications for family law mediation, 40 hours of ADR mediation training was considered an acceptable standard. In its consultation report the ADR Task Force observed that an increase in the 40 hour (approximate) training requirement in family mediation appears to be rising. Rather than make a recommendation the ADR Task Force left it to the benchers with input from the Family Law Mediation Subcommittee to determine the appropriate standard. The Family Law Task Force is of the view that the prevailing minimum requirement has continued to evolve since the ADR Task Force completed its research and that a minimum of 80 hours of mediation skills training better reflects the minimum requirement.

The Task Force considered a number of factors in arriving at the 80 hour qualification, including input from representatives of the Mediate BC Family Roster and members of the ADR Task Force. The feedback was that the current approved courses fall short of the acceptable requirement. As the field of family mediation has developed, training programs have evolved and expanded. Part

of the value in increasing the training requirement to 80 hours is that it provides greater opportunity to engage in family mediation role playing scenarios. The Task Force was advised that role playing provides critical exposure to essential skill development and the current training program approved under rule 3-20 falls short in this regard. The Task Force considered that training in role playing can function as an alternative to the experience requirement in mediation training.

The Task Force discussed how much of the training should be required to be in role playing and the feedback it received was that a minimum of 10 hour was desirable. In order not to reduce the current content of the minimum course requirements, adding a minimum role playing content further supports the need to increase the approximately 50 hours of course work.

The Mediate BC Family Roster requires a minimum of 80 hours of mediation skills training. Family Mediation Canada requires considerably more training. Membership in each organization reflects having attained a more specialized requirement and it is recognized that historically people have carried out family mediations without necessarily having achieved those requirements. It is justifiable for the Law Society to set alternative qualifications for lawyers acting as family law mediators. Both Family Mediation Canada and the Mediate BC Family Roster require experience conducting family mediations as a condition of admission. Eighty hours of mediation training is a more modest requirement, yet the Task Force believes an appropriate one for acquiring a minimum level of knowledge in the basics of acting as a family law mediator (the necessity of family violence training is set out below).

2. *Should training in assessing domestic violence be required?*

The course of study approved by the Practice Standards Committee[22] for lawyers acting as family law mediators provides two paths of qualification. In path one a lawyer will have taken approximately five hours of training in domestic violence. In path two, if the lawyer chooses the

[22] Practice Standards Committee meeting, April 2, 2009.

optional course CORR 605 Family Violence the lawyer will have received 21 hours of training in domestic violence. It is possible in path two to receive no training in family violence screening.

As noted in the analysis of family law arbitration, section 8 of the *Family Law Act* imposes obligations on family law dispute resolution professionals to assess whether family violence is present and the potential consequences to the safety of a party or family member and the fairness of the dispute resolution process.

For the same reasons as articulated with respect to lawyers acting as family law arbitrators the Task Force is of the view that a minimum of 14 hours of training in screening for family violence is a necessary pre-requisite for lawyers to act as family law mediators. The training should be taken through courses of study approved by the Credentials Committee.

3. *What experience requirement, if any, should apply (either as a practicing lawyer or as a mediator of non-family disputes)*

At present, Law Society Rules, rule 3-20(1)(a) requires three years full-time practice (or part-time equivalents) for lawyers wishing to act as family law mediators. The experience requirement has been the subject of much criticism. The ADR Task Force consultation report includes the recommendation that the Law Society "Abolish the rule requiring three years of legal practice to qualify as a family law mediator" (Recommendation 30). The Task Force discussed the experience requirement with representatives of the ADR Task Force and the Mediate BC Family Roster.

The main argument against the general experience requirement is that the necessary experience requirement for acting as a mediator is developed through the practice of conducting mediations. While one might acquire relevant knowledge through the practice of law one does not develop the necessary skills to act as a mediator. Therefore the experience requirement is viewed as a false equivalency. The Task Force discussed whether it would make any difference for the experience to be targeted to family law experience, but the same issue arises. While lawyers who deal with family law disputes would have a better grounding in procedural and substantive family law issues they would not, by virtue of that experience, acquire experiential knowledge of how to conduct mediations in a competent manner.

The Task Force then considered whether one should have some general experience as a mediator before being able to conduct family law mediations. While this has some more appeal than viewing general legal experience as a suitable pre-requisite it presents certain problems. A main concern with this is that the realities of many practices is that lawyers who conduct commercial mediations, labour mediations, etc. are not necessarily going to transition to family mediations. Nor, for that matter, are lawyers who deal in family law disputes necessarily going to structure their practices to conduct a series of mediations outside the area of family law in order to reach a threshold level of mediation experience required to conduct family mediations.

Ultimately the Task Force was persuaded by the Recommendation 30 of the ADR Task Force consultation report that the three year experience requirement in rule 3-20(1)(a) be abolished.

4. *If the Law Society changes its existing standards for family law mediators, how should the issue of grand parenting existing family law mediators be dealt with?*

As part of its analysis the Task Force considered how the Law Society should deal with lawyers who have met the existing requirements under rule 3-20. If the benchers approve the recommendations in this report the basic training requirements for lawyers to qualify as a family law mediator will increase approximately 44 hours, depending on the course of study.[23]

The Task Force considered several things in assessing how to deal with grand parenting existing family law mediators. First and foremost the Task Force was guided by asking what training is necessary to protect the public interest in the administration of justice. A secondary consideration was to establish a transitional process that is both fair and practical. The Task Force acknowledges that no single approach is perfect. Some lawyers will have been conducting family law mediations for years, whereas others will have little or no experience. Similarly, the courses lawyers will have taken will vary. The solution needs to be administratively feasible.

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[23] The Task Force is recommending 80 hours of ADR training in mediation skills and 14 hours of training in family violence. The current approved course of study is approximately 50 hours, which can include anything from 0-21 hours in family violence training depending on the courses the lawyer-mediator took to qualify.

Any grand parenting process therefore needs to take into account the risk to the public, the administrative feasibility of the Law Society implementing the requirement, and whether the requirements constitute unnecessary hardship on lawyers who qualify under the present rule.

While there is a gap between the existing requirements and the qualifications proposed in this report, the Task Force does not view this as a hardship because many family law mediators will have continued to take courses related to family law mediations (including, perhaps, courses on family violence). As such, many lawyers will have already met the proposed requirements. For those who have yet to meet the new requirements, the Task Force does not view the requirement to catch-up to the new standard as onerous. To the extent the new qualifications better reflects current best practices, it is in the public interest to require family law mediators to meet the requirement.

The Task Force preferred requiring lawyers who are family law mediators to indicate to the Law Society by January 1, 2014 that they meet the education and training requirements for family law mediators contained in this report. The Task Force leaves it to staff to determine how best to create a system that facilitates such reporting by lawyers.

ANALYSIS OF THE ISSUE AND OPTIONS: PARENTING COORDINATION

The Task Force makes the following recommendations with respect to lawyers acting as parenting coordinators.

Recommendation 3: The Task Force recommends that lawyers acting as parenting coordinators must meet the following qualifications:

1. 10 years of current practice experience, or experience as a judge or master;

2. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the parenting coordination function in a fair and competent manner. This family law experience must include considerable experience dealing with high conflict families with children;

3. A minimum of 40 hours of approved parenting coordination training, which must include:

    a. Parenting coordination skills training and theory;

    b. Dealing with high conflict families and individuals;

    c. Child development, interviewing children, and the effects of separation and divorce on children;

    d. The effects of separation and divorce on adults.

4. The minimum approved training qualifications of a family law arbitrator, which include:

    a. A minimum of 40 hours training in how to conduct an arbitration. Course work should include:

        i. Theory and skills training;

        ii. Drafting;

        iii. How to conduct an arbitration;

        iv. The statutory framework of arbitration;

        v. Family dynamics;

        vi. Administrative law principles governing arbitrations.

5. The minimum approved training qualifications of a family law mediator, which include:

    a. A minimum of 80 hours of mediation skills training. Course work should include:

i. Theory and skills training;

ii. Drafting;

iii. How to conduct a mediation;

iv. The statutory framework of mediation;

v. Family dynamics;

vi. A minimum of 10 hours of role playing scenarios.

6. A minimum of 14 hours of approved training in screening for family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process;

7. Relevant courses taken to meet the current rule 3-20 requirement and any relevant courses taken since qualifying count towards these requirements.

The third category of family dispute resolution professional the Task Force considered is parenting coordinators. The BC Parenting Coordinators' Roster Society defines parenting coordination as:

> … a child-focused dispute resolution process for separated families. Parenting coordinators are experienced family law lawyers, counselors, social workers and psychologists who have special training in mediating and arbitrating parenting disputes, and in helping separated parents recognize the needs of their children.[24]

Because parenting coordinators are often dealing with high conflict individuals they require specialized skills and training.

Parenting coordination is a relatively new field of practice in Canada. Parenting coordinators can be selected by agreement of the former couple or appointed by the court. Because of the potential

[24] See http://www.bcparentingcoordinators.com/ (last accessed August 8, 2012).

for parenting coordinators to be appointed by the court there are additional considerations. First, it is possible that neither of the people required to use the parenting coordinator will be pleased with that decision. Second, it is essential that the court is able to rely on the professionalism and skills of the parenting coordinators. Third, and perhaps most importantly, parenting coordination by definition involves children and the model is focused on child-centric solutions. While it is possible to mediate and arbitrate family disputes that do not involve children, it is impossible to act as a parenting coordinator regarding disputes that do not involve children.

The three factors set out above each speak to the requirement that parenting coordinators possess both a high degree of specialized training but also significant experience.

Parenting coordinators are often dealing with individuals who are unable to reach agreement on a wide range of daily matters. To the outside observer the disagreements will range from real issues of concern, such as which school within a district a child should attend, to matters that a rational observer would see as trivial (such as arguing over the need/ability to pick up the child 10 minutes before the scheduled time). Unfortunately, some high conflict individuals will fight over most everything. In light of this, parenting coordinators play an invaluable role in keeping high conflict individuals from flooding the courts with arguments over the interpretation of a court order. These high conflict individuals are also often the people who run through the money for counsel and then become serial self-represented litigants.

Parenting coordinators assist high conflict individuals in resolving disputes regarding court orders or agreements made between the former couple. In circumstances where the parenting coordinator is unable to lead the former couple to a consensual resolution of the dispute, the parenting coordinator can shift roles and become a decision maker, imposing a resolution on the former couple.

By their nature, parenting coordinator appointments are usually long term, often one to two years. The duration of the agreement can influence the relationship dynamic between the former couple and between the former couple and the parenting coordinator. Sometimes the parenting coordinator will resolve matters in one side's favour whereas other matters will be resolved the other way. This relationship dynamic requires that parenting coordinators have nuanced skills and

training to deal with high conflict individuals over time in order to continue to ensure disputes are resolved with the best interests of the children. In an optimal case a parenting coordinator can begin to shift how the former couple views the purpose of resolving disputes to the child-oriented focus.

In light of the information received during discussions with the government and representatives of the Parenting Coordinator Roster Society, the Task Force concluded that lawyers acting as parenting coordinators require the training of both family law arbitrators and mediators, as well as some discrete training on parenting coordination and dealing with high conflict individuals and families. In addition, an experience requirement comparable to arbitrators is required and experience in family law, including experience dealing with high conflict families and individuals is a desirable qualification. The Task Force recognizes that it is setting the bar of entry high. The Task Force engaged in lengthy discussion about the need to increase access to legal services while ensuring proper protection of the public. The Task Force erred on the side of greater training and experience mainly because of the presence of children in high conflict disputes and the particular vulnerability of children. Lawyers taking on dispute resolution functions that are expressly targeted at children should meet a high standard of skills training and experience. In addition, the need for the court to rely on lawyers acting as parenting coordinators speaks to a higher standard.

Although the Task Force believes more stringent qualifications are appropriate for parenting coordinators, it is concerned about the potential for the cost of these services to get out of reach of the ordinary British Columbian. An unintended but likely consequence of requiring 10 years practice experience and a considerable amount of dispute resolution training is that the cost of services of the parenting coordinator will go up. Because the parenting coordinators are dealing with high conflict individuals, this can exacerbate the cost. The Task Force was concerned that parenting coordination might become a dispute resolution service reserved for the wealthy.

To the extent the government intends to move more family law disputes out of court, particularly the types of disputes that parenting coordinators deal with, serious thought needs to be given to providing funding for these services. Whether that funding occurs through the Legal Services Society with a sum ear-marked for parenting coordination, or through funding family justice counselors or through another model all together is a matter for the government to consider.

Government should be encouraged to start those deliberations before the *Family Law Act* comes into force.

OTHER MATTERS

1) Which committee should have oversight of the qualification requirements?

At present, the Practice Standards Committee has oversight of qualifications for family law mediators, pursuant to Law Society Rules, rule 3-20. The review of qualifications for family law dispute resolution professionals provided an opportunity to consider whether the Practice Standards Committee is the proper home for such oversight.

The conclusion was that the qualifications recommended in this report are not practice standards; they are entry level qualifications. This provided an opportunity to consider whether the Credentials Committee is the more logical home for this. At the staff and managerial level a discussion took place which led to the conclusion that the Credentials Committee is the more logical home for this function. In addition to requiring a change to rule 3-20 it would also require shifting the Family Law Mediation Subcommittee to operate under the Credentials Committee. Consideration would also have to be given by the Credentials Committee whether to reconstitute that subcommittee so it had some expertise on family law arbitration and parenting coordination, or if additional subcommittees need to be constructed.

Recommendation 4: The Credentials Committee can set criteria for approved courses for lawyers acting as family law arbitrators, family law mediators, or parenting coordinators. In exercising its authority to assess courses the Credentials Committee should be guided by the substantive minimum requirements set out above.

2). *Family violence screening training for lawyers advising a party in relation to a family law dispute*

As noted above, the *Family Law Act* includes in its definition of dispute resolution professionals "lawyer advising a party in relation to a family law dispute." What this means is that come March

18, 2013 any lawyer who advises a party in relation to a family law dispute will have to adhere to the family violence screening provisions in s. 8 of the *Family Law Act.* The Task Force considered whether this should require a mandatory 14 hours of training in family violence screening or if lawyers should be alerted to the existence of the requirement in s. 8 of the *Family Law Act* and be strongly encouraged to take a course in family violence screening in order to ensure they possess the necessary skills to screen for family violence.

The Task Force concluded that rather than requiring lawyers acting in the traditional role of counsel to take courses in family violence screening, the Law Society should alert lawyers to the obligation under s. 8 of the *Family Law Act* and in very strong terms encourage lawyers to ensure they possess the required skills, knowledge and training to properly discharge their obligation under the Act. Lawyers should be trusted to take this obligation seriously, as they would any statutory obligation. If, over time, the regulatory process of the Law Society demonstrates lawyers are not properly screening for domestic violence and managing family law disputes with an acceptable understanding and sensitivity to family violence, the benchers should revisit this decision to determine whether mandatory family violence training is required.

The Task Force recognizes that some might argue that, with respect to screening for family violence, the *Family Law Act* does not distinguish between lawyers acting as alternate dispute resolution professionals and lawyers acting in their traditional capacity advising clients. In many respects the decision to treat family violence training in traditional lawyer-client relationships as a strongly recommended best practice and not a requirement is based on the pragmatic challenge of trying to impose mandatory training on all lawyers who do any amount of family law.

The Task Force was concerned that introducing mandatory violence screening training for all family dispute resolution professionals would place considerable strain on limited resources. The Task Force preferred integrating the requirement into the three areas of family law ADR discussed in this report and make a strong suggestion to all other lawyers engaged in family law matters to take such training as well. The hope is that over time a sufficient degree of knowledge and sensitivity to issues of family violence would develop, such that the policy objectives underlying the *Family Law Act* would be met. Given the particular vulnerability of people in families where domestic violence is present, however, the Task Force recommends that the Law Society remain

vigilant to ensure lawyers are adequately discharging their duties under the Act.

Recommendation 5: The Task Force recommends that the Law Society should alert lawyers of the obligation in s. 8 of the Family Law Act to screen for family violence. Lawyers who will be "advising a party in relation to a family law dispute" should be strongly encouraged to take courses in screening for family violence.

3. *Continuing Professional Development*

During its consultations the Task Force also asked whether continuing professional development targeted at ADR was desirable for lawyers acting as family law arbitrators, mediators and/or parenting coordinators. The consistent feedback was that targeted continuing professional development is important. Family law ADR is a continuously evolving field and the Task Force expects best practices will continue to evolve following the coming into force of the *Family Law Act*.

The Task Force recognized that family law has several aspects that can make it unlike other forms of ADR. The relationship between parties to a family law dispute is highly personal, emotional, and even after a relationship has ended the parties to the dispute may need to have continuing contact with each other. The potential involvement of children also necessitates special considerations to ensure the best interests of children are being protected. Children can be particularly vulnerable, and to the extent ADR creates a more private form of dispute resolution it is essential that the dispute resolution professionals are alive to the justice system's evolving understanding of the needs of children.

The *Family Law Act* codifies a policy shift in the area of family law that reflects an evolving understanding of how family disputes are best handled. The Task Force was also guided by the requirement in Ontario that family law arbitrators need to take 10 hours of ongoing training over any two year period, of which 50% must involve training in domestic violence or power imbalance issues. It is incumbent, therefore, on lawyers engaged in family law dispute resolution to keep current with best practices through their continuing professional development.

In discussing CPD the Task Force was cognizant that the minimum CPD requirement of the Law Society is 12 hours a year with a minimum of 2 hours in matters pertaining to professional responsibility and ethics. The Task Force considered whether it should recommend increasing the minimum CPD hour requirement but concluded that is a matter better dealt with by the Lawyer Education Advisory Committee as part of its periodic consideration of the CPD program. Instead the Task Force concluded it should consider whether a minimum amount of family law dispute resolution CPD should be required and if so how much. In light of its consultations and for the reasons set out above the Task Force concluded that lawyers acting as family law arbitrators, family law mediators, or parenting coordinators should be required to record a minimum of 6 hours of approved CPD in alternative dispute resolution.

The Task Force sought input from Ms. O'Grady in her capacity as Chair of the Lawyer Education Advisory Committee and from Alan Treleaven, Director of Education and Practice. The Task Force acknowledges that due to the very tight timeframe required to generate this report, much of the consultation period fell over the course of the summer when various Law Society Committees do not meet. As such, if there is sufficient concern from members of the Lawyer Education Advisory Committee that targeted CPD for lawyers acting as family law arbitrators, family law mediators, and/or parenting coordinators is something that Committee wishes to discuss the benchers may wish to refer the question to the Advisory Committee. If that decision is made the referral should require the Lawyer Education Advisory Committee to report to the benchers with a recommendation before March 18, 2013 in order for the benchers to resolve the policy position in advance of the *Family Law Act* coming into force.

Recommendation 6: The Task Force recommends that lawyers acting as family law arbitrators, family law mediators, and/or parenting coordinators be required to record a minimum of six hours of continuing professional development per year in dispute resolution skills training and/or theory.

4. *Amending the Legal Profession Act*

The approach the government will take to family law dispute resolution professionals is to identify which organizations a person must be a member of in order to act as a family law arbitrator, family

law mediator and/or a parenting coordinator. This will require each of the organizations to be capable of investigating complaints about members.

Section 29(d) of the *Legal Profession Act* authorizes the benchers to make rules that "establish qualifications for and conditions under which practicing lawyers may practice as mediators." As alternative dispute resolution becomes more common, particularly if government policy continues to encourage its greater use, it is important to ensure there is no ambiguity in the *Legal Profession Act* with respect to the Law Society's authority to set standards for lawyers acting as alternative dispute resolution professionals.

Section 11(1) and (2) of the *Legal Profession Act* states:

> 11(1) The benchers may make rules for the governing of the society, lawyers, law firms, articled students and applicants, for the carrying out of this Act.
>
> (2) Subsection (1) is not limited by any specific power or requirement to make rules given to the benchers by this Act.

An argument exists that s. 11 is broad enough for the benchers to make rules for lawyers acting as arbitrators and parenting coordinators and that s. 29 should not be read to limit that authority to making rules for lawyers acting as mediators. In addition, the regulations to the *Family Law Act* will indicate the Law Society can establish qualifications for lawyers acting as dispute resolution professionals. However, room for argument remains despite the relatively clear language of s. 11(2) and the Task Force is of the view that any ambiguity should be removed.

Recommendation 7: The Task Force recommends that the Act and Rules Subcommittee assist the benchers in seeking a consequential amendment to the Legal Profession Act to make it clear that the Law Society may make rules for the governing of lawyers acting as alternative dispute resolution professionals.

5. The Need for Written Agreements

During its discussions of qualifications the Task Force attempted to consider the broader context of how family law dispute resolution services are delivered, while remaining mindful of the scope of

its mandate. One issue that the Task Force identified during discussions with staff at the Ministry of Justice, and which does not constitute qualifications *per se*, is the desirability of family law arbitrators, family law mediators, and parenting coordinators being required to have written agreements that set out the terms of the ADR process. Appendix 2, Rule 5 of the *Professional Conduct Handbook* establishes the requirements for an agreement to act as a family law mediators. The Task Force is of the view that similar provisions should be created for lawyers acting as family law arbitrators and parenting coordinators.

Recommendation 8: The Task Force recommends that the Ethics Committee be asked to develop for inclusion in the BC Code the requirements for written agreements for lawyers acting as family law arbitrators, mediators and/or parenting coordinators. These provisions will include the present protections regarding avoidance of conflicts of interest, recommendations regarding the need for independent legal advice, and the requirement for a written agreement as are now set out in Appendix 2 in relation to lawyers acting as mediators.

An additional point to be added to this new provision is that if a lawyer's role changes from one where the lawyer acts as a facilitator of consensual resolution to one where the lawyer acts as a decision maker, the lawyer must clearly specify in writing the nature of the change in function and when the lawyer will begin to exercise the change. The written agreement between the lawyer and the parties must confirm that such changes in function will be specified in writing. For example: a lawyer may conduct a process designed to be a mediation-arbitration. When the mediation portion of the process fails, the lawyer puts on the arbitrator hat and the lawyer should confirm that shift in role in writing.

The Ethics Committee should attempt to have the amendments to the BC Code in place by March 18, 2013.

SUBSEQUENT STEPS

There are several subsequent steps that need to be taken following consideration of this report.

1. Following the benchers' discussion of the report on September 7, 2012, the Law Society should write to the Ministry of Justice indicating that the Law Society will create and implement Family Law ADR Qualifications by March 18, 2013.

2. The Act and Rules Subcommittee will have to draft rules to give the Credentials Committee the authority to identify acceptable courses of study and consider applications for lawyers engaged in family law ADR. These rules will need to be in place by March 18, 2013. This work should include consideration of whether s. 29 of the Act needs to be amended to provide a rule making authority for dispute resolution in general and not merely mediation.

3. The Ethics Committee will have to draft provisions for the *BC Code* that set out the requirement for lawyers acting as family law arbitrators and/or parenting coordinators to put their agreement in writing and identify the required elements of such agreements (to be consistent with the requirements for family law mediators).

4. Staff in the Policy and Legal Services Department, with input from the Professional Regulation Department, should assess the sufficiency of the Law Society's current regulatory process for dealing with complaints against lawyers performing ADR functions. If new policies are required, staff should alert the benchers to the issues and options.

5. The Family Law Task Force should remain operational until the December 2013 benchers' meeting. Members of the Task Force should attend family law section meetings to speak to the recommendations in the report and to alert lawyers to the family violence training obligations contained in s. 8 of the *Family Law Act.* If during those presentations serious concerns as to the appropriateness of the recommendations in this report arise, the Task Force should report back to the benchers to determine whether adjustments to the recommendations in this report are required. It is possible matters may arise subsequent to the *Family Law Act* coming into force on March 18, 2013 and keeping the Task Force

operative to deal with any such matters would be prudent. The Task Force does not anticipate any material expenses to result from this as it would likely not need to continue with its regular monthly meetings during this time.