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More questions than answers after 'Bott'

Letter to the editor

To the editor:

The recent Supreme Judicial Court opinion, *In the Matter of Bott*, 462 Mass. 430 (2012), has attracted widespread attention in the local mediation community. Because of its potential ramifications, many of us have been anticipating the case with great interest and even a certain anxiety.

The good news: While the court could have used the case to find that mediation is the practice of law per se, it did not. Of course, such a decision would have been a serious blow to non-lawyer mediators. But what did the court hold? And what can we learn from the case?

The facts are simple. Bott, an attorney, agreed to resign from the practice of law in the context of a legal disciplinary proceeding, and the Board of Bar Overseers accepted his resignation as a disciplinary sanction. Following his resignation, he filed a petition to a single justice requesting permission to serve as a mediator. The justice sent it to the SJC for its decision.

The narrow issue before the SJC was whether Bott, as an attorney whose resignation was accepted as a disciplinary sanction, was permitted to perform services as a mediator. The court held, essentially, that he may be barred from acting as a mediator "when to do so would be perceived by the public as an extension of the attorney's practice of law." To the SJC, public perception (how the public views the work sought to be performed by the sanctioned lawyer) is critical.

Thus, the court went on, "it is relevant whether a disbarred or suspended lawyer draws on his or her legal education and experience and exercises judgment in applying legal principles to address the individual needs of the client."

Further, to determine whether a sanctioned attorney has engaged in the practice of law, one must examine whether the person's post-sanction work was performed by the lawyer prior to the sanction, whether the work is customarily performed by lawyers, and whether the lawyer seeks to perform work in the same community or for other lawyers.

Bott's focus is narrow. It doesn't mean that a non-attorney mediator is engaged in the unauthorized practice of law. It's about whether a sanctioned lawyer can engage in mediation. When that attorney performs certain professional activities, there is a heightened risk that the public may perceive such activity as the practice of law.

In fact, *Bott* points out that some services performed by non-lawyers become legal activity when performed by a sanctioned attorney. For example, in one case a sanctioned attorney was barred from working as a title abstractor, even though title abstractors are not necessarily lawyers. In another example, the disciplinary rules themselves explicitly provide that sanctioned attorneys cannot work as paralegals, though paralegals are clearly not engaged in the practice of law.

What does the decision teach mediators generally? The public's perception about whether an individual is practicing law is at the heart of the matter — and the perception applies, without distinction, to attorneys and non-attorneys.

Jonathan E. Fields

That triggers for me questions that mediators have been wrestling with for a long time. If a mediator has clients sign an agreement that explicitly sets forth that he/she is not acting as their attorney, is that a sufficient defense to a "practicing law" claim? It still matters what the mediator does after they sign, it seems.

For example, the mediator couldn't go represent one of them in court on the same matter. But what about drafting financial statements or preparing separation agreements? Might that alter the client's perception about what role the mediator is actually performing?

And what if, despite the mediator's recommendation, the parties do not have attorneys review the draft? Clearly, a review by other attorneys would, among other things, emphasize that the mediator is not acting as an attorney. Or is the signed acknowledgement that most of us use enough?

Unfortunately, I have questions but no clear answers. I know that mediators will be dissecting *Bott* further in the year ahead, and I hope to learn some of my colleagues' thoughts on the matter.

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The writer is president of the Massachusetts Council on Family Mediation.