Toward a Pluralistic Approach to Mediation Practice
in a Legalistic, Problem-Solving Culture

by

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A thesis submitted to the
Faculty of Graduate Studies and Research in partial fulfilment
of the requirements for the degree of Master of Arts

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Carleton University
Ottawa, Ontario
August 2002

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October 2002
Abstract

This thesis examines whether the expansion of mediation into the formal justice system has increased reliance on the use of an evaluative-settlement approach, leading to the suppression or abandonment of more transformative-relational approaches to practice. Recent trends toward the increasing use of mediation within legislative initiatives and court-mandated mediation programs; the potential co-optation of mediation by the state or legal profession; the professionalization of mediation; and the development of practice standards are examined. To determine how a transformative-relational approach to mediation can exist within a legalistic, problem-solving culture, an examination of three Canadian standards of practice is undertaken. This examination reveals the existence of both transformative-relational and evaluative-settlement discourses within each of three set of practice standards. This finding provides hope that a pluralistic conception of mediation practice will continue to exist and perhaps become a larger part of the discourse as mediation continues to expand within the formal justice system.
Acknowledgments

This thesis has been a work in progress for some time. It could not have been completed without the tremendous support and encouragement of my thesis team, Cheryl Picard and Neil Sargent. I am grateful to Cheryl for providing me with insight and much needed guidance on how to bring the various pieces of the thesis together into a coherent whole. I first became interested in the field of mediation after reading one of her earlier articles on the professionalization of mediation when I was an undergraduate student in the law program at Carleton. I am grateful to Neil for sharing with me his knowledge of mediation and for challenging me to think more critically about what I wanted to accomplish when I first set out to write a thesis on mediation. I am very grateful to them both for the considerable time and commitment they invested in this project. I also wish to acknowledge and thank Diana Majury, the former Graduate Supervisor, for her unwavering support and understanding she extended to me throughout this journey.

On a more personal level, I would like to thank my best friend and partner, Tina Asdrubolini, for being such a positive influence in my life and for being a constant source of encouragement and support throughout the research and writing of this thesis. Tina’s completion of her MA thesis in the Legal Studies program last year provided me with the inspiration I needed to bring my own thesis journey to an end. I would also like to thank my family for their ongoing support of my academic and professional pursuits. They too share in the satisfaction of knowing that the paper is finally done! Last but not least, I would like to thank my colleagues at CAC for giving me the time I needed to complete this research project.
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Chapter 1 - Introduction

1.0 Introduction:

Mediation has become a commonplace response to the handling of conflicts in our society. It is practised in a variety of settings by a wide range of practitioners with differing backgrounds and disciplines. Interest in mediation and other contemporary forms of dispute resolution began to surface in the 1960s in response to an overburdened legal system and society’s growing dissatisfaction over the way in which the formal justice system handled disputes. Mediation and other forms of dispute resolution were seen as a welcomed response to the formal justice system largely because they embraced social goals not provided by more traditional dispute resolution processes, such as community empowerment\(^1\); restorative justice\(^2\); self-determination\(^3\); and the preservation of relationships.\(^4\) In essence, mediation was seen to offer “a form of dispute resolution radically different from the litigation paradigm, allowing people to shape their own solutions to problems free from what were perceived to be the narrow strictures of the traditional legal system.”\(^5\) Some believed the


informal and consensual nature of mediation would help to decrease the high costs, long delays and growing dissatisfaction with outcomes associated with reliance on the courts for the resolution of disputes.⁶

While adjudication still remains the dominant mode of dispute resolution within the formal justice system, mediation has become a popular and effective mechanism for early and cost-effective resolution of disputes within court-mandated programs.⁷ This growing popularity has some concerned that the increased use of mediation within the formal justice system has coincided with a decreasing emphasis on the early visions of social transformation in favour of more practical and state-serving goals of case management. Some have wondered how mediation, which once started out as a grassroots alternative to the formal justice system, empowering parties to resolve their own disputes through collaborative decision-making, is now being institutionalized and mandated as a problem-solving mechanism within the very system it was intended to supplement.⁸ Some have


⁷Julie McFarlane, Court-based Mediation of Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre.(Toronto: Ministry of the Attorney General, 1995).

argued that this shift in practice has brought mediation full circle, rendering the application of more transformative-relational approaches to practice within the prevailing legalistic, problem-solving culture something of a paradox. Similar concerns over how mediation is being practised have been expressed, to a lesser extent, in commercial and family practice areas.

This thesis explores a number of tensions that have resulted from the expansion of mediation into the formal justice system. One tension is a growing perception that the evaluative-settlement capacity of mediation is being emphasized at the expense of the capacities seen to be offered by a more transformative-relational approach. One of the problems associated with this tension is that mediators are becoming more directive, interventionist and outcome-oriented as a result of this shift in practice. What is being lost is party self-determination, collaborative decision-making and the emphasis on the relational aspects of conflict. This perception has gained momentum in view of recent trends toward the institutionalization of mediation within the formal justice system, the development of practice standards and qualifications for mediators, and the move to professionalize the field. With an emerging focus on more individualistic goals, many mediators fear that the state or legal community will co-opt mediation by using it as an evaluative-settlement approach to reduce caseloads and court costs, leading to the suppression of more transformative-relational based approaches upon which mediation was founded. A related fear is that mediation’s quality justice goals (community empowerment; restorative justice; self-

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9 Supra note 4; Menkel-Meadow, ibid.; Picard, ibid.

10 These practice areas will be discussed in more detail in chapters three.
determination; and the preservation of relationships) could be potentially lost if such a scenario were to unfold. It is against this backdrop that I ask the following research question: how can a transformative-relational approach to mediation exist in a legalistic, problem-solving culture?

In this paper, I take the position that the promotion of a transformative-relational approach to mediation within the formal justice system is not only important, but also necessary if the full potential of mediation is to be realized within a legalistic, problem-solving culture. The transformative-relational approach is based on a relational ideology, which values the 'empowerment' of each of the parties, as well as the 'recognition' by each of the parties of their respective needs, interests, values and points of view. This approach encourages the preservation of relationships by assuming that parties are capable of resolving their own disputes. It is these values, principles and goals that led to the promotion of mediation as a grassroots alternative to the more traditional, individualistic ideals held by the formal justice system. In this context, I argue that a transformative-relational approach to practice has many positive attributes to offer parties who find themselves embroiled in a legalistic dispute within a formal justice setting. Transformative-relational mediation aims to look beyond the mere settlement of a dispute to a consideration of the emotional and psychological needs of parties. Rather than imposing a settlement structure, the mediator

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11The terms 'empowerment' and 'recognition' were first used by Bush and Folger in their widely read book, The Promise of Mediation, Responding to Conflict Through Empowerment and Recognition, supra note 4 at 2. They define empowerment as "the restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems". Recognition is defined as "the evocation in individuals of acknowledgment and empathy for the situation and problems of others". They go on to suggest that "[w]hen both of these processes are held central in the practice of mediation, parties are helped to use conflicts as opportunities for moral growth, and the transformative potential of mediation is realized".
encourages the parties to tell their own story, in their own way, allowing them to become actively involved in shaping the outcome. While advocating for the protection of a transformative-relational approach to mediation within the context of court-based mediation programs, it is also recognized that there are positive outcomes that can be gained through the application of an evaluative-settlement approach to practice. Mediators who adopt this approach seek to assist the parties to resolve the dispute in an expedient manner, crafting settlements that optimally and jointly satisfy their needs and underlying interests. An evaluative-settlement mediator normally structures the process and directly influences the outcome of mediation. The decision to suggest or impose a settlement is often reached on the basis of the legal rights of the parties and legal concepts of fairness. Some of the more common outcomes associated with this form of mediation include the clearance of backlogs, quicker settlement of cases and shorter time to trial for cases that do not mediate or settle.

Evaluative-settlement and transformative-relational mediation have their own set of strengths and weaknesses, however, the argument I make in this paper is that neither is complete by itself. Despite common perceptions derived from the literature that offer a dualistic conception of mediation practice, mediation is depicted as a protean social practice that has an inherent capacity to provide multiple and intangible benefits for disputing parties across the various contexts in which it is practiced. As will be explained, this capacity is achieved when evaluative-settlement and transformative-relational based approaches to practice are used and blended together rather than in isolation of each other. In this context, I argue for a pluralistic and integrated conception of mediation, one that values and promotes the application of a wide variety of approaches within the formal justice system. It is hoped
that the conception of mediation in this light may encourage the adoption of a more focused and intentional effort to prevent the emergence of single-model approaches within the formal justice system. Further, it will help to ensure that we do not foreclose on the transformative-relational potential of mediation in a legalistic, problem-solving culture.

1.1 Research Objectives:

This thesis examines whether the expansion of mediation into the formal justice system has increased reliance on the use of an evaluative-settlement approach, leading to the suppression or abandonment of more transformative-relational approaches to practice, and along with them, the preservation of mediation’s quality-justice goals. To determine how a transformative-relational approach to mediation can exist within a legalistic, problem-solving culture, an examination of three Canadian (two national and one provincial) stated standards of practice is undertaken. The following three organizations are examined: ADR Institute of Canada (ADR Canada), Ontario Mandatory Mediation Program (OMMP), and Family Mediation Canada (FMC). These three organizations, representing different practice areas, are examined to determine to what extent the standards being adopted by each of their respective programs are of an evaluative-settlement nature, consistent with an individualistic ideology, and to what extent they are of a transformative-relational nature, consistent with a relational ideology. The principle basis for undertaking this investigation is an assumption that there is a link between language (discourse) and action. In other words, an assumption

12 At this point, I realize that it is not possible to reach any definitive conclusions about whether a transformative-relational approach to mediation can exist within a legalistic, problem-solving culture through an examination of current mediation practice standards alone. However, examining the current discourse on standards and how they are being promulgated by mediation programs can provide us with some insight into whether this might be possible.
is made that the approach mediators use in practice is reflective of the standards set out under their standards program.\textsuperscript{13} In setting out to conduct this analysis, I expected to find more evaluative-settlement discourse than transformative-relational discourse given that a significant number of mediators associated with these three associations have legal backgrounds.\textsuperscript{14} That being said, this does not imply that one set of ideologies would necessarily be better to find than the other. In fact, finding both evaluative-settlement and transformative-relational discourse would mean that, within these three associations at least, mediation is not conceptualized as a monolithic practice. This leads to a further research question - how to encourage and maintain a pluralistic approach to mediation in a legalistic, problem-solving culture? This question is examined in more detail in chapters four and five.

This thesis examines the application of mediation in the context of the formal justice system. It does not take into account the use of mediation within the context of community-based conflict resolution. An examination of how mediation is being practised within community-based settings, while interesting and important, is beyond the scope of this paper. It should be noted that the word 'approach' is used in this paper to broadly encompass the

\textsuperscript{13}For a discussion on the link between discourse and action, please see Michel Foucault, \textit{The Archaeology of Knowledge and The Discourse on Language}, [1969] Trans., A. M. Sheridan Smith (Pantheon Books, 1982).

\textsuperscript{14}When I first set out to conduct this analysis, I was under the impression that the practice of mediation was being altered within the formal justice system, judging by some of the articles I had read on the topic and by the discussions I had with friends and colleagues who had studied or been trained in mediation on some level, worked as a mediator or who had followed recent developments within the field with more than just a passing interest. Some of these accounts validated my own sense that mediation is perhaps no longer being depicted or practised as a transformative-relational based approach and that it has become one of the routine steps that is used to get parties to the table in civil disputes being managed through provincial court-mandated programs. Rather than just assuming this to be the case, I was interested in finding out some of the underlying reasons which could explain some of the changes mediation has undergone as a result of its expansion into the formal justice system.
type of practice model adopted by mediators while mediating disputes; evaluative-settlement
and transformative-relational approaches are the two primary ones discussed in this paper.
Numerous labels have been used in the literature to define the type of approach(es) used by
mediators. Some of the more common labels include: model, model of practice, practice
model, orientation, orientation to practice, style, practice style, style of practice, and mode
of practice. In addition to explaining mediation in terms of approach, Bush and Folger were
perhaps the first to discuss the practice of mediation in relation to ideological constructs,
specifically, the individualistic and the relational.\textsuperscript{15} They correlate the individualistic
ideology with the problem-solving approach, while the relational ideology is said to underlie
the transformative approach. They also frame and present mediation in terms of the four
'stories' they believe have come to define the nature of mediation practice. They are the
'satisfaction', 'transformation', 'oppression' and 'social control' stories of mediation
practice.

1.2. \textbf{Organization of Work:}

The thesis is divided into four main chapters. Chapter two examines the way in
which mediation is conceptualized and classified in the extant literature. Having an
understanding of how mediation is conceptualized in the literature serves as an important
backdrop for the analysis presented in chapter four, which assesses the degree to which
current accreditation programs follow a dichotomous view of mediation practice, supportive
of an either/or approach to mediation, or whether they are consistent with a more pluralistic
conception of mediation practice, one which would conceivably support the adoption of

\textsuperscript{15} Supra note 4.
more transformative-relational approaches to practice alongside evaluative-settlement approaches within a legalistic environment.

Chapter three provides the context to the growing perception that patterns of mediation practice are emphasizing an evaluative-settlement approach at the expense of more transformative-relational approaches to practice. The chapter examines the interrelationship between this perception and recent trends towards the institutionalization of mediation, namely, the increasing use of mediation within legislative initiatives and court-mandated mediation programs; the potential co-optation of mediation by the state or legal profession; the professionalization of mediation; and the development of practice standards and qualifications for mediators.

Chapter four examines the extent to which the last of the above indicators - development of practice standards and qualifications for mediators, has played a role in increasing reliance on the use of the evaluative-settlement approach, leading to the suppression or abandonment of more transformative-relational approaches to practice within the formal justice system. On the basis of this analysis, this chapter considers how a transformative-relational approach to mediation can exist within a legalistic, problem-solving culture. In this context, emphasis is placed on the possibility of moving towards a pluralistic approach to mediation practice.

The fifth and final chapter provides a summary analysis of the findings provided in chapter four and offers some insights on the implications of these findings. The chapter concludes with a number of suggestions and questions that may guide future research.
Chapter 2

Unpacking the Approaches and Ideologies of Mediation Practice

2.0 Introduction:

Mediation has become a popular tool for resolving disputes in our society. The increasing popularity of the field has gained the attention of practitioners, policy makers, trainers and academics from a range of backgrounds and disciplines, including, social work, law, sociology, health care, psychology, and pastoral counseling, among others. As evidenced in the extant literature on mediation, this popularity has translated into a number of interesting debates and discussions. One of the key debates, which is the focus of this chapter, concerns the conceptualization and classification of mediation practice in the literature.

The first part of the chapter examines literature that has depicted mediation practice in dichotomous terms. As will be seen, this dichotomous conceptualization of mediation has given rise to conflicting views of best practice, leaving readers to expect that there are

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16 Some of the more recent issues and debates include the appropriate role of the mediator in shaping and guiding the mediation process; mediator neutrality; ethical dilemmas; theoretical frameworks, and even what constitutes the practice of mediation.

two sets of mediation approaches. Considerable attention has been paid to two approaches in particular, problem-solving and transformation. These approaches are informed by differing ideologies (individualistic and relational, respectively) of how mediation should be practised and what goals it should achieve. This tension has led to an emerging view that contemporary mediation practice is being driven by an individualistic ideology, reflective of the evaluative-settlement approach. With the increasing institutionalization of mediation within the formal justice system, coupled with the recent participation of lawyers in the mediation process, some are concerned that the problem-solving approach is being emphasized at the expense of more transformative-relational approaches to practice.

The second part of the chapter presents more recent literature that offers a different way of thinking about mediation, one that moves beyond divisive and polarized conceptualizations of mediation approaches. In particular, this research depicts mediation as a more protean and fluid form of practice, a theme that has received little attention as a result of the dichotomous modeling found in the literature. An understanding of the various conceptualizations of mediation practice found in the literature is essential to accomplishing one of the primary objectives of this thesis, namely: to determine whether current mediation practice standards offered by accreditation programs reflect the dichotomous conceptualizations of mediation practice commonly depicted in the literature or whether they are consistent with more recent research which offers a pluralistic conception of mediation practice.
2.1. Dichotomous Conceptualizations of Mediation Practice:

The four most commonly cited typologies of mediation practice found in the literature are the bargaining versus therapeutic approach, which was developed by Silbey and Merry;\(^{18}\) Bush and Folger’s problem-solving versus transformative approach;\(^{19}\) Kolb’s settlement versus communicative approach;\(^{20}\) and Riskin’s evaluative versus facilitative approach.\(^{21}\) This section examines these four typologies to demonstrate how approaches to mediation practice have been dualistically represented in the literature. In reviewing these typologies, I rely predominantly on the work of Cheryl Picard, who has succinctly synthesized the relevant scholarship in this area.\(^{22}\) For the purposes of this review, mediation is defined as:

> the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.”\(^{23}\)

2.1.1 Bargaining versus Therapeutic Approach:

As described by Picard, Silbey and Merry construct a classification scheme that consists of two “idealt-type” descriptions of mediator styles or settlement strategies, namely:

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\(^{18}\) Silbey and Engle Merry, *ibid.*

\(^{19}\) *Supra* note 4.

\(^{20}\) Kolb, *supra* note 17.

\(^{21}\) Riskin, *supra* note 17.

\(^{22}\) Picard, *supra* note 17. Please refer to her paper for a more detailed synopsis of these works.

\(^{23}\) Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (San Francisco: Jossey-Bass) at 14. Many authors have used this definition to refer to the common conception of mediation as a function of practice. It is, in my opinion, a useful definition to adopt for the purposes of this research paper.
the bargaining style and the therapeutic style. These categories were constructed as a result of studying one hundred and seventy-five mediation sessions involving forty different mediators at work. On the basis of their observations, Silbey and Merry conclude that mediators employ a variety of strategies to bring cases to settlement. These strategies may change depending on the interaction of the parties, but become more pronounced with experience over time. Silbey and Merry make a determination on the type of style used by the mediator on the basis of how they present themselves to the parties and the degree of control they exhibit over the substantive issues to be mediated. The extent to which the mediator can generate commitment from the parties to encourage or reach settlement is another factor used in the determination of mediator style.

As Picard observes, the bargaining style described by Silbey and Merry focuses on the settlement of the issues in dispute based on what parties want. Mediators using the bargaining style tend to exhibit greater control over the process than their therapeutic counterparts. Authority is claimed by mediators on the basis of their expertise and involvement in the legal system and view the goal of mediation as the settling of the dispute. The mediation process is carried out in a structured environment. Mediators maintain direct control of the process and rely on private caucuses to generate settlement, with little or no direct communication between the parties. Agreements are normally prepared without the

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24 Picard, supra note 17 at 40.

25 Ibid.

26 Ibid.

27 Silbey and Merry, supra note 17.
parties present.

In contrast, the therapeutic style is one where the mediator focuses more on communication and the preservation of relationships and less on reaching settlement.28 Disputes are seen to be the result of a communication breakdown rather than differences in interests or needs between the parties. Within this style, parties are encouraged to fully express their feelings and attitudes as a way of resolving their differences. Unlike their bargaining counterparts, therapeutic mediators are open to exploring past relations and external issues not related to the dispute. In this respect, therapeutic mediators view the purpose of mediation as helping the parties to reach consensus through mutual agreement. They are able to legitimate authority as a result of their experience in managing and preserving relationships. Since the focus remains on the relational aspects of the dispute, less emphasis is placed on the discussion of legal norms or principles. The writing and self-enforcement of agreements are used to preserve and enhance the future relationship between the parties.

2.1.2 Problem-solving versus Transformative Approach:

Like Silbey and Merry, Bush and Folger articulate their own account of mediation practice that focuses on problem-solving and transformative models of mediation. According to Picard, “Bush and Folger’s problem-solving and transformative constructs represent opposite ends of a continuum of mediation practice.”29 The authors suggest that current mediation practice is representative of a problem-solving approach that focuses on

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28Ibid.

29Picard, supra note 17 at 42.
the settlement of disputes and the achievement of party satisfaction. Bush and Folger connect the central value of the problem-solving approach to a prevailing individualist worldview where conflict is seen to emerge as a result of unmet and incompatible needs. The ideal response to conflict is one that is capable of eliminating any obstructions to satisfaction by finding solutions that meet the needs of all involved parties to the greatest possible degree. In the words of Bush and Folger, the individualist view is premised on the belief that:

... the most important goal is maximizing the satisfaction of individuals' needs or, conversely, minimizing suffering -- producing the greatest possible satisfaction for the individuals on both (or all) sides of a conflict. This story stresses mediation's capacity to reframe conflicts as mutual problems and to find optimal solutions to those problems...

Like mediators in Silbey and Merry's bargaining style, problem-solving mediators are seen to be more directive and focused on finding solutions to problems.

Bush and Folger refer to the problem-solving approach as the 'Satisfaction Story' of the "mediation movement," which views satisfaction as a critically important value, since it is tied more directly to the "realization of life's potential for bringing fulfillment". When fully realized, the value of satisfaction leads into, and is connected to, a view of human nature that emphasizes separateness, autonomy, individuality, and self-interestedness. Bush

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30 Supra note 4 at 4.
31 Ibid. at 229.
32 Ibid. at 56.
33 Ibid. at 26.
34 Ibid. at 236.
and Folger argue that mediation is increasingly being viewed and utilized as a mechanism for problem-solving and satisfaction of parties’ needs, across numerous contexts in which the process is employed.  

Bush and Folger contrast the problem-solving approach with a transformative model of mediation, also referred to as the ‘Transformation Story’ of the movement, which sees mediation as an instrument that is capable of engendering moral growth in disputing parties and producing compassionate human beings in the midst of conflict. Bush and Folger offer the transformative model in the hope of redirecting mediation practice beyond the popular problem-solving orientation they suggest is dominating contemporary theory and practice. Bush and Folger believe the potential of the transformative approach stems from its capacity to generate two essential dimensions – empowerment and recognition. The concept of empowerment refers to an individual’s ability to restore or gain a sense of his or her own value and strength in response to a resulting problem event or conflict. The recognition concept, on the other hand, refers to an individual’s ability to acknowledge or empathize with the situation of others. When used together, these processes can enable disputing parties to use conflicts as opportunities for moral growth. Transformative mediators resemble the therapeutic mediators described in Silbey and Merry’s work in that they concentrate on empowering parties to define issues and decide settlement terms for themselves, with a view to increasing mutual understanding between the parties.

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35Ibid. at 33.
36Ibid. at 2.
37Ibid.
Bush and Folger point out that the transformative approach to mediation does not stand alone, but is linked to a particular view of social relations that has come to be known as the relational worldview. This view values the achievement of human conduct that integrates strength of self and compassion towards others with the ultimate goal of transformation. Conflict is viewed as an opportunity for positive moral growth and transformation rather than as a problem in need of resolution.

2.1.3 Settlement versus Communicative Approach:

Kolb and Associates\textsuperscript{38} chronicle the work of twelve accomplished mediators from a range of dispute sectors. Kolb constructs a “framing” methodology to describe the schemes that mediators use to interpret and organize their activities while mediating a dispute.\textsuperscript{39} Based on her study, mediators were seen to use a settlement frame or a communication frame to conceptualize their work. To distinguish patterns of behaviour within these frames, Kolb divided the work of the mediators into three groups based on their approach to practice: professionals, builders of the field, and those who use mediation as an element in their practice to achieve particular ends (what Kolb refers to as ‘extending the reach of mediation’).\textsuperscript{40}

The professional mediators were more likely to adopt a settlement frame as a way of defining their role and structuring their activities. Similar to Silbey and Merry’s bargaining approach, and Bush and Folger’s problem-solving approach, professional/settlement

\textsuperscript{38} Kolb et al., supra note 17.

\textsuperscript{39} Ibid.

\textsuperscript{40} Ibid.
mediators are seen to operate from an individualist set of ideologies and orient their activities toward practical problem-solving to uncover the elements of a dispute that will result in a possible deal and that will motivate parties towards the acceptance of the deal. Professional mediators make a living working as private practitioners on a full-time basis, either in private practice, as part of a dispute resolution firm or in an institutional setting. Because professionals mediate similar types of cases within a given specialization, they tend to adopt a more pragmatic and directive approach to their work than the other two groups. They provide information based on case law and risks to non-settlement and use persuasion tactics to influence parties to agree to terms of settlement.

Several mediators profiled in both the builder and outsider groups are seen to define their work in more communicative and relational terms than the professional group. The ‘builders of the field’ category represent those mediators who have developed the models from which many mediators in various dispute areas (legal, business, public policy, community) draw to conceptualize their work. Mediators in this group tend not to practice full time, but divide their time among mediation, teaching, writing and public advocacy. The outsider group consists of a diverse cross-section of ‘informal’ mediators who intervene to solve a wide variety of disputes and conflict outside the boundaries of mediation practice. While they do not align themselves with the field, this group is considered to have ‘extended the reach of mediation’ through the variety of mediative techniques they employ in their everyday life as policemen, judges, teachers, and employees, etc.

Mediators in both groups were seen to use mediation as means to “empower

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41Ibid. at 466.
community members, further the goal of citizen participation, and set standards for responding to the current world challenge of ethnic, tribal and cultural disputes.\textsuperscript{42} Unlike the professional group, the builder and outsider groups use a less directive style to enhance communication so that parties are able to come away from mediation with a better understanding of the dispute. There is an effort to impel the parties to remain engaged in dialogue so that new ideas and areas of compromise might be discovered. They also encourage parties to remain focused on future prosperity rather than past conflict. In this respect, Kolb’s communication frame bears some resemblance to Silbey and Merry’s therapeutic approach, and Bush and Folger’s transformative approach.

2.1.4 \textbf{Evaluative versus Facilitative Approach:}

Like Silbey and Merry, Bush and Folger, and Kolb, Riskin employs dichotomous modeling to describe the various approaches to mediator practice.\textsuperscript{43} Using a grid methodology, Riskin evaluates mediation styles on the basis of two contrasting features, with each quadrant representing a general orientation toward mediation practice.\textsuperscript{44} The first measures the scope of the problem the mediator needs to address to resolve the issue (i.e., narrow or broad), while the second examines the strategies and techniques mediators employ to resolve problems (i.e., evaluative or facilitative).\textsuperscript{45} Although suggesting that mediation approaches are not tightly contained within his typology, Riskin states that mediators tend

\textsuperscript{42}Ibid.

\textsuperscript{43}Riskin, \textit{supra} note 17.

\textsuperscript{44}This grid methodology for classifying mediation orientation is also described in Picard, \textit{supra} note 17 at 45.

\textsuperscript{45}Riskin, \textit{supra} note 17 at 17.
to operate from a predominant orientation that is based on a combination of education, training, personality and experience. Riskin designed the system to help parties understand the type of mediation process they wish to undertake and the type of mediator they should use.

As Riskin explains, the evaluative mediator assumes the parties want the mediator to provide guidance on the appropriate grounds for settlement. The mediator is qualified to give advice by virtue of training and experience in the particular field of the dispute. In contrast, a facilitative mediator assumes the parties are capable of creating better solutions than what a mediator might create for them. Facilitative mediators attempt to clarify and enhance communication between the parties to assist them in decision-making.

Starting at one end of the continuum, a mediator using an evaluative-narrow approach would assess the potential strength or weakness of each parties’ position in court and convince parties to settle based on his or her assessment of their case. An evaluative-broad approach also seeks settlement of the dispute, but the mediator uses a process that emphasizes the discussion of interests over positions, with the hope of creating a solution that accommodates these interests. A mediator using the facilitative-narrow approach seeks to help parties fully understand their situation using unbiased assessments. At the other end of the continuum, a facilitative-broad approach helps the parties understand and clarify the issues they wish to resolve, with the aim of facilitating a discussion of interests over positions.

\[40\text{Ibid.}\]

\[47\text{Ibid. at 277.}\]
2.1.5 Reflections on the Four Typologies: The Effect of Dichotomous Modeling on Mediation:

Having outlined the four typologies above, a number of observations can be made. Firstly, as Picard observes, approaches to mediation practice are often depicted in dichotomous classifications.\(^{48}\) In each of the four typologies described, mediators are seen as having a settlement goal or a relational goal, with each goal being found at opposite ends of a pole. The notion that a settlement and relational goal are mutually exclusive (cannot be successfully combined) is a strong tenet of the theory set out by Bush and Folger. They believe that a problem-solving mediator cannot follow the hallmarks of transformative mediation and still ensure that a settlement will be reached. In the same way, they argue that a transformative mediator cannot encourage empowerment and recognition while pursuing the goal of settlement. For example, the mediators described in Silbey and Merry’s bargaining approach, Bush and Folger’s problem-solving approach, Kolb’s settlement approach, and Riskin’s evaluative typology are seen to value the goal of settlement. In these characterizations, mediators adopt a style that is directive, structured and focused on reaching settlement. Mediators are also seen to assume an activist role in the outcome of the dispute and tend to avoid direct communication between the parties. By contrast, the mediators depicted in the therapeutic, transformative, communicative, and facilitative approaches are seen to espouse more relational goals, such as mutual understanding, empowerment, recognition and open communication.\(^{49}\) In these approaches, mediators focus on the

\(^{48}\)Picard, supra note 17 at 47.

\(^{49}\)Ibid.
underlying issues and problems that may help the parties work through the dispute. To accomplish these ends, mediators focus on the feelings and emotions of the parties and adopt a style that is less directive and activist, and more communicative.

The effect of this classification framework reveals how following a particular ideology can have a direct implication on the types of approaches mediators use in particular dispute settings. It also shows how a particular ideology can affect a mediator's actions, the goals they set, the control they exert over the process, and the strategies they use to assist the parties to resolve the dispute. Although these typologies were created by the authors to bring order to the diversity of what constitutes mediation practice by current standards, the result has led to the characterization and conceptualization of mediation as a dichotomous process. What effect has dichotomous modeling had on mediation? Perhaps the most significant outcome has manifested itself in an ideological debate over which approach to practice the mediation community should adopt. As outlined earlier, this debate has focused largely on two approaches to practice: problem-solving and transformation. These two approaches are seen to represent contrasting ideological views over what mediation

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50 In her analysis of Kolb and Kressel's research, Menkel-Meadow observes that the variety of approaches to mediation outlined in When Talk Works illustrate how basic techniques must be altered depending on the context of the problem or institution in which the dispute is situated. See Carrie Menkel-Meadow, “The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices” (1995) Negotiation Journal 217 at 228.

51 Picard, supra note 17 at 57.

52 Ibid.

53 As I have explained, approaches to mediation practice have been depicted in dichotomous terms. For purposes of consistency, I use the practice conceptualizations of problem-solving and transformation employed by Bush and Foiger. In my opinion, the problem-solving and transformative characterizations are sufficiently broad to capture the similar conceptualizations employed by Silbey and Merry, Kolb and Riskin.
should accomplish. The problem-solving approach is based on an individualistic ideology. The individualistic ideology views the world as made up of individuals who have different and competing needs and desires. Individuals following this ideology are driven by values of satisfaction, seeking to have their needs and desires satisfied to the greatest degree possible. The transformative approach is based on a relational ideology. The relational ideology views the world as made up of individuals that are connected to each other by a human capacity to relate the needs and experiences of self and those of others. This relational capacity leads to an “integrated human consciousness that acts with both strength and compassion”.

The ideological divide between the problem-solving and transformative approaches has had the effect, as Picard suggests, of one approach being pitted against the other, which “gives it ‘pride of place’ by allowing it to become the standard that measures the other.” Advocates of the relational ideology believe that the parties should be the ones that decide both the process and the outcome of the mediation, with the mediator following their lead. In this respect, some adherents of this view raise serious concerns about disputants’ confusion, stemming from a lack of understanding of what to expect from mediation, the quality of mediation using evaluative-settlement approaches and techniques, and the potential

54 _Supra_ note 4.

55 _Ibid._ at 242.


57 _Supra_ note 4 at 243.

58 Picard, _supra_ note 17 at 48.
for coercion that may result from the application of such approaches.\textsuperscript{59} Adherents of this view are reluctant to call such approaches mediation, preferring instead to use terms like mediation-arbitration, non-binding arbitration, neutral case evaluation or private settlement conferences.\textsuperscript{60} Advocates of the individualistic ideology, on the other hand, claim that transformative-relational mediation is too idealistic, unfocused and not particularly well suited to helping the parties reach agreement. Many adherents of this view describe transformative-relational mediation as “touchy-feely, therapeutic, new-agey, and even a potted plant approach to mediation.”\textsuperscript{61} Detractors of the transformative-mediation also claim that the solutions derived from such approaches can be contrary to standards of fairness.

The tension between approaches has also led to related differences regarding the appropriate goals of mediation. Supporters of the individualistic ideology, for example, believe that disputants are primarily interested in having their disputes resolved, and thus settlement is the only or primary goal of mediation. In this view, any settlement is a success and not settling is, inherently, a failure. Advocates of the relational ideology believe that other values are more important than simply whether a dispute is settled. They claim the unique values of mediation is its potentials to empower individual disputants and to encourage mutual recognition between disputants. There are others who argue that the goal of mediation should be to assist disputants to craft not just any settlement, but one that optimally and jointly satisfies their underlying interests. Others focus on enhancing


\textsuperscript{60}\textit{Ibid.} at 845

\textsuperscript{61}\textit{Ibid.}
relationships and protecting disputants and third parties from harm. While this may not be an exhaustive list of what mediation theorists and practitioners see as the primary goals of mediation, it does reflect some of the major and strongly-felt views about what the goals of mediation should be.

Another issue resulting from this tension between approaches is the question of who should be doing mediation. The legal community and governments on one side, and social work, community and other non-lawyer mediators on the other are grappling with this question. Some mediators believe the legal profession and provincial and state governments are using mediation as a problem-solving device, reflective of a rights-based approach, as an adjunct to the court system. They claim that mediation is being used as a mechanism to support efficient case management, cost savings, reduced hearing times and timely settlement. Social workers, therapists and community mediators, on the other side, believe that mediation should abandon the problem-solving approach in favour of a more relational, transformative model of practice. These groups contend that mediation is better placed to enhance social relations and restore harmony among parties to a conflict. This tension has also led more recently to debates related to the accreditation of mediators.

While the tension between the individualistic and relational ideologies continues to be played out, Bush and Folger argue, as outlined earlier, that an evaluative-settlement approach is being emphasized at the expense of more transformative-relational approaches

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62 Picard and Saunders, supra note 8 at 227.

63 Ibid.

64 This debate will be discussed in more detail in chapter 3.
to practice. They attribute this development to the increasing focus on the individualistic ideology, which emphasizes party satisfaction and settlement. Viewing conflicts as problems to be solved and mediation as an opportunity for all parties to have their needs met first gained momentum with the interest-based, problem-solving negotiation model developed by Fisher and Ury.\textsuperscript{65} This book was written to provide the general public with information on negotiating agreements without facilitation assistance. The increasing involvement of lawyers in the mediation process, particularly in court-connected mediation, is a further reason attributed to the use of a problem-solving based approach.

Menkel-Meadow suggests that the emphasis on the problem-solving approach has resulted largely from the field’s pursuit of quantitative-efficiency claims over qualitative-justice claims.\textsuperscript{66} Both processes represent different ideologies on how disputes should be resolved. Quantitative-efficiency, in her framework, refers to mediation’s ability to reduce caseloads in a cost and time-efficient manner, while qualitative-justice refers to the capacity of mediation to provide individuals with increased access to justice otherwise not available to them through more formal processes and to provide a greater opportunity for party participation and recognition of the other parties’ goals. This framework is based on three main findings. Firstly, the use of mediation, arbitration and other third-party dispute resolution processes were advocated increasingly by United States Supreme Court Chief Justice Warren Burger in the mid-1970s as a way to combat the perceived litigation.

\textsuperscript{65}The model developed by Fisher and Ury, \textit{supra} note 6, has become one of the most popular and widely recognized frameworks for characterizing negotiation.

\textsuperscript{66}Menkel-Meadow, \textit{supra} note 8 at 6.
explosion. Similarly, a decade later ADR organizations were created in the United States to deal with mounting costs associated with corporate litigation. Secondly, scholars have focused much of their research and writing on the advantages of mediation and ADR to resolve cases at a high rate of speed and effectiveness. Thirdly, and related, scholars in the past have tended to evaluate the effectiveness of dispute resolution and mediation processes from a settlement-efficiency perspective.

Menkel-Meadow’s research demonstrates that different groups have pursued mediation for different reasons: the established Bar and legal community have tended to pursue mediation as an efficiency, settlement-producing mechanism, while social workers and community volunteers have used mediation in the promotion and facilitation of quality settlements. However, rather than offering an alternative to the system it was intended to replace, Menkel-Meadow suggests that courts and the formal justice system are using mediation and various forms of ADR “to reduce caseloads and increase court-efficiency at the possible cost of realizing better justice.” 67 Similarly, Bush and Folger argue that the practice of mediation has moved steadily away from its origins as a transformative-based, community-driven ideology to a problem-solving ideology, which is concerned with expedient settlement of disputes. One of the growing concerns associated with this tension is that the expansion of mediation into the formal legal system, coupled with the adoption of the role of mediator by lawyers has resulted in the use of mediation as an evaluative, problem-solving, rights-based mechanism.68 The assumption is that this development is

67 Ibid. at 3.

68 Bush and Folger, supra note 4; Picard and Saunders, supra note 8 at 231.
serving to dilute the original transformative goals of mediation to more “evaluative and business-like ends”.

2.2 Pluralistic Conceptualizations of Mediation Practice:

As outlined above, there is a tension between different modes of conceptualizing mediation. The tendency in the field has been to view mediation as “therapeutic, helping or communication” work with individuals on the one hand, or in terms of a settlement-oriented, problem-solving, structural and evaluative framework on the other. These tensions were seen in the typologies developed by Silbey and Merry, Bush and Folger, Kolb, and Riskin. Although the tendency has been to conceptualize mediation in bipolar dichotomies, more recent research suggests that the perceived tensions between practical-settlement and relational-based models of practice need not be seen in dichotomous terms, but should instead be seen to “inform each other and allow a protean social practice”. The following overview of literature is intended to demonstrate the tremendous diversity of approaches and models of practice that have developed to further differentiate approaches to mediation practice.

Despite focusing much of their attention on the nature of mediation practice in dichotomous terms, as evidenced through the juxtaposition of the problem-solving and transformation approaches to practice, Bush and Folger offer two other accounts or “stories” of mediation, which they believe characterize the growth of the mediation movement;

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69 Picard, supra note 17 at iii.

70 Menkel-Meadow, supra note 50 at 218.

71 Ibid. at 225.
namely, the ‘Social Justice Story’ and the ‘Oppression Story’. These views are framed and presented as stories that would be told by people in the “movement” to describe mediation in terms of its inherent goals and capacities. In general terms, the Social Justice Story\textsuperscript{72} sees mediation as a tool to be used for helping to organize and build coalitions among individuals and as a means of generating greater bargaining power for the “have-nots”. In contrast, the Oppression Story\textsuperscript{73} sees mediation as a tool to be used in applying pressure and manipulation in ways that cause greater unfairness to the disadvantaged. While not making an explicit correlation, Bush and Folger suggest that each of these stories are supported by different approaches to mediation practice, which have different and varied impacts. The authors suggest that the existence of these stories supports the view that the current state of the mediation movement is diverse and pluralistic, not monolithic.\textsuperscript{74} While acknowledging the diversity of mediation practice, Bush and Folger argue that no one approach can ever achieve all the goals at one time. They do, however, suggest that a dominant form of practice has emerged, one which has moved steadily in the direction of emphasizing the problem-solving and settlement dimensions of the process, with the result of little attention being given to coalition building or transforming of the parties through empowerment and recognition.

The series of profiles presented in Kolb’s \textit{When Talk Works}, outlined earlier, reveal a variety of approaches at work among three groups of mediators: professionals (problemsolvers); builders of the field (transformative); and those who use mediation as an element

\textsuperscript{72}Bush and Folger, \textit{supra} note 4 at 18-19.

\textsuperscript{73}\textit{Ibid.} at 22-24.

\textsuperscript{74}\textit{Ibid.} at 15.
in their practice (therapeutic, community). Consistent with the four typologies described earlier, the profiles presented in Kolb’s work reveal how different philosophies about purpose have direct implications on the approaches and techniques chosen by the mediator. The settlement approach (seen to be employed by the professional group) is favoured by those mediators who emphasize party autonomy and satisfaction. Concern for personal growth and transformation of the parties led other mediators (primarily those in the builder and outsider groups) to employ a relational-communicative approach. While Kolb’s “framing” methodology (settlement or communicative) is instructive for describing the schemes that mediators use to interpret and organize their activities while mediating a dispute, Menkel-Meadow argues that the twelve profiles, when taken together, reveal a “greater variety, flexibility and plasticity of models” than the illustrations commonly revealed in the literature. In particular, the profiles show that approaches used by the three groups of mediators are not overly rigid or static, but can be altered depending on the context of the problem, the nature of the dispute, the level of training and experience of the mediator, and/or the institutional setting in which the dispute is situated.

Menkel-Meadow has discerned at least nine different types of models used by the twelve practitioners. These are as follows: facilitative; evaluative; transformative; bureaucratic; open; closed; activist; community-controlled; and pragmatic. The majority

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75 The bracketed terms are another way of describing the interpretive labels developed by Kolb. They are also consistent with the labels set out in this paper.

76 Menkel-Meadow, supra note 50 at 228.

77 Ibid.

78 Ibid. at 228-230.
of the mediators profiled indicated that they use a ‘facilitative model’ to help parties arrive at their own solutions; since mediation is said to be facilitative in its purest form, this is perhaps not surprising. The ‘evaluative model’, a hybrid of mediation and arbitration, is another approach used by some mediators. Mediators following this approach suggest possible outcomes or solutions to parties based on how well they would do if the case went to trial. Many of the professional mediators are seen to use this model. The ‘transformative approach’, as set out by Bush and Folger, seeks to change the parties through empowerment and recognition and community involvement. Unlike the evaluative model, the parties are given more choice over the ground rules and other process issues. Some of the mediators in the builder and outsider groups choose the transformative model as their preferred mode.

‘Bureaucratic models’ are employed by many of the professional mediators working in court (through mandatory programs) or other institutional settings. The setting is considered the key factor in how mediation is conducted. Since bureaucratic mediators and those in private practice tend to have set routines on how they mediate, the outcomes and processes of mediation are seen to be more limited under a bureaucratic approach than a potentially more transformative-relational based model. Menkel-Meadow also distinguishes between ‘open’ and ‘closed’ processes. The former provides more opportunities for control by the parties over the rules and routines, whereas the latter present less opportunities for such control. ‘Activist mediation’ involves substantial involvement by the mediator, whereby mediators are responsible for choosing who will participate in the dispute and in some cases, for crafting the outcome. Public policy mediators are seen to use this model. ‘Community-controlled mediation’, considered a less professionalized process, is often
practiced by more than one mediator. Mediators in community-based programs in Kolb’s study are concerned that this model will become co-opted by affiliation with court programs or other governmental institutions, a concern discussed in chapter three. Lastly, some of the mediators were also seen to use a ‘pragmatic model’. In this model, mediators use a variety of persuasion tactics to reach agreements in order to avoid an impasse. Menkel-Meadow considers this “highly instrumentalist, agreement-oriented mediation”.

These examples illustrate the diversity of approaches to mediation at a particular moment in time. Indeed, these examples are likely one of many that can be drawn in terms of distinguishing other models, particularly as the field continues to expand into new dispute sectors and with the increasing involvement of individuals from other professions. Importantly, these examples demonstrate that the contours of actual practice are not created in a vacuum, but conform to the different philosophies and goals of mediators, types of problems, and the different environments in which mediation is practiced. As will be seen in the next section, these profiles have shown us that mediation is a deeply contextual process, one which is adaptive to the environment in which it is used. The differences in approaches and techniques are also attributable to the variety of professional origins mediators bring to their work, including: law, social work, labour, mental health, and public policy, to a name a few.

Another point to be made is that these models are not considered mutually exclusive.

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79 Ibid. at 230.

Some of them, particularly the disputes at the community and public policy level, deal simultaneously with the rights and responsibilities of disputants, as well as their needs and interests. Menkel-Meadow argues that mediation, when used as a more open process, can “take account of legal, economic, and social rights and entitlements while also being sensitive to individual and community needs and interests which are articulated in formal legal entitlements.”\textsuperscript{81} Williams offers a similar view, suggesting that a problem-solving and transformative-based approach of mediation can and should continue to co-exist, since these approaches are not necessarily mutually exclusive.\textsuperscript{82} In other words, he does not buy into Bush and Folger’s assumption that mediation is incapable of providing both settlement and relational benefits to disputing parties at the same time. He maintains that transformative and problem-solving mediation “often operate together” in practice, resulting from both parties’ agreeing to resolve the conflict in a cooperative manner.\textsuperscript{83} In this regard, Williams suggests that mediators need not abandon a focus on satisfaction or agreement in the pursuit of empowerment and recognition, since both outcomes are equally dependent on the other.

This thinking is consistent with the results of a recent study of volunteer mediators in a community justice program,\textsuperscript{84} which found mediators to possess varying degrees of

\textsuperscript{81} Menkel-Meadow, \textit{supra} note 50 at 227.

\textsuperscript{82} See Michael Williams, “Can’t Get No Satisfaction? Thoughts on The Promise of Mediation” (1997) 15:2 \textit{Mediation Quarterly} 143. Even Bush and Folger have admitted that the problem-solving approach may represent a partial shift toward a transformative approach to the extent that it represents a departure from a distributive orientation (akin to the adversarial model in the formal justice system), which defines conflict in adversarial terms. \textit{Supra} note 4 at 111.

\textsuperscript{83} Williams, \textit{ibid.} 143 at 154.

transformative and problem-solving attributes in their approach. The degree to which they would possess one or the other, or both were seen to be dependent on the situation, level of flexibility of the mediator, as well as frequency and level of mediation experience. Although the volunteer mediators were seen to use both approaches at different points during a mediation, experienced mediators were more likely than less experienced mediators to use a transformative approach.\textsuperscript{85} The goal of the transformative approach was to foster better communication and understanding between the disputing parties through empowerment and education.\textsuperscript{86} The adoption of a more transformative approach was not seen to happen at any one point, but would occur gradually over time. In examining the concept of neutrality in mediation practice, Taylor believes that mediators should base their approach (transformative, problem-solving or hybrid) according to the mandate given them by the disputing parties.\textsuperscript{87} She states “whether I am in expanded or strict neutrality and whether I am using problem solving or working more on a transformative level, it will be because that is what the client has given me permission to do”.\textsuperscript{88} In this context, Taylor believes, like the other theorists presented above, that a problem-solving or transformative approach to mediation should be seen as a continuum rather than a single point. Furthermore, the

\textsuperscript{85}This finding is also consistent with the mediators in Picard’s study, \textit{supra} note 17. ‘Veteran’ mediators were more likely to be drawn to mediation by visions of transformation and empowerment. In this respect, veteran mediators were more likely than ‘newcomer’ mediators to conceptualize mediation as a socioemotional activity rather than as a settlement, pragmatic activity.

\textsuperscript{86}Martin, \textit{supra} note 84 at 51.

\textsuperscript{87}Taylor, \textit{supra} note 80 at 230. She uses the term ‘client’ to refer to the disputing parties in a family mediation context.

\textsuperscript{88} \textit{Ibid.} at 230. Taylor believes this is part of exercising client self-determination.
decision to use one or both approaches should be made according to the context of the dispute and the mandate given by the parties.

The above views are offered not because they are the last word on the subject, but because they demonstrate that earlier typologies have failed to recognize the inherent ability of mediation to provide multi-dimensional benefits across the many contexts in which it is practised. Earlier typologies of mediation have characterized a particularly narrow view of mediation at a time when the field should be expanding its notion of what mediation can rather than what it cannot do. The field continues instead to be engaged in extensive debates on how to measure success. The adherents of a transformative-relational approach tend to be much more concerned about increased participation, personal growth and empowerment goals, almost to the point of dismissing a focus on settlement. Followers of an evaluative-settlement approach tend not to worry about relational goals and focus instead on achieving settlement. But many practitioners and theorists resist this reductionist view and point out that there are many other aspects of mediation "success" that often get ignored in dichotomous modeling, such as satisfaction of the parties with the outcome and the quality of the experience for the disputants and the mediator.\textsuperscript{89} As outlined earlier, some believe there is a trend to measure success on the basis of tangible results, with cost-effectiveness as an explicit dimension of the evaluation. Measuring mediation based on settlement rates alone would likely encourage the use of evaluative-settlement approaches over more transformative-relational models of practice.

\textsuperscript{89}Alex Wellington, "Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism" (1999) 12 Canadian Journal of Law and Jurisprudence 297.
Like Menkel-Meadow, Picard argues that the continued positioning of one approach over another is problematic insofar as it masks the diversity and complexity of the various approaches to practice that currently populate the mediation landscape.\textsuperscript{90} She offers a more integrative view of mediation, one which takes into account the various contextual factors surrounding a dispute and the plurality of meanings associated with mediation, all of which amount to a newly revealed perspective on how mediators conceptualize and understand their work.

2.2.1 A New Framework for Understanding Mediation:

Cheryl Picard questions the method of dichotomous modeling represented in the extant literature and suggests that current understandings of mediation practice, as seen by both individual and groups of mediators, are more diverse and pluralistic than revealed in the literature to date. Her study of mediation trainer-practitioners in Canada in the late 1990s suggests that mediators hold different perspectives on how they conceptualize and understand mediation.\textsuperscript{91} Specifically, Picard’s research points out that mediators draw on a range of meanings to define their work rather than a single or set of meanings often found within the extant literature. This diversity in meaning is attributed to a number of interrelated factors, including the growth and expansion of mediation into new dispute areas over the last ten years, the diverse range of individuals now working as mediation practitioners,

\textsuperscript{90}Picard, supra note 17 at 11.

\textsuperscript{91}Ibid. It should be noted that this study relied upon self-report measures rather than observation. Picard’s analysis and supporting conclusions were based on interpretive sociology. This social research instrument was used to obtain information about the nature of mediation by examining how Canadian mediators in the late 1990s, with various demographic characteristics and dispute backgrounds, understand and conceptualize their work.
and the emergence of mediation as a profession, all of which has led to the introduction and expansion of contrasting theories of mediation practice.\textsuperscript{92}

Using an integrative framework for understanding mediation, Picard’s research reveals at least four distinct, and in some cases inter-related, patterns of mediation meanings among the group of respondents surveyed. The integrative tool was devised from the compilation of a series of responses to a survey, which examined how respondents understood their role, style and orientation to mediation, including their use of caucus and individual beliefs about mediation. These patterns and combination of interactions were labeled the ‘pragmatic,’ the ‘socioemotional,’ the ‘pragmatic-socioemotional,’ and the ‘socioemotional-pragmatic’. Within each pattern of meaning exist patterns of interaction among traits, all of which remain present in varying degrees in each of the other identified patterns.

Mediators who were seen to exhibit a ‘pragmatic’ pattern of meaning tended to define their orientation to mediation in “settlement, evaluative and directive” terms.\textsuperscript{93} Similar to Silbey and Merry’s bargaining approach, Bush and Folger’s problem-solving orientation, Kolb’s settlement frame, and Riskin’s evaluative frame, pragmatic mediators in Picard’s research sample understand their role to be that of helping parties to resolve their dispute through frequent caucus sessions and by remaining task-focused and problem-oriented. In contrast, individuals with a highly ‘socioemotional’ pattern of meaning define their

\textsuperscript{92}Ibid. at 191.

\textsuperscript{93}Ibid. at 194.
orientation to mediation practice in "humanistic, transformative and relational" terms.\textsuperscript{94} This group understands their role to be that of helping the parties to communicate and better understand each other. Socioemotional mediators tend to caucus less frequently than their pragmatic counterparts. Since they tend to be concerned with parties' emotions, nearly all of their attention is devoted to the individual rather than the problem at hand.

Mediators thought to identify with the 'pragmatic-socioemotional' and the 'socioemotional-pragmatic' patterns of meaning were seen to use a more evenly distributed mixture of concepts and traits when describing their role, style and orientation to mediation practice. In both patterns, mediators were not seen to clearly identify with either the pragmatic or socioemotional poles, but would draw from both ends of these poles, in varying degrees, to conceptualize their practice of mediation. This finding conflicts with the work of Bush and Folger, who suggest that mediators tend to be either settlement driven or transformative, not both. Mediators in Picard's study believe they change their approach to practice based on the circumstances surrounding the dispute and the characteristics of the parties. In addition, the mediators view their role in more pluralistic ways over time. This finding is contrary to Riskin's work, which suggests that mediators usually have a predominant style or orientation to practice. It also contradicts the work of Silbey and Merry's, which posits that mediators strategies become more pronounced over time rather than more diversified.

This research also demonstrates that certain patterns of mediation meaning can become even more diversified when examined against several contextual factors, such as

\textsuperscript{94}Ibid.
gender, educational background and the dispute sector in which a respondent works, including the length of time they have been mediating. This was seen in the discussion regarding how trainer-practitioners understand their role as mediators. Picard’s analysis reveals that, while trainer-practitioners use the same words to describe their role as mediators, they do not always mean the same thing. For instance, mediators were found to attribute different meanings to the word “facilitative,” a role with which many mediators identified. In Picard’s study, mediators have three different understandings of the facilitator role, one of facilitating process, facilitating communication, and facilitating resolution. Variations in understanding were seen to be connected to the four contextual variables described above. This pattern also holds true when mediators conceptualized their role as being transformative in nature. In some cases, a transformative role is seen to be associated with changing institutional structures, while in others it is linked to relational aspects of mediation, or a spiritual event.

This pattern of attributing different meanings to similar words was also seen to be the case when mediators described their style of mediation. Mediators who described their style of mediation as ‘facilitative’ understand this style to be associated with different meanings, including serving an educational function, being emotionally and personally attentive, and attending to process management.

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96 *Ibid.* at 143.


mediation as 'problem-solving' included reference to both settlement and therapeutic, thereby attributing different meanings to this particular style. In addition, Picard's study found that the majority of mediators use more than one style of mediation depending on the nature of the conflict situation, a finding that challenges the prevailing assumption found in the extant literature that mediators rely on one predominant style while mediating disputes.\(^9\) Similar to variations observed with the role of a mediator, a mediator's style was seen to be influenced by various contextual factors, including experience as a mediator, education and training, and professional background.\(^10\) Picard's study also suggests that while mediators may have some tendencies as a result of their gender and professional background, their style of mediation may change depending on the circumstances surrounding the dispute and the characteristics of the disputing parties.

In examining the way in which mediators conceptualize their role as mediators, coupled with how they describe their particular style of mediation, Picard suggests a conclusion might be reached that there is not a single understanding for many of the terms that mediators use. These differences in meaning are seen to be linked to various contextual factors of both mediators and the disputing parties, but which until now have been ignored in dichotomous modeling found in much of the extant literature.

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\(^9\)\textit{Ibid. at 170.}

\(^10\)\textit{Ibid.}
2.2.2 Reflections on a Pluralistic Conceptualization of Mediation Practice: The Many Ways and Meanings of Mediation:

What are some of the implications of Picard’s research on the field? For one, it may serve to prevent further research from continuing polarized and dichotomous ways of conceiving mediation practice. In this context, it may provide some much needed guidance on how to construct future mediation models and approaches that take into account the range of purposes and patterns of meanings from which mediators draw to conceptualize, rationalize, organize and carry out their work. It also suggests that it may be problematic for the field “to presume to know what people mean when they talk about mediation”.\textsuperscript{101} For another, it may be instructive for helping the field to develop more comprehensive analyses of how particular tactics and aims of mediators need to be adapted to the particular context or situation in which conflict arises.\textsuperscript{102} Parties to a dispute, in turn, should be encouraged to turn their attention toward understanding the varieties of mediation practice and the variety of mediators “to ensure they have the best chance of having their needs met”.\textsuperscript{103}

The research suggests that the field of mediation may be becoming more flexible and diversified as the field continues to grow and mature and as the nature of understanding of mediation becomes increasingly diverse over time. This finding challenges those who continue to study and write about mediation in dichotomous representations. On a broader level, this research demonstrates that it may be premature to designate what mediation is and is not, or indeed – what it should be, since this type of discussion would restrict this

\textsuperscript{101}Ibid. at 165.

\textsuperscript{102}Menkel-Meadow, supra note 50 at 228.

\textsuperscript{103}Picard, supra note 17 at 208.
diversity.\textsuperscript{104}

Similarly, the information presented by Kolb, Menkel-Meadow, Williams, Martin and Taylor suggests that there are a diversity of approaches that characterize mediation practice. Each of these authors depicts mediation as a highly fluid and flexible form of practice, one which can be altered by a number of external factors, including, but not limited to: the nature and type of dispute, the experience and level of flexibility of the mediator, characteristics of the disputing parties, the mandate given by the parties, as well as the mediators' ideologies and goals of mediation, and the setting in which mediation is practised. To adapt to these differing conditions, mediators were seen to use a variety of approaches, often integrating problem-solving and transformative-relational attributes in their approach. This practice of integration was seen to increase the capacity of mediation to provide multiple and intangible benefits for disputing parties.

Rather than trying to characterize single-school or dualistic views of mediation practice, along with efforts to maintain distinctions about which approach or ideology is superior, I suggest that it would be more productive for the field to recognize the advantages that can be gained by advocating a more diverse, pluralistic conception of mediation, one that sees mediation as a protean form of practice that is uniquely adaptable to a variety of factors, such as the context and nature of the dispute, the level of training and experience of the mediator, and the setting in which the dispute is situated. The preceding research reveals that mediation can provide many positive and flexible benefits, both quantitative and qualitative, not always possible under the formal justice system or other more formal dispute resolution

\textsuperscript{104}Ibid. at 191.
processes. This is seen to be achieved when evaluative-settlement and transformative-relational approaches to practice are used together, rather than in isolation of the other. However, the juxtaposition of one approach to practice against the other ignores the multiple and intangible benefits that can result from such a development. The prevailing assumption in certain segments of the field has been to associate different goals of mediation with different approaches to practice. Some take a micro view and see mediation as a pragmatic process that is capable of helping parties resolve disputes in a mutually acceptable way. The focus remains on settlement rates because they are quantifiable, relatively easy to compare with other processes, and more readily related to the goals and aspirations of the disputants. Others, like Bush and Folger, take a macro perspective and suggest that mediation should be used to transform the moral character of individuals through the social concepts of recognition and empowerment. They claim that attention on mediation’s capacity to transform is linked to an understanding that the field is capable of providing valuable effects other than the settlement of a dispute. Although not as easily measurable, success is achieved when the parties have come to some new understanding or learning about themselves and the other disputants. In this sense, each view or approach to practice, in its own way, contributes to the value of mediation.

The capacity of mediation to enable disputing parties to achieve a greater mutual understanding of each other should not be marginalized at the expense of a more problem-solving, evaluative approach. Similarly, the capacity of mediation to identify substantive solutions and process benefits to achieve positive outcomes for parties should not be abandoned in favour of emphasizing only a transformative-relational model of practice. In
other words, it is suggested that the full potential of mediation may depend on its ability to carve out a dimension or an approach to practice that focuses not only on its inherent problem-solving capacities, but on its ability to act as a transformative-relational mechanism in situations where this would be the desired approach, both for the mediator and the disputing parties.

The way in which mediation is conceptualized and understood in the literature becomes particularly important in light of recent trends toward the institutionalization of mediation within the formal justice. The development of practice standards and qualifications for mediators is one such trend that will be examined in more detail in chapter four. Standards that adopt a singular or dichotomous conceptualization of mediation practice, for example, could serve to mask the diversity and complexity of approaches that currently operate in practice. While the practice of mediation continues to expand within the formal justice system, the challenge for mediation will be to avoid foreclosing around a single model approach, one which some believe has taken on a decidedly evaluative-settlement framework, reflective of the individualistic ideology. To not do so would be to neglect the types of qualities and benefits that can be provided by more transformative-relational approaches, including those that can be achieved through a pluralistic approach to practice that would see the integration of evaluative-settlement and transformative-relational approaches to practice. The failure to see this potential could lead more directly to the loss or suppression of the application of more transformative-relational approaches to practice in a legalistic, problem-solving culture. It is against this backdrop that the following chapter surveys some of the current trends affiliated with the institutionalization of mediation within
the formal justice system, developments which have some concerned that an evaluative-settlement approach is being emphasized at the expense of more transformative-relational approaches to practice.
3.0 Introduction:

As outlined in chapter two, there is a growing perception in the mediation field that an evaluative-settlement approach is being emphasized at the expense of more transformative-relational approaches to practice within the formal justice system. Drawing on literature in the mediation field, this chapter illustrates how this perception has gained momentum in view of recent trends toward the institutionalization of mediation within the formal justice system. In particular, it surveys the most significant indicators associated with the institutionalization of mediation, including: the increasing use of mediation within legislative initiatives and court-mandated mediation programs; the potential co-optation of mediation by the state and/or the legal profession; the professionalization of mediation; and the development of practice standards and qualifications for mediators. One of the strongest concerns associated with these activities is that the expansion of mediation into the formal justice system and the adoption of the role of mediator by lawyers has caused it to become more of an evaluative, bureaucratic and rights-based mechanism that is used to aid in the settlement of disputes and the reduction of caseloads and court costs. Chapter four will examine whether the development of practice standards and qualifications for mediators, the last indicator surveyed in this chapter, has increased reliance on the use of an evaluative-settlement approach, leading to the suppression or abandonment of more transformative-relational approaches to practice within the formal justice system.
3.1 Institutionalization of Mediation:

The state has shown increasing interest in alternative forms of dispute resolution in general and mediation in particular. According to a survey of government initiatives in Ontario, the basis for the growing interest in alternative dispute resolution is a result of a significant increase in civil litigation over the last ten years, along with a greater complexity of litigation; increased time required for preparation, settlement and trial of litigation; an increasingly rights-oriented and litigious society; increased media reporting of the courts' enforcement of various rights; and the continuing promulgation of legislation from all levels of government, which give people more reason and opportunity to go to court.¹⁰⁵ These factors have led to an increasing use of mediation within a legislative context. A number of pieces of legislation currently call for the use of mediation. For example, the Divorce Act¹⁰⁶ stipulates that it is the duty of lawyers to discuss mediation with clients before they proceed to file for divorce; the Canadian Environmental Assessment Act¹⁰⁷ recently approved the use of mediation and procedures for the appointment of a mediator; the Young Offender's Act¹⁰⁸ permits the use of alternative measures to case settlement, often in the form of mediation; and the Bankruptcy and Insolvency Act¹⁰⁹ requires parties, in certain circumstances, to attend mediation sessions. In addition, a report released by the Canadian Bar Association's Task


¹⁰⁶R.S., 1985, c. 3 (2nd Supp.).


¹⁰⁸S.C., 1980-81-82-83, c. 110, s.1.

¹⁰⁹R.S., 1985, c. B-3, s.1; 1992, c. 27, s.2.
Force on systems of civil justice recommended the use of ADR to reach early settlement of disputes as a way to reduce court costs through time-saving options. While the legislation outlines the procedures for the use of a mediator, none actually set standards around who can mediate. There is some speculation that this may change in the future if Canada follows the practice in the US, which see legislators certifying mediators, deciding on who is eligible to mediate, and setting standards by which mediators can mediate particular types of disputes.111

Advocates of the institutionalization of mediation, particularly through legislative initiatives, argue that the process of mediation would become more predictable and would provide a clear mechanism for enforcing agreements, thereby protecting the parties that elect to use it.112 There are others who suggest that institutionalization would contribute to more successful mediation, both in terms of number of agreements reached and by encouraging greater community participation in those agreements.113 Opponents believe that institutionalization would limit the flexibility and creativity of mediation approaches in favour of certainty and predictability.114 In particular, opponents claim that the application of mediation within an institutionalized setting will pull mediation toward a settlement and

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111 Picard, *supra* note 8 at 151-52.


evaluative-oriented approach. In this regard, there is speculation that current court-connected mediation programs, created through the efforts of the state and legal community, are promoting a singular, bureaucratic model of mediation, reflective of an evaluative-settlement approach to practice.\textsuperscript{115}

3.1.1 Court-Connected Mediation:

The adoption of court-connected programs in Canada is among the most significant recent developments toward the institutionalization of mediation. In the last five years, mediation has been gradually integrated into formal court systems across the country to deal with a variety of disputes.\textsuperscript{116} Parties in civil cases under Ontario’s mediation program, except for family, construction lien and bankruptcy, are being submitted to mandatory three-hour mediation sessions to consider settlement on a broad basis before having their day in court. Mandatory mediation programs have been offered in Ottawa, Ontario since early 1997. The program is being offered inside a full case-management court structure under the supervision of a local volunteer ADR committee, which has representation from the local bar, bench, ministry staff, mediator community and public. The first court-connected mediation program of its kind to deal with backlogs of civil cases was initiated, unofficially, in Toronto, Ontario.

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\textsuperscript{115}Michael Fitz-James, “Measuring Mediation,” (May 2001) 25 Canadian Lawyer 37; Picard and Saunders, supra note 8 at 231; Robert A. Baruch Bush, “Efficiency and Protection, or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation” (1989) 41 Florida Law Review 253 at 260. This development is revisited in section three in the examination of the procedures used by OMMP to select mediators seeking placement on the court mediation roster.
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\textsuperscript{116}The Honourable George W. Adams and Naomi L. Bussin, “Alternative Dispute Resolution and Canadian Courts: A Time for Change” at 17, (Paper Prepared for Presentation at the Cornell Lectures the week of July 11, 1994, Cornell University, Ithaca, New York) [Unpublished]. The court systems of Ontario, Quebec, Alberta and Manitoba are supporting and in many cases, mandating mediation programs to deal with a variety of disputes.
\end{flushright}
in 1994. The Ottawa program, however, has been developed more recently to serve as a testing ground for other mandatory mediation programs, which are being implemented, in various stages, province-wide over an unspecified period.

The Ottawa program, like its Toronto counterpart, was established in response to a growing dissatisfaction among lawyers and their clients over the way in which the civil courts handle the resolution of disputes.\textsuperscript{117} The program was initiated, in part, to help improve access to the court system and resolve civil cases faster and cheaper than if they were forced through the traditional litigation process.\textsuperscript{118} This view was also supported by the final report of the Civil Justice Review, which advocated for the continued integration of mediation under the case management system.\textsuperscript{119} Since the pilot project began in 1997, more than 2,000 cases have been through mediation.\textsuperscript{120} Of interest is that nearly 60 percent of these cases were settled either in whole or in part after the three-hour compulsory session.\textsuperscript{121} If settlement under this program is not reached, the parties are given the option of continuing with the mediation process at their expense or going to court. While used as an adjunct to the formal court system, the Ontario program continues to operate without a formal regulatory scheme. In this respect, the program does not set standards around qualifications,

\textsuperscript{117}Julie Macfarlane, Court-based Mediation of Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre (Toronto: Ministry of the Attorney General, 1995).

\textsuperscript{118}Lynne Cohen, “Measuring Mediation” (October 1999) Canadian Lawyer at 37.


\textsuperscript{120}This number is likely considerably higher than at the time these results were first published.

\textsuperscript{121}Supra note 45 at 37.
credentials or training. Mediators are selected by Local Mediation Committees on the basis of established selection criteria, which were developed and approved by the Ministry of the Attorney General in consultation with a broad range of stakeholders. The program also does not advocate or follow any particular approach or model of mediation. However, some theorists speculate that the high settlement rates achieved by the program are evidence to the fact that the program is endorsing an approach that is consistent with an individualistic ideology, focusing on the attainment of immediate outcomes, while avoiding the costly expense of trials.

With the increasing involvement of the legal community in court-connected programs, there is increasing support for the notion that mediators selected to work in court-connected programs should be lawyers. Some predict that this support may eventually lead to professionals outside of law being able to practice as mediators, but only if they can demonstrate that they have considerable substantive process training, legal experience and knowledge of case law. Zweibel suggests that many of the civil disputes are filtered primarily "through the prism of a lawyer-driven, legal rights analysis," but only after they

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122 Picard and Saunders, supra note 8 at 231.

123 The consultation process that was used to develop the selection criteria is explained in more detail in chapter four.

124 Picard and Saunders, supra note 8 at 231-233.

125 Ibid. at 14.

126 Ibid. See also J. Mucalov, "Alternative Dispute Resolution," (June/July 1997) 6 National (A.B.C.) 14 at 17.
have been defined by legal analysis and recast as a formal legal complaint.\textsuperscript{127} Mediation, under this model, is effectively presented and managed as a mini-trial process where parties receive a neutral, non-binding legal opinion. An effective mediator is seen to be one who can use an evaluative-settlement approach to remove litigation from the courts by facilitating settlement agreements in as many cases as possible.\textsuperscript{128} While the court-connected model appears to offer significant benefits in terms of reducing the time and cost associated with the hearing of civil cases, some believe the approach upon which it is based represents an impoverished view of mediation to the extent that it precludes an opportunity for the parties to move beyond the settlement of the dispute.

While lawyers traditionally do not have extensive experience with the mediation process, non-lawyer mediators claim that lawyer-trained mediators are frequently selected from the court roster on the basis of their ability to apply legal experience and knowledge of case law to contested issues. Non-lawyer mediators believe that lawyers are using mandatory mediation as a platform to promote evaluative-settlement approaches to practice that are pursuant to settlement. These findings support the results of a recent survey on the impact of Ontario’s mandatory mediation program on legal culture. The survey suggests that, while lawyers are responding to mediation in a variety of ways, many of them are forcing mediation

\textsuperscript{127}Ellen B. Zweibel, “Models of Conflict Resolution” in \textit{Access to Affordable and Appropriate Law Related Services in 2002}. Report Sponsored by the Department of Justice, the Law Commission of Canada, the Canadian Bar Association and the Faculty of Law, University of Windsor, January 1999) at 87-88.

\textsuperscript{128}Bush, \textit{supra} note 115 at 260.
back into an adversarial and normative structure of litigation.\textsuperscript{129} A survey conducted in 1997 indicated that lawyers, whether practising or not, are chosen as mediators by litigants 94% of the time in Ontario.\textsuperscript{130} In this context, there is a perception that the ability to explore relational issues, an attribute used by mediators with social work and community backgrounds, is being replaced by “20 minute mediation to further [lawyers’] unchanged goals in litigation”.\textsuperscript{131}

Non-lawyer mediators believe the trend toward the institutionalization of mediation as a legal or semi-legal process, as seen through court-connected mediation programs and the increasing participation of lawyers in the mediation process, will likely have serious and widespread implications for those mediators who are not willing to adopt an evaluative-settlement approach to practice.\textsuperscript{132} The trend toward defining the role of mediator on the basis of civil case law is cited as one such example that may serve to reduce the demand for non-lawyer mediators. In addition, a recent survey of mediators suggests that while experienced mediators are more likely to be drawn to the work of mediation by visions of social transformation and empowerment, an increasing number of newly trained mediators are attracted to court-connected programs due to the financial and personal incentives they

\begin{itemize}
  \item \textsuperscript{129}Michael Fitz-James, \textit{supra} note 115 at 37. The unpublished survey entitled, “Culture Change: Question Mark?” was conducted by Dr. Julie Mcfarlane, a University of Windsor law professor, under a Law Commission of Upper Canada-funded project.
  \item \textsuperscript{130}Michael Fitz-James, “Mandatory Mediation in Civil Cases Big Success,” \textit{The Ottawa Citizen}, D1 (1997).
  \item \textsuperscript{131}\textit{Supra} note 15 at 37.
  \item \textsuperscript{132}Cheryl Picard, “What is Alternative in ADR?” (Thursday, March 27, 1997) 2 \textit{Jus in Re} 2 at 3.
\end{itemize}
can offer.\textsuperscript{133} The concern is that the opportunity for paid work and personal satisfaction "may yield a crop of mediators trained in evaluative-models unaware or uninterested in the fact that different mediation modalities exist".\textsuperscript{134} There is a fear that such activities will negate the opportunity for transformative-relational approaches to emerge as an equally acceptable stream of practice within court-connected programs. The above factors are now being considered in view of a potential co-optation of mediation by the legal profession and with greater attention being paid to the emergence of mediation as a profession.

Critics claim that a co-optation of mediation by the legal profession would dilute the hard fought gains the ADR movement has provided for community groups, women, minorities and other disadvantaged groups who would otherwise never experience alternatives to traditional options to pressing social and political disputes. They suggest that this trend would eventually lead to the co-optation of ADR's quality-justice goals, including consensus, informed decision-making and self-determination.\textsuperscript{135} On the second point, Menkel-Meadow's research provides evidence to indicate that despite the recent efforts made by community groups to resist the efforts of the formal justice system to dominate and subsume informal processes of dispute resolution, court efficiency rather than reform has recently come to dominate ADR discourse in Canada. Pirie believes this is evident due to the:

\ldots inattention to, or co-optation of, ADR's quality goals including the institutionalization of many ADR devices within the courts to reduce

\textsuperscript{133}Picard, supra note 17 at 59.
\textsuperscript{134}Ibid. at 59.
\textsuperscript{135}Menkel-Meadow, supra note 8 at 6.
litigation cost and delay, the developing 'law of ADR' as courts rule on the legal questions raised by various forms of ADR and the 'colonization' of the alternatives (How to Win at ADR) by traditional adversarial practices.\textsuperscript{136}

This ideology can be seen in practice as increasing economic pressures compel legal professionals to move cases out of the courts, while they continue to struggle to maintain control of the big cases. This trend has prompted critics to predict that the field of dispute resolution will be taken over by a lawyer subculture, as in the case of established legislation and government policy, which in specific areas, dictate that only lawyers be referred cases to mediate.

3.1.2 The Legal Profession and Mediation:

The interest in mediation by the legal profession, both at the individual and professional organization level, is not surprising. Lawyers see themselves as influential players in the field of dispute resolution, claiming that mediation and other forms of ADR are within their natural domain of practice.\textsuperscript{137} In addition to being involved in the practice of mediation, the legal profession has been aggressive in establishing and promoting ADR and mediation courses in law schools. Several Canadian law schools continue to build their course calendars with an ambitious range of undergraduate and graduate courses in ADR, while some offer ADR as a stream of study within the law school curriculum itself. Many law firms have also established ADR and mediation as a product line alongside their

\textsuperscript{136}Pirie, supra note 8 at 170.

\textsuperscript{137}Supra note 116 at 1.
established practices.\textsuperscript{138} Retired judges have similarly been active, either on their own or through private practice, in claiming jurisdiction over certain legal disputes through the provision of private courts. Some lawyers are accepting the notion that mediation has altered the route that many legal actions take to settlement, and that it “is fast becoming a mandatory element of their practice.”\textsuperscript{139} Pirie believes the ‘cheaper and faster’ goals are dominating ADR discourse in Canada, which have resulted in an abandonment of community empowerment, improved relationships and recognition of party needs and interests.\textsuperscript{140} Indeed, there is general perception among some in the legal profession that they have to defend their turf against what they now claim to see as a “growing army of professionals specializing in so-called alternative dispute resolution, [and that] armed with [o]nly a college diploma or BA in legal studies, [ADR professionals] are horning into everything from child custody battles to labor disputes.”\textsuperscript{141}

There is a concern that lawyers will now seek to exclude non-lawyers from practising in areas of dispute settlement, particularly those areas that traditionally were processed through the formal justice system. Critics of the legal profession’s emerging influence in

\textsuperscript{138}Michael G. Crawford discusses the recent interest in ADR mechanisms, specifically mediation, among in-house corporate counsel in the resolution of corporate disputes. He maintains that corporate counsel are now among the leading proponents of ADR, along with sociologists, judges and private practitioners. “In-House Counsel: On the Leading Edge of ADR” (November/December 1997) 21:10 \textit{Canadian Lawyer} at 9-12. See also Picard, \textit{supra} note 17.

\textsuperscript{139}Michaela Keet and Teresa B. Salamone, “From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation” (2001) 64 \textit{Saskatchewan Law Review} 57 at 98.

\textsuperscript{140}Andre Pirie, \textit{Teaching ADR in Canadian Law Schools: The A,B, Cs of ADR} (March 1994) 6. In this article, Pirie discusses whether the teaching of ADR will result in profound changes in how lawyers practice dispute resolution.

\textsuperscript{141}Victor Dwyer, “Privilege and Pressure” (October 6, 1996) 110:40 \textit{Maclean’s} 16 at 18.
mediation suggest that potential monetary gain and control of the field are among the main reasons attracting lawyers to mediation. Pirie, for one, sees these goals as desirable, if not necessary, suggesting that the success or failure of mediation may inevitably weigh on the nature of the role of the lawyer in the mediation process.\footnote{Andrew Pirie, "The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems?" (1985) 63 Canadian Bar Review 378 at 381.} Reid, a lawyer and recently turned ADR practitioner-trainer, agrees with Pirie and suggests that "lawyers...are key to ADR assuming its full potential as a dispute resolution approach".\footnote{Alan D. Reid, "ADR: A Dignified Resolution" (1996) 12:2 Solicitor's Journal 4.} Reid maintains lawyers, by shifting to an ADR-like consciousness and with some training, are ideally placed to help individuals realize their healing potential without making structural changes in their practices.\footnote{Ibid. at 6.}

With the recent success of court-connected mediation programs, some lawyers have begun to shift toward more collaborative approaches as a way to involve themselves in the practice and direction of mediation. Seeing the benefits of mediation in practice and learning the value of other models of conflict resolution, many lawyers are increasingly responding to the idea that a client's legal rights are not necessarily synonymous with their underlying needs and interests in the settlement of disputes.\footnote{Supra note 127 at 85.} Some have even abandoned litigation in favour of ADR as the means through which they settle disputes. This development is based, in part, on the growing realization that litigation is incapable of responding adequately to the multi-dimensional nature of disputes because of its inherent tendency to frame disputes as
narrow, distributive legal problems. This new found ideology has some mediation practitioners concerned that lawyers will overemphasize a problem-solving, evaluative approach and rely on their legal training to reach early settlement of disputes in court-connected programs. Another concern is that lawyers will use mediation as simply another instrument in their legal arsenal to reduce caseloads and increase court efficiency at the cost of realizing better justice. Some critics believe these developments are already being felt within mediation and may prove to have a profound effect on how mediation is practised in the future. As Picard and Saunders argue:

[t]he danger for mediation lies in being too closely bound to a profession which lacks the make-up, the history, the motivation, the education and the training to engage in the wider project and goals of mediation, and which in many ways has proven itself antithetical to the larger purposes of mediation.

Perhaps the adage "be careful what you wish for, you may get it," may be the appropriate one to explain the recent activity surrounding the use of mediation in the formal justice system, and the growth of the ADR movement as a whole. Instead of viewing ADR as operating in the shadow of law, as academics in the past have maintained, many now regard ADR as a practice of law. Menkel-Meadow sees this development as ironic, in view of the fact that the "field [of ADR] was developed, in part, to release us from the some — if not all — of the limitations and rigidities of law and formal legal institutions has now

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146 Ibid at 86.

147 Picard and Saunders, supra note 8 at 233.

148 Picard, supra note 6 at 2. Picard uses this expression to describe, rather aptly, the recent growth of ADR in the Canadian legal system.

149 Mnookin and Kornhauser, supra note 6; Menkel-Meadow, supra note 8 at 1.
developed a law of its own".\textsuperscript{159} This development, Menkel-Meadow argues, is the result of increased pressure and persistence on the part of the legal profession to resist the efforts of non-litigious forms of dispute resolution to change and reform legal institutions and practices, resulting in another case of "legal innovation co-opted".\textsuperscript{151} Supporters of ADR argue that the new found legitimacy ADR has been accorded as a result of its partial assimilation into the courts and legal system is a positive move in the right direction for ADR. This change is not marked by a sign of legitimacy for ADR, but rather by a fear that "the institutionalization of civil court, settlement-based mediation may well negate the transformative potential of mediation by defining mediation as a problem-solving mechanism existing within the liberal rule of law."\textsuperscript{152} According to Zweibel, greater pressure is being placed on the ADR community to expand its own practice base as the courts, lawyers and other regulatory bodies apply non-litigious approaches to cases traditionally defined as rights-based.\textsuperscript{153}

3.2 The Accreditation of Mediators and the Move Toward Professionalization:

The debate over the institutionalization of mediation has also coincided with more recent dialogues on the accreditation of mediators, a debate which has become more prominent in light of the relatively recent expansion of mediation into court-connected programs. The debate on credentialing has focussed largely on whether and how to impose

\textsuperscript{159}Menkel-Meadow, supra note 8 at 2.

\textsuperscript{151}Ibid.

\textsuperscript{152}Picard, supra note 132 at 3.

\textsuperscript{153}Ellen B. Zweibel, supra note 127.
entry requirements for a field that has traditionally prided itself on “grass roots people skills and accessibility”. The focus on what to require when it comes to sanctioning mediators has led to heated discussions, particularly in the North American context, on the professionalization of mediation. This debate is seen by many academics and practitioners to represent a departure from earlier efforts on the part of the dispute resolution community to “de-professionalize legal institutions for problem-solving and dispute settlement”.

3.2.1 Professionalization of Mediation:

In general, relatively little attention has been paid to the professionalization of mediation in the literature, but the general consensus among those who have researched this issue is that the current drive towards professionalization is being fueled by, on the one hand, motives of consumer protection and excellence and, on the other, the desire for prestige and power. Lawyers and mediators in private practice contend that mediation should

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154 Picard and Saunders, supra note 8 at 228.

155 There is an extensive literature on the sociology of professions and occupations. The extent to which mediation is a profession according to the classical sociological literature, while interesting and important to the ongoing debates within the mediation movement, is beyond the scope of this thesis. My focus concerns whether and to what extent the expansion of mediation within the formal justice system, including the accreditation of mediators, has increased the reliance on an evaluative-settlement approach, leading to the suppression or abandonment of the application of more transformative-relational approaches to practice in a legalistic, problem-solving culture. Picard explores the professionalization of mediation in relation to how the field measures up against eight characteristics to differentiate occupations from professions. Supra note 8. For a discussion of occupations and professions, see generally, Eliot Freidson, The Professions and Their Prospects (Beverly Hills: Sage Publications, 1971); Richard H. Hall, Occupations and the Social Structure (Englewood Cliffs: Prentice-Hall, 1969); Ronald M. Pavalko, Sociology of Occupations and Professions (Itasca: F.E. Peacock Publishers Inc., 1971); Talcott Parsons, “The Professions and Social Structure,” in Essays in Sociological Theory, Revised Edition (New York: The Free Press of Glencoe, 1954).

156 Picard, supra note 8 at 141.

professionalize in order to protect the consumer from inept or unscrupulous practitioners and because of the trend toward court-connected mediation. Those on the counter-veiling side of the drive towards professionalization – community and volunteer mediators, have been less supportive of the desire for broadly applied standards of practice and credentialing. The latter group suggest that 'true' dispute resolution processes, which ultimately provide for social justice and empowerment goals, can only be achieved when peacemaking skills are practiced by, and applied to, a wide variety of people in diverse contexts. Critics of professionalization are quick to point out that many of today's most experienced mediators are volunteers in community-based mediation programs with little or no specialized credentials. Those in favour of professionalization, however, argue for greater unification of dispute resolution structures, since mediation services can be provided by individuals, groups or rosters of practitioners from a diverse range of backgrounds. This thinking stems from the fact that current processes can be mandated, voluntary or combination of the two, while practitioners may have a background in community mediation, law, social work, or health care, among others.

These tensions aside, recent evidence indicates that governments and governing bodies, the public and other professional associations have more or less been satisfied that mediation has come to characterize the attributes of a profession. While this assumption

\footnote{See generally Pirie, supra note 8; Bush and Folger, supra note 4; Picard, supra note 8; and Catherine Morris, “Where Peace and Justice Meet: Will Standards for Dispute Resolution Get Us There?” in Qualifications for Dispute Resolution: Perspectives on the Debate, eds., Catherine Morris and Andrew Pirie (Victoria: University of Victoria Institute for Dispute Resolution, 1994) 3 at 15.}

\footnote{Morris, ibid.}

\footnote{Pirie, supra note 8 at 181-182.}
continues to be widely debated, Pirie suggests that what is really happening to mediation is what classical theory informing professionalization has come to predict of an evolving occupation, that we are in fact witnessing "the beginning of the occupational closure of mediation". He also suggests that the debate on qualifications, consumer protection and protection of the integrity of the mediation process has led to the emergence of the 'new dispute resolutionaries' as we know them today.

Picard's work on professionalization of mediation, which examines, in part, how the field of mediation measures up against Pavalko's eight characteristics to differentiate occupations from professions, presents a slightly different story than the one Pirie depicts. While acknowledging the advancements made by mediation along the occupational-professional continuum in recent years, Picard prefers to suggest that "mediation is a profession in the making". Her study concludes with the speculation that a system of certification for mediators will be established in the future. Given the potential negative side-

\[161\] *Ibid.* at 188.

\[162\] *Ibid.* at 189.


\[164\] Pavalko, *supra* note 155. Pavalko developed an occupational-professional continuum to determine the extent to which a specific work activity may be considered to be professional. Picard conducted a survey of various dispute resolution activities to explore the professionalization of mediation and consider how the field currently measures up against Pavalko's eight characteristics to differentiate occupations from professions, including: theory, relevance to basic social values, training, motivation and sense of commitment, autonomy, sense of community and code of ethics. Using these criteria, Picard concludes that mediation possesses all of the traits of a profession, but in varying degrees. Mediation is at the professional end of the continuum using the criteria of relevance to basic social values, motivation and sense of commitment. The field is at the non-professional end of the continuum when measuring it against the criteria of theory, training, autonomy, community and code of ethics. Accordingly, she supports the hypothesis that mediation is a "profession in the making". For an elaboration of these issues, please refer to Picard, *supra* note 8.

\[165\] Picard, *supra* note 8 at 157.
effects of professionalization -- the protection of economic interests of the profession and elitist groups over the interests of the public, the potential for disempowerment through elitism and exclusion, some practitioners are concerned whether mediation should be seeking professional status at all. A further concern is that the move to professionalization may threaten the realization of a broader vision of mediation, one that depicts it beyond a singular, evaluative mode of practice. In other words, there is a belief that defining mediation in professional terms may constrict rather than enrich our understanding of mediation practice and imperil the wider and larger goals of consensuality, accessibility and community empowerment from being fully realized in practice.

3.2.2 Standards and the Accreditation of Mediators:

The debate on professionalization is inextricably linked with the debate on standards and the accreditation\textsuperscript{166} of mediators. Edwards and Morris suggest that one of the initial goals of those proposing to develop standards proposals "was for the practice of mediation to be recognized as a profession".\textsuperscript{167} Numerous studies in the last decade were conducted on the issue of standards and certification in non-litigious dispute resolution. Many of these studies were done in response to the growing need on the part of policymakers, government organizations and other interested groups to protect the consumer and the integrity of the dispute resolution process itself.\textsuperscript{168} The studies were also conducted in effort to provide

\textsuperscript{166}In this review, the word 'accreditation' can also be interpreted to mean credentialing and licensing.


\textsuperscript{168}Society of Professionals in Dispute Resolution Commission on Qualifications (SPIDR), Ensuring Competence and Quality in Dispute Resolution Practice (Report No. 2) (April 1995). See also Picard, supra note 8; Morris, supra note 158; Bush, supra note 115. Consistent with his later work in The Promise of
some form of guidance for those seeking mediation training and for mediators seeking benchmarks for ethical and competent practice. A 1995 Report of the Civil Justice Review recommended that standards be developed by the Alternative Dispute Resolution profession, in collaboration with the Law Society of Upper Canada and other professional organizations, for the certification and accreditation of ADR practitioners who provide services, either privately or through court-connected mediation, to the public. A survey at the federal level similarly recommended the establishment of accreditation requirements and minimum standards for the delivery of dispute resolution services. Despite these recommendations, accreditation standards have not yet been promulgated at the provincial or federal level in Canada. The following analysis reflects the range of competing interests and practices that have pre-empted the development of appropriate criteria or standards for mediation:

... at one extreme are the neighbourhood centres espousing voluntarism, self-help and peer relationships. At the other end are highly trained professionals who want to make a decent livelihood carving out a niche in the professional world of help somewhere between career diplomats, organizational consultants, lawyers and therapists. Clustered at both ends are

*Mediation* with Folger, Bush argues a third conception of the mediator’s role – the ‘empowerment and recognition’ role in which the mediator’s role is neither to facilitate agreement, for purposes of efficiency, or protect rights, but to encourage mutual recognition, understanding and empathy by the parties and to help them exercise informed and free autonomy of choice.

169 *Supra* note 167 at 8594.

170 Ontario Court of Justice and the Ministry of the Attorney General, *supra* note 6 at 28.

171 Department of Justice, *Dispute Resolution in Canada: A Survey of Activities and Services: The Network: Interaction for Conflict Resolution* (Department of Justice, 1995) at 43.

differing views of charging fees and differing perspectives on credentialing.\textsuperscript{173}

The lack of available knowledge and consensus on what is considered most important for a competent mediator – substantive expertise in the area of dispute or procedural knowledge - has contributed to the tensions which have emerged among those who are grappling with standards issues. While there has been some concern as to whether conflict theory has adequately addressed the issue of mediator competency, research in Canada has tended to support the use of performance-based standards over degrees as the criteria for practice eligibility.\textsuperscript{174} According to Picard, the call for the setting of qualifications and standards for mediation practice is premised on three myths: one, mediation is easy; two, non-mediator trainers can teach mediation skills; and three, offering mediation to disputing parties is more important than the quality of service.\textsuperscript{175} These myths raise serious questions concerning the ability of those in the mediation field to prevent those who are unqualified or unsuited to practice mediation. Operating in the centre of this mythology of mediation are those who believe that inappropriate barriers to mediation would invariably hamper the dissemination of peacemaking skills, place limits on who is eligible to mediate, and marginalize the work of community and volunteer mediators, who have long practised

\textsuperscript{173}Ron Kraybill and John Paul Lederach, “Professionalization and the Mennonite Conciliation Service” (1992) 11:3 Conciliation Quarterly 8-9.

\textsuperscript{174}SPIDR, supra note 168. Mediator characteristics such as tenacity, empathy, experience, playing an active role, impartiality, neutrality, sensitivity, listening skills, responsibility, sincerity, expertise and other related factors have all been identified as attributes that are more appropriate and useful in assessing qualifications than formal degrees. See also Christopher Honeyman, “On Evaluating Mediators” (1990) 6 Negotiation Journal 23; Picard, supra note 8. In addition, the Law Societies of Upper Canada, Quebec and British Columbia regulate mediation practice eligibility based on the number of years of litigation experience.

\textsuperscript{175}Picard, supra note 8 at 144.
outside the legal system.\textsuperscript{176} Some also question whether mediation is merely a new speciality in the catalogue of skills offered by existing professions (such as law, mental health or social work) or whether it is an autonomous profession in its own right.\textsuperscript{177} While ADR groups and other critics agree that these claims are based on false notions, Pirie believes that the language of qualifications and the construction of both core and special competencies for mediators is “manufacturing mediation so that such processes come to resemble, are appropriated by or pose no fundamental challenge to existing legal structures, power and control”.\textsuperscript{178} There is an added fear in the ADR community that preoccupation with credentialing and qualifications may threaten the personal and social empowerment ideologies of mediation practice. They form this opinion on the belief that:

\ldots mediation demystifies and deinstitutionalizes formal settlement mechanisms...[and] that, through mediation, the resolution of conflict is drawn away from ‘professionals’ and returned to those most affected by it, thereby empowering participants and stimulating social transformation.\textsuperscript{179}

While support for the establishment of certification standards and entry requirements are high among the legal profession, mediators in private practice and those responsible for court-connected programs, many volunteer and community mediators object to an organized group that would govern and limit access to the field for fear that mediation would become exclusive and elitist, much in the same way, one could argue, as the health and legal

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\textsuperscript{176}SPIDR, Commission on Qualifications, Ensuring Competence and Quality In Dispute Resolution Practice (Report No. 1) (April 1989).
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\textsuperscript{177}Pipkin and Rifkin, supra note 157.
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\textsuperscript{178}Pirie, supra note 8 at 180-181.
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\textsuperscript{179}Picard and Saunders, supra note 8 at 228-229.
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professions have evolved. Society of Professionals in Dispute Resolution (SPIDR) echoed this concern by concluding that no single entity should establish qualifications for dispute resolution practitioners. They established this principle recognizing that areas of mediation tend to be sufficiently varied to the extent that competence in one dispute setting would not necessarily ensure competence in another. Lawyers and private practice mediators, on the other hand, who continue to remain in favour of a credentialing scheme, argue that the public will be provided with important and relevant information so that they can make a more informed decision around the selection of a potential mediator, particularly when the substantive legal rights of the parties are in dispute. A similar line of argument is that certification and the attainment of established standards would enhance consumer confidence in the mediation process.

Theorists and practitioners alike, while applauding the increased use of mediation practices in several fields, suggest that the establishment of court-connected mediation programs has made the question of who can and cannot mediate more urgent and has forced various governing organizations to certify mediators often without the full support of the ADR community and without an adequate knowledge base. Proponents of credentialing maintain standards are necessary to ensure that the quality of dispute resolution in court

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180 Picard, supra note 8.

181 SPIDR, supra note 168. There is no single group or organization that currently represents or regulates guidelines on qualifications and standards for mediators.

182 Reeve, supra note 172 at 452.

183 Ibid. at 449.

184 Picard, supra note 132 at 3.
mediation programs increases when those programs become mandatory. In this context, there is a growing perception in court-connected programs, in contrast to free market mediation where parties have greater choice in the service provided, that parties should have a right to expect that the court-approved roster is composed exclusively of qualified and competent mediators.

Lying at the heart of these debates are issues concerning professional exclusivity and expertise, self-esteem, professional ideology and prosperity. Accreditation is seen to have significant implications for mediators working outside court-connected programs, namely community and volunteer mediators. The main concern is that many of the services offered by community-based mediators will no longer be recognized as legitimate alongside mediators with specialized credentials. There is a growing perception that accreditation may enhance the ability of lawyers to mediate more substantial cases, while limiting or controlling the ability of non-lawyers to mediate similar cases. This has led to a general concern among mediators that accreditation will result in the creation of a state monopoly over mediation practice. Picard and Saunders suggest that informal accreditation has already been occurring through the institutionalization of state-run court-connected mediation programs and various legislative initiatives in the absence of any formalized accreditation scheme. What are the

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185 P.F. Devine, "Mediator Qualifications: Are Ethical Standards Enough to Protect the Client?" (1993) 12 S.L.U. Public Law Review 187 at 188. This is also consistent with SPIDR's view in that they believe the requirements for qualification should be mandatory when parties have less control over the dispute resolution process, program or neutral. See supra note 176.

186 Reeve, supra note 172 at 453.

187 Picard, supra note 132 at 3.

188 Picard and Saunders, supra note 8 at 229.
implications of this development on mediation? It suggests that the future direction of the field may be dictated by those who control state-run mediation programs and by implication, those permitted to mediate in such programs. In other words, if the trend toward court-connected mediation schemes continues, the governance and direction of the field may be decided in large part by the dictates and needs of both the state and the legal profession.\textsuperscript{189} The arrival of a formal regulatory scheme may increase reliance on an evaluative-settlement approach to practice, leading to the suppression or possible abandonment of more transformative-relational approaches to practice. Another view is that the institutionalization of mediation within the formal justice system could potentially lead to the loss or suppression of the original reform goals on which mediation was founded.

There is yet another debate within the field over accreditation and the use of standards which does not overlap quite so neatly with the one between volunteer and community mediators on the one side, and lawyers and mediators in private practice on the other. This is a debate between those mediation practitioners and theorists who are in favour of some form of accreditation, but disagree over the types of standards or approach to be used. For example, family mediators are normally required to have gone through some type of accreditation program before they are eligible to practice as a family mediator. However, lawyer-trained mediators who practice in the family area may not necessarily emphasize the same values and goals as their non-lawyer counterparts, thereby resulting in a potential disagreement over the appropriate standards or approach that should be used. The same tension exists within more generalist mediation accreditation programs, which can retain

\textsuperscript{189}Ibid.
mediators with different backgrounds, goals and values, and varying levels of training and experience to mediate various types of disputes in different contexts and settings. The ever-increasing application of mediation in a variety of contexts has complicated the decision over the types of standards or approach to accreditation to be used. Another factor contributing to the uncertainty over the appropriate approach to accreditation is the relatively “nascent state of knowledge”\textsuperscript{190} in mediation regarding competence and the role standards should play in assessing competence.

While it is important and perhaps inevitable to debate the meaning of appropriate standards of practice for mediation as it continues to expand within the formal justice system, the institutionalization and regulation of mediation through some form of accreditation scheme could have, as alluded to earlier, a direct impact on who will be considered part of the field (e.g., private practice mediators, lawyers, judges, community or volunteer mediators), what part of the field practitioners will be allowed to practice (court-connected, commercial, family practice), and importantly, how the field will ultimately define its goals and purposes.\textsuperscript{191} There is a concern that a “one size fits all” approach to accreditation would limit the range of mediation practice and practitioner. The practice of mediation would become limited insofar as the prescribed standards would have a strong influence over mediator training, the type of mediator selected to mediate, the approach employed by the

\textsuperscript{190}Edwards and Morris, \textit{supra} note 167 at 8592.

\textsuperscript{191}Janet Rifkin, “The State of the Field of Conflict Resolution: A New Tool of Social Control or an Instrument of Emancipation and Change?” A public lecture presented at Carleton University, in conjunction with The Mediation Centre at Carleton University and the University of Ottawa Law School, on October 3, 1996.
mediator, and how mediators would be evaluated.\textsuperscript{192} There is an emerging view that different standards of practice are needed in the different contexts in which mediation is practised.\textsuperscript{193} However, if one accepts the premise that current patterns of practice are reflective of an individualistic ideology, as derived from the dichotomous characterization of mediation practice presented in chapter two, one might expect the policies on standards of practice and qualifications for mediators would emphasize an evaluative-settlement approach to practice. The development of such standards would likely impose greater uniformity on mediation, hampering the application of more transformative-relational approaches to practice, including the development of more diverse approaches to mediation. The promotion of a single model approach within practice standards would also reduce the capacity of mediation to provide multiple and intangible benefits for disputing parties inside the formal justice system.

The following chapter considers whether and to what extent the individualistic ideology is reflected in different sets of current mediation practice standards, reflective of the evaluative-settlement approach, or whether the standards are more relational in nature, consistent with the transformative-relational approach. The chapter also examines whether the standards are sufficiently broad to cover both evaluative-settlement and transformative-relational approaches to practice, reflective of a more pluralistic approach to mediation. In this regard, a review of current mediation practice standards offered by three organizations affiliated with the formal justice system is undertaken, as a specific testing ground, to determine whether and to what extent the promulgation of standards and qualifications for

\textsuperscript{192} Reeve, supra note 172 at 465; Edwards and Morris, supra note 167 at 8626.

\textsuperscript{193} Edwards and Morris, ibid. at 8601.
mediators may be pulling mediation toward an evaluative-settlement approach or whether and to what extent there may be evidence of a more pluralistic approach to mediation practice.
Chapter 4

An Evaluation of Mediation Practice Standards

4.0 Introduction:

Building on the discussion in chapter three, this chapter sets out to determine whether a transformative-relational approach to mediation can exist within a legalistic, problem-solving culture by examining the current mediation practice standards offered by three programs. The following programs, two national and one provincial, are examined for the purposes of this analysis: ADR Institute of Canada, Ontario Mandatory Mediation Program, and Family Mediation Canada.194 These organizations have been selected for review because they represent a cross-section of practice areas (commercial, civil law and family practice, respectively) currently offering accreditation to mediators in Canada who mediate legalistic disputes, either in a commercial or family environment, or in connection with court-mandated programs under the formal justice system. In the case of the Ontario Mandatory Mediation Program, mediators are not formally accredited; rather they are eligible to be appointed to the court roster if they meet a set of established selection criteria administered by Local Mediation Committees. It should also be noted that the accreditation programs offered by ADR Canada and Family Mediation Canada are voluntary. Mediators who become members of these organizations need not apply for accreditation. There are several other organizations in Canada and the US that have developed, or are developing, standards

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194 These accreditation programs are provided in full text in Appendix I.
and criteria for mediator qualifications. Many of these organizations are generally multi-disciplinary in nature, comprising a mix of professionals such as lawyers, social workers, health care professionals and others.

The chapter is divided into four sections. Sections 4.1 to 4.3 review the standards, selection/skill criteria and body of knowledge outlined by each of the three selected programs to determine whether they are sufficiently flexible to cover both approaches to practice discussed throughout the thesis, or whether they perpetuate a dualistic or single school view, reflective of the dichotomous conceptualizations of mediation presented in chapter two. This review is undertaken with the following question in mind: to what extent do these particular accreditation programs adhere to the individualistic ideology, resulting in the development of qualifications and standards of practice that emphasize an evaluative-settlement approach at the expense of more transformative-relational approaches to practice? In other words, this chapter examines the extent to which the individualistic or relational ideologies may be reflected or operationalized in the discourse developed by each of the programs. There is an implied assumption that an examination of discourse can provide some insight into the type of ideology or approach that would be favoured by a particular program or the mediators who are accredited or governed by the program. Section 4.4 provides a summary analysis of where these standards programs stand in relation to the first research question guiding this thesis: how can a transformative-relational approach to mediation exist in a legalistic,

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195 The following organizations represent a sampling of efforts: Academy of Family Mediators (U.S.), Association of Family and Conciliation Courts (U.S.), B.C. Arbitrators and Mediators Institute, British Columbia International Commercial Arbitration Centre, Mediation Development Association of British Columbia, The Network - Interaction for Conflict Resolution, Canadian Institute of Applied Negotiation, and the Canadian Foundation for Dispute Resolution.
4.1 ADR Institute of Canada (ADR Canada):

ADR Canada is a national, non-profit organization dedicated to the development and promotion of dispute resolution services in Canada. It acts as a national clearinghouse for information and skills building in the area of dispute resolution. The organization also provides a broad range of tools and services for practitioners and users of ADR services. ADR Canada has established standards with respect to the training and education of mediators and arbitrators for admission to membership in the Institute and for national accreditation as ‘Chartered Arbitrator’ or ‘Chartered Mediator’ (hereinafter, C.Med).\textsuperscript{156} This discussion focuses on the C. Med designation.

ADR Canada established the C. Med designation to assist the public in finding qualified mediators. By establishing the C. Med designation, ADR Canada effectively prohibits other groups or individuals from adopting or using this designation in the provision of mediation services without their consent. Regional institutes (or provincial affiliates) are responsible for administering and regulating the C. Med designation. These institutes also have various education, accrediting and discipline committees who regularly review and report on the standards established for the C. Med accreditation program.

Although not explicitly defined, ADR Canada claims to recognize ‘generalist competence’ in mediation practice. They further acknowledge that those wishing to mediate

\textsuperscript{156} ADR Canada, formerly the Arbitration and Mediation Institute of Canada, obtained recognition under the \textit{Trade-marks Act} (R.S. 1985, c. T-13) for the designation of Chartered Mediator, a professional certification program offered since 1995. This designation is also referenced as C. Med, Mediateur Certifie, Mediatrice Certifie, and Med C.
in specialized areas, such as family and multi-party mediation, may require additional skills and competencies not provided by their program. While ADR Canada encourages individuals wishing to become mediators to apply to their program, they acknowledge that individuals need not be chartered in order to provide mediation services to prospective clients. ADR Canada defines mediation as:

... a process of intervention in a dispute or negotiation by an impartial third party who has no decision making power. The third party assists disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute by structuring the negotiation, maintaining the channels of communication, assisting each party to articulate their needs, identifying the issues and assisting the parties in creating alternative ideas to resolve the dispute.\textsuperscript{197}

This definition of mediation does not appear to favour the adoption of any particular approach. Rather, it uses language reflective of both evaluative-settlement and transformative-relational approaches to practice. The first part of the second sentence uses language that is reflective of a more relational approach: "...assists disputing parties in voluntarily reaching their own mutually acceptable settlement, ...maintaining the channels of communications," while language in the latter half of the sentence uses more problem-solving like language, such as "...by structuring the negotiation...assisting each party to articulate their needs" (rather than interests). The last part of the sentence uses phrases that are interwoven with elements of both approaches, "...identifying the issues and assisting the parties in creating alternative ideas to resolve the dispute".

ADR Canada uses general principles, a set of criteria and a protocol to assess the

\textsuperscript{197}ADR Institute of Canada, "Education and Training - Professional Certification - Chartered Mediator," \url{www.amic.org/education/mediator.html}.
eligibility of a candidate for the granting of the C. Med designation. This information is used to form a set of standards by which candidates are evaluated. Before being considered for eligibility, applicants must first meet the educational and practical experience and skills assessment requirements. The educational component requires: i) completion of at least 80 hours mediation theory and skills training in mediation training programs approved by ADR Canada and ii) completion of 100 hours of study or training in dispute resolution generally, the psychology of dispute resolution, negotiation, consultation, mutual gains bargaining, communication, management consulting, conflict management, or specific substantive areas, such as law, psychology, social work, or counseling. This broadly defined list lends support to ADR Canada’s claim that they recognize ‘generalist competence’ in mediation practice, since no one course of study or practice area is preferred. With respect to practical experience, applicants must have conducted at least 10 mediations, with preference given to work as the sole mediator or as a mediation chairperson in at least 5 of the mediations conducted. There is an added requirement that states the mediator be remunerated, either by fee or by salary for services rendered, for at least 5 of the mediations conducted. On this last point, it appears that ADR Canada is attributing legitimacy to paid experience over volunteer work, which would invariably disadvantage those with a background in community mediation.

As part of the accreditation process, applicants are required to demonstrate competency as a mediator in four main areas: administrative, procedural, relationship and facilitation. Administrative skills, the first competency area, is defined as ‘the ability to organize and conduct the practice of mediation in an efficient and effective manner’. This
competency area lists a number of generic skills, including an ‘ability to organize and maintain office systems’; ‘ability to work within the systems/rules governing the accepting and handling of engagements’; ‘ability to allocate time, effort and other resources’; ‘ability to organize the required needs of the mediation’. Although these skills are considered more generic in nature, the fifth skill element emphasizes a decidedly pragmatic tone, suggesting that a mediator possess an ‘ability to bring the engagement to completion’.\textsuperscript{198} This is achieved by having ‘a good understanding of closure techniques and the settlement process,’ skills which are consistent with an individualistic ideology.

Procedural skills, the second competency area, are defined as the ‘ability to recognize the nature of the dispute and establish clear understandings, concerning the process, with and between the parties’. This section does not provide any information that would clearly indicate whether an evaluative or relational privilege is being employed. Rather, the information focuses on the type of knowledge and skills a mediator should possess to be able to supervise and conduct a mediation.

Relationships skills is the third competency area listed. This competency is defined as the ability to instill and maintain a positive relationship and good communication between the parties. This section places emphasis on the following set of abilities: maintaining a positive relationship, listening and speaking effectively, and maintaining a conducive atmosphere during the session. The application of these skills would be considered useful for mediators using either an evaluative-settlement or transformative-relational approach to

\textsuperscript{198}The other four skill elements are: ability to organize and maintain office systems; ability to work within the system/rules governing the accepting and handling of engagements; ability to allocate time, effort and other resources; and the ability to organize the required needs of the mediation.
practice.

Facilitation skills is the fourth and final competency area. Facilitation skills are defined as the ability to conduct the mediation session using fair, flexible and effective procedures, skills and techniques. The 'ability to bring closure and achieve settlement' and the 'ability to advance the process' are two of the skill elements highlighted, both of which are seen to encourage mediators to work toward breaking impasse and achieving settlement. However, these skill elements are complemented by others which offer a more relational perspective, including the 'ability to deal with high emotion', 'ability to deal with issues', and 'ability to surface needs and interests'. These latter skills elements tend to encourage an approach that would help the parties focus on the underlying issues that would help them work through the dispute.

The preceding review of ADR Canada's accreditation program does not reveal much in the way of whether they are encouraging their mediators to adopt one particular approach over another or indeed, whether the standards themselves are sufficiently flexible to allow mediators to use both evaluative-settlement and transformative-relational approaches in the context of a commercial dispute. They adopt a definition of mediation which promotes both evaluative and relational language. They also integrate individualistic and relational ideologies within two of the four competency areas, relationship and facilitation. However, neither of these ideologies are seen to be present within the procedural competency area, with only one skill element under the administrative category reflective of the individualistic ideology. At the same time, it does not appear that an individualistic ideology is being operationalized within the standards at the expense of a more relational one. What do these
findings suggest? It may suggest that ADR Canada decided to develop a generic set of standards under which many mediators could qualify. ADR Canada indicates that their standards are “intended as a guideline of generally recognized desirable qualities for competent mediators practising in a commercial environment.” 199 Perhaps it is the intention of ADR Canada to accredit a wide selection of mediators, with different ideologies, approaches, skills and knowledge, who can respond to the various types of disputes that can occur within commercial settings. Such a system would likely support the accreditation of mediators using more transformative-relational approaches to practice. This type of thinking would also go along way in helping to build and promote a pluralistic and integrated approach to mediation practice within the context of commercial disputes.

4.2 **Ontario Mandatory Mediation Program (OMMP):**

As outlined in section 3.1.1 of chapter three, mandatory mediation was introduced by the Attorney General of Ontario on a pilot basis in Toronto and Ottawa-Carleton in 1997. The full program did not come into effect until January 4, 1999, upon the establishment of Rule 24.1 of the Rules of Civil Procedure. Under this Rule, all civil, non-family actions that are subject to case management are referred to mandatory mediation. 200 This Rule was augmented eight months later in September 1999 by Rule 75.1, which brought estates, trusts and substitute decision matters within the Ontario Mandatory Mediation Program...

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199 *Supra* note 197.

200 Case management is a system through which the court supervises cases and imposes strict timelines on their movement through the pretrial and trial process.
OMMP is intended to provide an alternative dispute resolution process within the traditional civil justice system. According to the Ministry's fact sheet, the "[p]rogram was designed to help parties resolve disputes outside of court early in the litigation, thereby saving them both time and money." This supposition is supported by a program evaluation of Rule 24.1 completed in early 2001 under the auspices of the Civil Rules Committee, which found that mediation is providing a favourable impact on the speed of dispute resolution and the cost of litigation. The OMMP has adopted a definition of mediation very similar to the one used by ADR Canada. They view mediation as a:

... process involv[ing] the use of collaborative techniques by a mediator who is neutral third party. The mediator informally assists disputing parties in voluntarily reaching their own mutually acceptable settlement of some or all of the issues in dispute by structuring the negotiation, maintaining the channels of communication, articulating the needs of each party, and identifying the issues.

They conclude the definition with the stipulation that "[m]ediators must be committed to a process that is: voluntary; private; confidential; self-determining; creative; practical and flexible." This definition, like the one used by ADR Canada, uses language that integrates...
elements of both evaluative-settlement and transformative-relational approaches to practice.

It should be noted that the OMMP does not formally accredit mediators seeking placement on the mediation roster. Local Mediation Committees (LMC) are solely responsible for selecting mediators based on the following established criteria: i) experience as a mediator; training in mediation; and educational background, ii) familiarity with the civil justice system, and iii) references. The selection criteria were established and approved by the Ministry of the Attorney General, based on an extensive consultation process, which included members of the mediation community, the bar, the public, the judiciary and the ministry. LMC’s are made up of volunteers from each of these communities. Appointed in both Toronto and Ottawa-Carleton, LMCs are responsible for supervising a consistent system of mandatory referral to mediation in their respective communities. The committees are also responsible for selecting mediators for the OMMP’s mediator roster, monitoring mediator performance, and responding to complaints about mediators named on the list. The Ministry of the Attorney General developed a set of provincial standards, noted above, to assist the LMC’s when assessing candidates who seek placement on the roster. These criteria are explained in more detail below.

Experience as a mediator; training in mediation; and educational background are

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206 There is a debate in the dispute resolution community on whether rosters represent implied credentials for mediators seeking to provide mediation services. For a discussion on the current lack of distinction between rosters and credentialing, please see L. Deborah Sword “Lists, Panels, Rosters: What’s Next?” (1999) 11:1 Interaction 1.

207 The mediation rosters in Toronto and Ottawa function on a two year cycle. Mediators selected for the roster are required to re-apply after each two year term. Before being placed on the roster, mediators must agree to abide by a number of provisions, some of which include: maintaining professional liability insurance with a minimum coverage of one million dollars; agreeing to conduct up to twelve hours of pro bono mediations per year; and abiding by the OMMP’s administrative policies and code of conduct.
grouped together to represent the first selection criterion. According to the guidelines, this criterion is “designed to recognize direct and indirect experience in dispute resolution and to ensure an inclusive selection process.” The relevant sub-elements identified under ‘experience as a mediator’, the first category, include: the number of times the candidate has been retained as a mediator; the candidate’s role in mediation; involvement in the mediation community; complexity of the mediated disputes; and types of cases mediated. Candidates are required to have conducted at least five mediation sessions as a sole or co-mediator to qualify for the roster. Unlike ADR Canada, which appears to give preference to paid work, OMMP considers both paid and volunteer work as relevant mediation experience. Past settlement success or settlement rate is not assessed under experience. The absence of this criteria from the guidelines appears to be consistent with a statement found on the OMMP website, which emphasizes a pluralistic and integrated approach to mediation, reflecting both evaluative-settlement and transformative-relational ideologies:

[s]ettlement of the lawsuit is not the only positive outcome of a mediation. A mediation is considered successful even if the parties do not settle, but gain a better understanding of the other side’s position, if they have narrowed the issues or settled some of the[m], or if they have agreed on a process to resolve issues later in the proceedings.  

A wide range of disciplines and professional backgrounds are referenced as part of the experience criteria, including: counseling, pastoral care, social work, law, work with or within agencies, boards, commissions or tribunals and workplace settings where dispute

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208 Supra note 202.

resolution is part of the candidate's responsibility. By outlining such a broad list, OMMP appears to recognize that there are multiple paths to the way in which practitioners attain skill and competence in dispute resolution. This recognition also allows a more inclusive selection process, an original intent of the criterion.

Training in mediation is the second of the three categories listed under the first selection criterion. This element provides for the greatest number of points that may be scored within the criterion. Several factors are considered in the determination of overall training experience, including:

- type of training program(s) taken
- number of training hours received (40 hours is considered to be the minimum)
- nature of training - theoretical, practical or both
- extent to which the training covered various topics, such as interest-based mediation, conflict analysis, negotiation, ethics, confidentiality, role-playing, cross-cultural sensitivity and power imbalances
- involvement in dispute resolution mentoring or training programs, including the role of the candidate, and the nature and length of involvement
- public speaking or teaching on the issue of dispute resolution in an educational setting or institution
- role in development of training courses and material

Previous training experience is assessed for the degree to which it provides a balance and blend related to the theoretical knowledge, skills, and other attributes required for competent mediation practice. OMMP purports to recognize and value highly those candidates who
have demonstrated a commitment to acquiring or upgrading professional skills in mediation and dispute resolution theory and techniques".\textsuperscript{210} Particular emphasis is given to those candidates who have acquired training in ‘diverse areas of dispute resolution’. Therefore, it would seem worthwhile, and perhaps advantageous, for mediators seeking placement on the roster to have had training in both evaluative-settlement and transformative-relational approaches to practice.

Educational background is the last category identified under the first grouping of selection criteria. Of the three elements listed, educational background is accorded the least amount of weight. Similar to the experience category, this one was designed to include a broad range of disciplines, recognizing that mediators can and often do come from varied professional backgrounds and disciplines. Preference is accorded to those candidates who complement their educational training with experience that is closely related to their work as a mediator.

Familiarity with the civil justice system is the second selection criteria assessed by the LMCs. This criterion is scored the highest among the three criteria listed. As part of this criteria, candidates are also required to have familiarity with the litigation process, the judicial system, and case management rules. This finding is confirmed by the Ontario Lawyers Gazette, which revealed that “the [LCM] committee looks for candidates who not only have experience or training in mediation, but who also have an understanding of ‘rights-
Based dispute resolution, either from courts or administrative tribunals.²¹¹ Requiring mediators to have knowledge of civil procedure and case management rules and processes is perhaps the single biggest factor which distinguishes OMMP from the other two accreditation programs. At the same time, these knowledge elements are not unexpected for a court-mandated program. Does this requirement cancel out earlier recognition given to mediators who have a broad range of experience and training in mediation? In other words, does this requirement serve to favour lawyer-trained mediators over other types of mediators? The answer to this question may depend on the nature of the dispute in question. A lawyer-trained mediator may be selected to mediate a dispute where the concern relates more to the legal rights of the parties than their needs and interests, or in cases where there is a specific requirement for the mediator to evaluate the legal position of the parties and the cost-benefit of pursuing a legal resolution rather than settling in mediation. Such situations will not necessarily exclude the selection of non-lawyer mediators. It does suggest, however, that non-lawyer mediators would have to demonstrate that they possess the required level of legal knowledge and experience to mediate such disputes, should they wish to do so. The choice of approach may similarly depend on the nature of the dispute. The greater the focus on legal rights and entitlements the more likely it may be that an evaluative-settlement approach would be sought. However, this observation may be tempered by the fact that OMMP adopts a perspective that equates successful mediation on the basis of whether the parties gain a better understanding of each other side’s position and not simply on whether

settlement is achieved. This suggests that mediators, whether legally trained or not, may be encouraged to use more transformative-relational approaches in the context of a legal dispute to empower individual disputants and encourage mutual recognition between disputants.

One factor not considered in the above assessment is the selection preference of individual litigants. Prior to entering the mediation process, individual litigants are given the option of selecting mediators from the court roster they believe would best suit their particular case. In chapter three it was noted that in 1997, the first year of the program in Ontario, litigants chose lawyers as mediators 94% of the time. A number of factors could be examined to explain this statistic, some of which include: the number or percentage of lawyers-trained mediators to non-lawyer mediators on the court roster at the time the program began; type of case sent to mediation; selection criteria used by the program at the time the program began; familiarity of disputants with the mediation process within the court system, and familiarity of disputants with the role of mediator. Since this statistic was released in 1997, it would be interesting to see whether the selection preference of individual disputants has changed or remained the same since the inception of the program. Similarly, further research would be required to determine the results of a more recent survey, outlined in chapter three, which found that lawyers are adapting a more “adversarial and structural” approach to the mediation process. Several factors could be examined for this review, such as the nature and type of cases being accepted by lawyer-trained mediators versus non-lawyer mediators, and the type of experience and knowledge required for the case.

A reference assessment is the third and final selection criteria used by LMCs. Candidates are required to submit three references who can attest to their mediation skills
and commitment to the values and principles of mediation. Also considered is the level of involvement in the mediation community, though no information is provided on the nature and type of involvement required. Since the reference check is based on a qualitative assessment, it is difficult to predict or know how the information would be assessed or what type of information would be most valued. The reference assessment is the least weighted of the three criteria considered by the LMCs.

The standards criteria developed by OMMP seem to focus on a broad range of criteria to assess candidates seeking placement on the court roster. While there is a requirement for candidates to have familiarity with the civil justice system, emphasis is also placed on candidates who have acquired training and experience in diverse areas of dispute resolution. At first glance, these two selection objectives seem to counteract the other. Given that both are required, it is difficult to determine whether OMMP would favour mediators who may have more legal knowledge and experience than training/experience in diverse areas of dispute resolution, or possibly mediators who happen to have more training/experience in diverse areas of dispute resolution, but less legal knowledge and experience. Examining the points scale would suggest that the latter example would prevail, since more total points are awarded under the first criteria (experience, training and education - 65 points) than the second (familiarity with the civil justice system - 30 points). Of course, further analysis would be required to see precisely how and to what extent LCMs are interpreting the selection objectives. The inclusion of such broad criteria, coupled with the operationalization of pluralistic and integrated discourse in the definition and value statement provided on the website, does seem to indicate that OMMP would encourage the adoption
of more transformative-relational approaches to practice in the context of court-based disputes, particularly if this would be desired or even the preferred approach for the dispute in question.

4.3 Family Mediation Canada (FMC):

Family Mediation Canada (FMC) is an interdisciplinary membership organization, with numerous provincial affiliates, that is committed to providing leadership to its members by setting practice standards and developing educational resources. FMC is committed to the public and endeavours to set practice standards of competence that ensures quality of service. In fact, between 1986 and 1989, FMC played a lead role in laying the groundwork for the move toward the establishment of standards and certification for mediation practice. FMC believes that with the recent growth of ADR, and family mediation in particular, the public needs assurance that the people who call themselves family mediators are trained and appropriately prepared to mediate family disputes. FMC established and recently approved a set of practice guidelines, a certification process and training standards for family mediators practising in the field of separation and divorce. FMC worked with provincial, territorial and international mediation associations to establish uniform standards

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212FMC is an interdisciplinary association of social workers, lawyers, human services and health care professionals.

213Edwards and Morris, supra note 167 at 8591.

214Linda C. Neilson, Peggy English, and the Certification Committee (Neilson et al.), Family Mediation (FMC) Practice, Certification and Training Standards (Family Mediation Canada, November 1, 1999). This document is the result of an earlier consultative draft prepared by FMC entitled “Family Mediation Canada’s Report on a Model Standard of Practice, Certification of Competence and Training.” This report was commissioned as part of the “Standards and Certification Project,” which was started by FMC in 1993 as part of a series of consultations with members, practitioners, and other dispute resolution organizations in Canada and the US.
that would apply across Canada. While the FMC certification process does not prevent anyone from practising family mediation, it does prevent family mediators who are not certified by FMC from claiming FMC certification or accreditation. This follows the same certification process set-out by ADR Canada for the C. Med designation.

FMC offers three categories of Certified Family Mediator: Family Relations Mediator, for those who limit their practice to child, relationship and support issues; Family Financial Mediator, for those who focus their practice on family financial issues; and a Comprehensive Family Mediator, for those who mediate the full spectrum of family practice issues, including child, relationship, financial and property. The training and education requirements differ slightly for each category, with the more rigorous certification requirements assigned to the Comprehensive Family Mediator. With the exception of the final section on training, the following provides an assessment of the full certification curriculum as it applies to all three categories.215 In part one of the certification curriculum, FMC offers a comprehensive definition of family mediation, suggesting that it is a:

... facilitative, non-adversarial conflict resolution process in which one or more family mediators intervene in family conflict in order to help the family change its communication and negotiation styles from adversarial and confrontational to co-operative and integrative, with a view to assisting the family in the development and design of its own solutions to its own conflicts. Family mediation includes, but is not limited to disputes and conflicts about: pre-nuptial issues, the reorganization of the family after separation and divorce, the particulars of future parenting plans for children (including custody, access and guardianship issues), financial support and property matters connected to separation and divorce. Family mediators also mediate child protection matters, family business matters, and disputes within intact families about issues such as: the division of responsibility for the care

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215 The last section of this review only examines the minimum training requirements for an applicant seeking accreditation as a Comprehensive Family Mediator.
of elderly parents, parental conflict with or about children, family finances, estate matters, adoption, educational matters. . . Family mediation is a confidential (closed) process unless all participants agree to open mediation...[which is] a process that may result in the mediator preparing a report about the mediation and/or making recommendations.\textsuperscript{216}

This definition, particularly the opening sentence, uses discourse that is characteristic of a transformative-relational ideology, in the sense that it encourages the disputants, in this case the family, to develop and design their own solutions rather than relying on the mediator to suggest one for them. A relational approach operates on the assumption that parties are capable of resolving their own disputes. As part of this approach, FMC encourages mediators to work with family members to adopt 'co-operative and integrative' negotiating styles to help improve communication between family members. In doing so, mediators would presumably have to adapt their own style(s)/approach(es) to those being used by the family members. In this sense, FMC appears to adopt a pluralistic conception of mediation practice, recognizing the benefits that may result when a relational-based approach is integrated with different styles (approaches) to help the parties resolve their own disputes through open communication.

The practice guidelines, listed as section two of the certification curriculum, outline the general process by which mediators will work with the participants throughout the mediation process. Family mediators are required to observe the guidelines in order to establish and maintain a mediation process that recognizes the needs and interests of the participants, including the special interests of children.

\textsuperscript{216}Neilson et al., supra note 214 at 4.
Section three outlines a number of general and specified tasks that mediators are required to undertake both before and during the mediation process. The second part of this section contains language that is consistent with a relational ideology. The first point listed under section 3.2, for example, suggests that it is important for mediators to ‘establish an empathetic, effective working relationship with participants’. Numerous examples are provided on how mediators can demonstrate this task, some of which include: ‘enhance the quality of the participants’ communication with each other’; ‘set a cooperative tone’; ‘promote each participant’s understanding of the conflict and enhance each participant’s insight into and empathy for the views and personal situations of the other’; ‘encourage and support self-empowerment of the participants’; ‘respect the participants’ self-determination’; ‘create an environment of mutual exploration’; and ‘facilitate and model active listening’. The second point provides mediators with examples on how to ‘facilitate the participants’ negotiations and resolutions’. To achieve this outcome, mediators are required to ‘facilitate the full disclosure of all information relevant to the dispute’; ‘guide the participants’ discussions from positions to interests’; and ‘ensure participants measure solutions against criteria of fairness and the interests of all affected others’. These second set of factors are considered general competencies and are therefore not specific to either a transformative-relational or evaluative-settlement approach.

To obtain any of the FMC Family Mediator certifications, applicants are required to demonstrate a wide range of knowledge, skills and abilities required for the performance of the above-mentioned tasks. Section four divides these elements into seven categories:

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217 Ibid. at 7.
knowledge; communication; relationship; content management; process; ability; and personal attributes.

With respect to knowledge, applicants are expected to possess a sound grasp of the various issues associated with family mediation, including the legal, economic and social aspects of separation and divorce, the effect of abuse and control in families, the implications of gender, particularly in terms of power imbalances, as well as the ethical and moral issues that can emerge in mediation. In addition to having significant experience in mediation, applicants are expected to have knowledge of the various styles and techniques involved in negotiation, conciliation, and conflict management and how they can be used in conjunction with the family mediation process. This requirement addresses the advantages that can be gained by using a diverse range of approaches within the context of a family dispute, reinforcing the pluralistic and integrated language found in FMC's definition of family mediation.

Communication and relationship skills are listed as the second and third categories of section four. Under communication skills, the first category, FMC mediators are expected to be able to call upon and apply a wide range of communication skills appropriate to the particular mediation and to the participants. This section offers a detailed view of what is expected of mediators and includes such standard skill elements as: i) listening and responding accurately and non-judgmental to feelings, thoughts and situations; ii) speaking in terms of interests, rather than in terms of positions; iii) re-framing negative comments in positive terms; iv) clarifying information and assumptions; v) summarizing communications and consolidating areas of agreement; vi) displaying empathy and understanding without
personal partiality or bias; vii) acknowledging the importance and validity of a multiplicity of participant perspectives; and viii) demonstrating and promoting sensitivity to verbal and non-verbal cues. Since these skills are considered to be standard skill elements for mediators, they do not appear to support or favour any one particular approach.

FMC mediators are required to support the above skill elements with a number of competencies, all of which are seen to support the preservation and enhancement of relationships with participants. These include: creating rapport; establishing trust; respecting the participants; encouraging mutual respect among all participants; being objective and impartial; and encouraging the participants’ self-determination. A fourth category in section four outlines the skill elements mediators should possess to be able to manage, supervise and conduct a mediation. This section, referred to as ‘content management skills’, does not provide any specific information that would indicate whether an evaluative or relational approach is being sought. A number of skills and techniques are outlined under the section on ‘process skills,’ the fifth category, including: ‘assisting the participants in exploring their interests’; ‘assisting the participants in converting positions into interests’; and ‘assisting the participants to alter their negotiation styles from adversarial and confrontational to integrative and cooperative’; ‘knowing when and how to use caucuses’; ‘helping the participants understand the best and worst alternatives to a mediated settlement’; ‘assisting participants to break impasses’, etc. This list offers a mixture of skills reflective of both transformative-relational and evaluative-settlement approaches. The first two elements

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218 ADR Canada identifies these skill elements as procedural skills. The OMMP program does not make specific reference to these kind of skills.
appear to be characteristic of a more relational approach, while the latter three are reflective of a more evaluative approach. The third skill element, the one found in the middle, re-emphasizes the value of using different styles (approaches) to help the parties in mediation to resolve their own disputes.

Categories six and seven touch upon the nature of mediator’s personal qualities and how they can impact the mediation process. More specifically, FMC believes that a “mediator’s personal presence, status acceptance, [and] spiritual sense...[although] not fully measurable,...are the building blocks of the superlative mediator, without which no amount of education and training or practice will suffice”. These subjective qualities are captured under the element heading, ‘ability’. Element seven, personal attributes, lists a range of personal attributes and qualities mediators should possess as a way of managing complex interactions and keeping the parties involved in the mediation process. The first two qualities adopt a more relational orientation: i) a non-directive, non-judgmental nature in respecting the individuality and autonomy of others together with an ability to allow others to make their own decisions in their own ways; and ii) personal warmth, an empathetic nature and a genuine liking of people. These attributes are balanced with more evaluative, directive-like abilities, including: i) an ability to be firm and assertive when needed to control the mediation process, without the need to control the outcome or the participants; and ii) well-developed lateral thinking and problem-solving skills and the abilities to be clear, creative and imaginative. The remaining attributes are more generic in nature, ones that could be found in mediators using a relational or evaluative approach. These include: self-

219 Neilson et al., supra note 214 at 13.
awareness, including an awareness of one's own inter-personal communication style, its effect on others, and one's own culture, values and biases; experience with the diversity of life and acceptance of differences; interpersonal understanding and intelligence; an ability to remain calm, level-headed and caring in the face of hostility, adversity and tension; a sense of humour; a willingness to learn by asking and listening; an ability to separate the professional from the personal while retaining professional warmth, empathy and objectivity and keeping personal feelings and experiences in abeyance. In this regard, it appears that FMC expects mediators to possess a mixture of personal abilities and attributes, reflective of both a relational and individualistic ideology.

Training is the fifth and final section included on FMC's certification guidelines.\textsuperscript{220} Although FMC strongly recommends formal degrees as a prerequisite to mediation training, a degree is not a requirement of the certification process. As part of the prerequisite screening, candidates are also assessed on the appropriateness of their work experience in combination with the personal attributes outlined above. Candidates seeking certification as a Comprehensive Family Mediator must meet the following minimum training requirements: i) completion of at least 80 hours of basic conflict resolution and mediation theory education and skills training, including cultural training; and ii) completion of at least 150 hours of further related education and training.\textsuperscript{221}

\textsuperscript{220}Section six of the guidelines, supra note 214, outlines in more technical detail the process for obtaining the FMC certification.

\textsuperscript{221}The second category is broken down into various sub-categories, including the family dynamics of separation and divorce; issues related to child law, such as custody, access, guardianship, support, child protection and abduction law; power imbalances, abuse and control issues; legal and financial issues relating to separation and divorce and family reorganization; ethical issues relating to the mediation process; and agreement drafting.
These training requirements are to be complemented by the completion of an approved mediation practicum in accordance with FMC standards. The practicum is comprised of 30 hours of supervised training, with 20 hours devoted to actual mediation sessions or simulated mediation sessions and 10 hours of consultation with a practicum supervisor. The goal of the practicum is to provide mediators with an opportunity to advance from observing mediations and co-mediating with an experienced mediator to mediating under supervision.\textsuperscript{222} Neither the training requirements nor the practicum component provide information that would indicate the type of approach that would be favoured by FMC.

As with the above two programs, it is difficult to know for certain whether the standards and practice guidelines developed by FMC are sufficiently flexible to allow mediators the opportunity to adopt both evaluative-settlement and transformative-relational approaches to practice. However, it appears that FMC is encouraging this kind of practice through the integration of the individualistic and relational discourses within their set of standards. The integration of these discourses can be seen, in varying degrees, within several of the generic and specific tasks and skill-based competencies. What are some of the possible reasons that might explain this occurrence? Firstly, FMC may recognize, on some level, the unique capacity of mediation to provide multiple and intangible benefits when evaluative and relational approaches are integrated. Secondly, building standards that reflect both evaluative-settlement and transformative-relational approaches to practice also allows

\textsuperscript{222}In addition to these requirements, candidates are expected to spend 20 hours educating themselves about family mediation, coupled with at least 14 hours of conflict resolution or mediation skills training in the last three years. Since the Comprehensive Family Mediator is expected to mediate across a range of specialized areas of practice, the training requirements for applicants seeking this certification appear more onerous than the ones set out by ADR Canada or OMMP for their applicants.
for a more inclusive process, recognizing that family mediators can come from many diverse backgrounds and disciplines, such as law, social work, health professions, pastoral care, and community services. In other words, FMC’s standards do not appear to have been designed in such a way as to preclude mediators from any one of these disciplines from applying to one of the FMC family mediator certifications.

4.4 Summary of Findings:

The integration of the individualistic and relational discourses is most apparent within FMC’s program. While premised on a relational ideology, FMC’s definition of mediation encourages mediators to help family members design solutions to their own conflicts through the application of co-operative and integrative negotiating styles. The knowledge category embodies this definition by assessing the degree to which mediators have knowledge of how various forms of dispute resolution, such as negotiation and conciliation, can be integrated within the family mediation process. This integrated conception of mediation is also consistent with the research presented in chapter two, which depicts mediation as a plurality of practice rather than as a single-model or dualistic process. This integration theme is continued under several of the general and specific tasks and skill-based competencies outlined in FMC’s practice guidelines. While numerous tasks and skill elements integrate both discourses in varying degrees, FMC is perhaps the most explicit about preserving and promoting a transformative-relational approach to practice within its established set of standards compared to the other two programs. This finding is consistent with the relational ideology of family mediation, which assumes that parties are often capable of resolving their own disputes. This finding gives us reason to believe that FMC would encourage their
accredited mediators to adopt a transformative-relational approach to practice while mediating family practice disputes.

There also appears to be explicit integration of the individualistic and relational discourses within the OMMP’s program. The definition of mediation uses language that incorporates elements of both ideologies, as does a statement found on the OMMP website, which sees settlement and recognition between the parties as the two primary goals of the mediation process. This practice of integration is also seen within the first of three criteria\textsuperscript{223} OMMP uses as a basis upon which to select mediators for the court roster: experience as a mediator; training in mediation; and educational background. This criterion encourages the participation of mediators with different disciplines and professional backgrounds. Some of the ones outlined include: counseling, pastoral care, social work, law, work with or within agencies, boards, commissions or tribunals and workplace settings where dispute resolution is part of the candidate’s responsibility. The research presented in chapter two revealed that the type of approach used by mediators is seen to be influenced by professional background, among other contextual factors. Given this finding, it is reasonable to believe that a selection of a diverse range of mediators with different professional backgrounds would likely result in the application of different types of approaches, reflecting both ideologies. Both paid and volunteer work is considered relevant mediation experience. Candidates are assessed for the degree to which their experience (incorporating training and education elements) provides a balance and blend related to theoretical knowledge, skills, and other attributes that would

\textsuperscript{223}The last criteria, reference assessment, does not provide any insight into the type of ideology or approach that would be favoured by the LMCs.
be required for competent mediation practice, with particular preference being accorded to those individuals with experience in diverse areas of dispute resolution. The inclusion of broad selection criteria such as the ones identified above suggests that both evaluative-settlement and transformative-relational approaches to practice would be encouraged, reflective of a pluralistic approach.

Familiarity with the civil justice system is the second of the three selection criteria adopted by OMMP. It was suggested that this requirement is the single biggest factor which distinguishes OMMP from the other two accreditation programs. Does this selection criteria contradict the first selection criteria, which appears to support the selection of a diverse range of mediators? As a court-based initiative, the OMMP program was established to provide an alternative dispute resolution process within the traditional civil justice system, a system which has been premised on an individualistic ideology, focusing on the settlement of disputes. As such, does the criteria support the adoption of an individualistic ideology at the exclusion of a relational one? Does the criteria necessarily imply that it will favour mediators who use an evaluative-settlement approach? Further, to what extent will it favour lawyer-trained mediators over other types of mediators? While these kinds of questions are worthy of further consideration, it is suggested that this criteria would favour lawyer-trained mediators over other mediators who may not have knowledge of civil procedure and the litigation process, but not necessarily non-lawyer mediators who may have such experience. In other words, the requirement may not have been designed to rule out non-lawyer mediators who may encourage a more transformative-relational approach to practice. This practice would seem to run counter to the pluralistic, inclusive discourse being encouraged
under the first selection criteria.

With a focus on the selection of a broad range of mediators, with diverse work, training and educational experience, it appears that the OMMP program is moving in a direction that would seek to encourage the application of more transformative-relational approaches to practice and possibly, the adoption of a more pluralistic and integrated approach to mediation. However, if the second criteria is narrowly interpreted to include only those mediators with experience in evaluative-settlement approaches to practice, this may increase the likelihood of the emergence of a single-model approach to mediation, thereby reducing the adoption of more diverse and integrated approaches within a court-based setting.

Of the three standards programs reviewed, the one offered by ADR Canada is perhaps the least clear on the degree of integration between the individualistic and relational discourses. Some overlap between these discourses was seen in the relationship and facilitation competency areas. The overlap was also apparent in the definition of mediation. However, the two remaining competency areas do not adhere to any one particular discourse, with only one skill element under one of the competency areas reflecting an individualistic discourse. Since neither discourse is advocated at the expense of the other, it is not clear what type of ideology and approach ADR Canada is attempting to promote through their established set of standards. One interpretation is that they may have decided to develop a sufficiently generic set of standards to attract, train and accredit a wide selection of mediators, with different ideologies, approaches, skills and knowledge, who can respond to many different types of disputes within commercial settings. ADR Canada may have chosen
to not develop a set of standards that would preclude certain mediators from applying to their program, whether they use an evaluative-settlement or transformative-relational approach to practice, as the case may be. There appears to be no evidence to suggest that ADR Canada is perpetuating a dualistic or single-school view of mediation. Does this mean that there is room for evaluative-settlement and transformative-relational mediation to co-exist within ADR Canada’s set of standards? Further research would be required to answer this question.

The foregoing analysis of the practice standards offered by ADR Canada, OMMP and FMC revealed that, while professional standards programs do operationalize an individualistic ideology into their standards through the adoption of individualistic discourse, they also frequently draw upon a relational ideology. What does this finding tell us? Firstly, it suggests that there might be more integration taking place between evaluative-settlement and transformative-relational approaches to practice than what the extant literature suggests. This finding correlates with the more research literature outlined in chapter two, which depicts mediation as a social process that is capable of providing individualistic and relational benefits to disputing parties through the integration of evaluative-settlement and transformative-relational approaches to practice. This finding challenges some researchers and theorists who continue to conceptualize mediation in dichotomous terms. Similarly, it challenges the prevailing assumption in the field to associate different ideologies and goals of mediation with different approaches to practice. Another finding is that the standards being adopted by these organizations do not appear to be guiding or endorsing the application of a single model approach, reflective of the evaluative-settlement approach. Finding the existence of a relational discourse within each of the three sets of standards suggests that
transformative-relational approaches to practice are not being completely abandoned in favour of more evaluative-settlement approaches within commercial, legalistic environments. These observations, taken together, suggest that mediation is not conceptualized as a monolithic practice, giving us hope that a transformative-relational approach to mediation can exist within a legalistic, problem-solving culture. It also suggests that standards programs, or at least the ones reviewed in this thesis, are in a favourable position to adopt and perhaps promote a more pluralistic approach to mediation at the level of practice. It is difficult at this point to predict with certainty whether these or similar organizations will endeavour to build pluralistic language into the policies on standards and qualifications within existing and future accreditation programs. This type of approach will help to ensure that we do not foreclose the transformative-relational potential of mediation. The next chapter offers further insights and suggestions that may help to encourage and maintain a pluralistic approach to mediation within a legalistic, problem-solving culture. The chapter concludes with a number of questions that may guide future research.
Chapter 5

Conclusions, Implications and Future Research

5.0 Introduction:

There is a perception in the field that current patterns of practice in most mediation models emphasize practical evaluative-settlement over other more transformative-relational approaches to practice. This perception has coincided with recent trends toward the institutionalization of mediation within the formal justice system, the emergence of mediation as a profession, and the development of practice standards and qualifications for mediators. These trends are seen to be the result of increasing attention being paid to an individualistic ideology, which is concerned with the goals of settlement and satisfaction, rather than a relational ideology, which focuses on the goals of communication, empowerment and recognition. This thesis set out to explore whether the expansion of mediation into the formal justice system has increased reliance on the use of an evaluative-settlement approach, leading to the suppression or abandonment of more transformative-relational approaches to practice, and along with them, the preservation of mediation’s quality justice goals. In pursuing this research objective, I adopted the perspective that the transformative-relational potential of mediation should be valued if the full potential of mediation is to be realized within a legalistic, problem-solving culture. In this context, a review of three standards programs was undertaken to determine whether a transformative-relational approach to mediation can exist in a legalistic, problem-solving culture. Two national (ADR Canada and Family Mediation Canada) and one provincial program (Ontario
Mandatory Mediation Program) were reviewed.

5.1 Research Findings:

The review of three stated standards of practice revealed a number of important insights. One of the most revealing insights is that both individualistic and relational discourses were seen to be operationalized, in varying degrees, in the practice standards in each of the three programs. The most readily apparent integration of the individualistic and relational discourses was found within the accreditation program offered by Family Mediation Canada. This blending was seen within several of the generic and specific tasks, and skill-based competencies. It is also present in the definition of mediation offered by FMC, which encourages mediators to help family members design solutions to their own disputes through the application of co-operative and integrative negotiating styles. The degree to which mediators have knowledge of various forms of dispute resolution (negotiation and conciliation are cited as two examples) is assessed as one of requirements under the knowledge category. Finding the existence of both individualistic and relational discourses throughout the body of standards may be partly explained by the fact the FMC recognizes that family mediators come from many diverse backgrounds and disciplines, such as law, social work, pastoral care, community services and health professions. In producing an integrated approach to their standards of practice, it appears FMC has avoided running the risk of precluding certain types of mediators who may have a professional or personal interest in becoming accredited under one or more of the family mediator categories offered by FMC. It is also important to note that, of the three programs, FMC was also the most explicit about preserving a transformative-relational approach to practice within its set of
Explicit blending of the individualistic and relational discourses was also found in the selection criteria developed by the OMMP. This blending of discourses was seen in a number of areas, including the definition of mediation, the overall goal of the mediation process, and the first and most highly weighted of the three criteria used by OMMP to select mediators, namely, experience as a mediator; training in mediation; and educational background. The inclusion of such broad selection criteria suggests that both evaluative-settlement and transformative-relational approaches to practice would be encouraged within the OMMP. One of the counter-veiling factors associated with such a possibility is the requirement for mediators who seek placement on the OMMP roster to have familiarity with the civil justice system, the second selection criteria. A number of implications are associated with this requirement. Perhaps the largest implication is that non-lawyers who may not have court experience or knowledge of civil law may end up being excluded from the selection process. This development may depend largely on how the selection requirement is interpreted by the Local Mediation Committees. For example, if this requirement is narrowly interpreted to include only those mediators with experience in the civil court process and evaluative-problem-solving approaches, such a development would likely increase the emergence of a single-model approach within a court-based setting, leading to the suppression of more diverse and integrated approaches to practice.

Of the three programs reviewed, ADR Canada was perhaps the least clear in terms of the degree of integration between individualistic and relational discourses. Some overlap was found in the relationship and facilitation competency areas and in the definition of
mediation. For the most part, the standards were generic in nature and did not indicate whether one particular approach was being favoured over the other. One interpretation is that the generic set of standards being offered by ADR Canada may in fact encourage the selection of a wide range of mediators with different ideologies, approaches, skills and knowledge to respond to the various types of disputes that can arise in a commercial setting. Such an approach may leave open the possibility of the inclusion and application of more transformative-relational approaches to practice within a commercial-based setting. By not providing specific language, ADR Canada could be considered the most pluralistic of the three programs. In articulating this possibility, we should still not lose sight of the fact that many mediators selected by ADR Canada are required to identify the facts of a dispute in order to bring about a remedy that will help disputants ascertain what the appropriate entitlements should be for the particular commercial dispute in question. Such a mandate may not necessarily promote the value of participants’ voices in the final analysis or invite a shift away from legal or entitlement issues to an exploration of human interests.

Another important finding is that mediators trained in different ideologies and approaches to practice could apply, qualify and/or be accredited by each of the three organizations. The programs were not seen to exclusively adhere to any one ideology in the development of their standards. In this sense, the development of practice standards and qualifications for mediators do not appear to be imposing absolute uniformity on the application of mediation within the formal justice system. While it would be premature to conclude that the standards offered by these three programs are sufficiently flexible to cover both evaluative-settlement and transformative-relational approaches to practice, the programs
do not appear to be perpetuating a single-model approach. Finding the existence of both the individualistic and relational discourses within each of the three set of standards suggests that there is more integration taking place between these two approaches to practice than would appear in the literature. However, we do not know at this point how much of a link there is between the discourses underpinning the practice standards and selection criteria observed in this review and the actual approach used by mediators in practice. On this point, it should be noted that the foregoing analysis was based on an assumption that the approach(es) mediators’ use are likely to reflect the standards or selection criteria set out under the particular program in question. The extent to which mediators follow the standards set out for them in practice, or conversely, whether the standards accurately reflect how mediators operate in practice, could be the subject of future research.

The above observations give us some hope that continuing in this direction may lead to a fuller integration of these approaches under the auspices of accreditation programs affiliated with the formal justice system. To help lead us in this direction, policy-makers and those responsible for the accreditation of mediators need to work together to adopt a more focused and intentional effort to prevent the emergence of single-model approaches in a legalistic, problem-solving culture. There appears to be an opportunity for the field to further test out how evaluative-settlement and transformative-relational approaches to practice can work together, rather than in isolation, to preserve and promote diversity and plurality in mediation practice within the formal justice system. Moving more fully in this direction would also signal that the field is ready to recognize and support the concept of mediation,

224 Supra note 13.
as research presented in chapter two illustrated, as being a plurality of practice rather than
as a monolithic process.

Throughout this paper, it has been argued that mediation has the potential to offer
many benefits for disputing parties not otherwise possible under other formal dispute
resolution mechanisms, and in particular, a legal-oriented framework. It can provide a fertile
source of satisfaction to the disputing parties, one in which the needs and the interests of the
parties determine the final outcome. In some cases, under the right conditions, it may also
provide more transformative-like effects by allowing individuals the opportunity to focus on
the enhancement and preservation of relationships. However, the way in which practitioners
and theorists seek to differentiate the effects of mediation has translated into assertions that
one approach is superior to another. The recent debates over the extent to which an
evaluative-settlement approach is being used at the expense of more transformative-relational
approaches are problematic, insofar as the debates themselves have masked the diversity and
complexity of the various approaches to mediation that currently operate in practice.

The distinction between an evaluative-settlement approach and a transformative-
relational one should not be taken as edict for accrediting organizations to choose one
approach over the other. While both approaches have their own unique strengths and
advantages, it has been argued that each is incomplete by itself. As the research in chapter
two pointed out, the problem-solving and relational-based approaches, on their own, do not
represent the entire depth or complexity of thinking on mediation that is needed to design,
evaluate and improve mediation development efforts, including efforts in the area of standard
setting, for the present and the future. The preferred method is to link both approaches in a
way that encourages the development of a pluralistic and integrated approach to mediation practice, one that transcends but does not replace the existence of these and other approaches in a legalistic, problem-solving culture. One of the ways in which to preserve and promote a transformative-relational approach to practice within commercial, court-based settings would be to build pluralistic language into the policies on standards and qualifications for mediators, reflective of both individualistic and relational ideologies. Another approach would be to build pluralistic language into training requirements or guidelines for mediation practice. Training requirements could be used as one of the ways in which to encourage and perhaps require mediators to learn about and become skilled in the application of both sets of approaches in practice. Future research could examine how mediators are being trained and whether and to what extent training requirements or guidelines are being used to inform or guide the type(s) of approaches mediators apply in practice.

The application and integration of both evaluative-settlement and transformative-relational approaches is proposed as an overarching framework for conceptualizing mediation development practice, research and theory in the hopes of encouraging future researchers, practitioners and policy makers to contribute to a better understanding of this important field of practice. Such a framework will also help to promote more transformative-relational approaches to practice in a legalistic, problem-solving culture, leading to the realization of the full potential of mediation. While the tension that exists between evaluative-settlement and transformative-relational approaches to practice may never be completely resolved to the satisfaction of some, it is hoped the foregoing recommendation will lead to a situation where the application of transformative-relational
mediation in a legalistic culture is no longer perceived as paradoxical.

5.2 Implications of Findings:

The findings outlined in this thesis suggest that the dichotomous conceptualizations of mediation should not necessarily lead us to be pessimistic about preserving transformative-relational approaches to mediation in a legalistic, problem-solving culture, since current standards programs appear to be advocating a more pluralistic-like conception of mediation through the integration of the individualistic and relational ideologies within their established set of standards. The standards offered by the three accreditation organizations do not appear to be designed in such a way that is forcing mediators to make a choice between one approach or another. By not forcing mediators into a narrow interpretation of approaches, mediators will be able to adopt an approach appropriate to the nature of the case, the parties, and the context of the dispute. Finding the existence of a relational discourse within practice standards also suggests that the goals of ADR inside the formal justice system may overlap with the goals that are espoused by community-based mediators.225 For example, the potential of mediation to encourage mutual recognition between disputants, a goal commonly promoted within community-based mediation programs, is articulated in a statement found on OMMP’s website and in the definition of mediation offered by FMC. Future research could examine whether there is any difference (or similarity) between the types of goals being endorsed by community-based mediation programs and the ones being advanced by court-mandated mediation programs in Canada.

The findings outlined in thesis also lend support to the view that approaches to mediation practice should not be considered mutually exclusive. The analysis revealed that evaluative-settlement and transformative-relational approaches do operate together in the discourse. At the same time, we know little about how these two approaches operate in practice. In this regard, policy-makers and those responsible for the accreditation programs might do well to listen to the plurality of understandings of mediation articulated by the mediation practitioners in Picard’s study and the diverse approaches to practice presented in Kolb’s study of three groups of mediators. In light of these findings, this paper advocated a pluralistic conception of mediation, one that sees more integration and blending between evaluative-settlement and transformative-relational approaches to practice. As research in chapter two revealed, these two approaches should not necessarily be seen to operate as entirely separate or bi-polar approaches, but rather as two approaches that can be blended together to provide multiple and intangible benefits for disputing parties. Mediation practitioners and consumers should not feel compelled to make a choice between one approach or another in the context of a dispute, since the decision to use one particular approach may not necessarily result in the loss or suppression of the other. It is this type of pluralistic understanding of mediation that should be reflected and endorsed in the development of practice and training standards.

Picard’s research tells us that we cannot necessarily presume to know what mediation means, since many of the labels used to describe mediation approaches in the past may no longer be indicative of actual practice. This might give us caution to infer or assume too

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226 Picard, supra note 17.
much by what is written in existing sets of standards. In this regard, policy makers and those responsible for accreditation programs should work together to classify and more clearly articulate current understandings of mediation practice. There are various ways in which this could be done. Mediators, in consultation with theorists, could observe and discuss each others' work in an open forum. Mediators could participate in peer consultation groups to discuss mediation cases, approaches and techniques. Another way would be to operate a speaker's bureau or a public education program. In one sense, such activities would be helpful for adherents of differing mediation ideologies and the recipients of mediation services to recognize and appreciate the distinct varieties of approaches that currently populate the mediation landscape. Similarly, mediation practitioners should also have the flexibility to decide which approach or combination of approaches to use once they understand the needs of the particular case and the characteristics of the disputing parties. This work could perhaps lead policy makers and those responsible for accreditation programs to become more open-minded about not only how various approaches to mediation practice can co-exist within the formal justice system, but how they can become more fully integrated to provide multiple and intangible benefits that are seen to be achieved when different approaches are blended together. Such work could be exercised and built into the design and implementation of existing and future training requirements/curriculums for mediators.

Standards that provide for the greatest flexibility, diversity of practitioner and model of practice will only serve to enhance the capacity of mediation to create multi-dimensional outcomes for disputing parties in the formal justice system and in the various contexts in which mediation is practised. In this regard, policy makers and those responsible for
accreditation programs should make a more concerted effort to develop policies on standards and qualifications that provide for the greatest flexibility and diversity of approaches to practice. For this to happen, the mediation community needs to encourage a widely based collaborative effort where practitioners, academics, user groups and government officials sit together to discuss how to best develop guidelines/standards that encourage a pluralistic and integrated approach to mediation. In the event such efforts are underway, there needs to be encouragement for this kind of work to continue.

As mediation continues to develop within the formal justice system, particularly in the context of court-mandated mediation programs, it will be increasingly important for policy makers and those responsible for accreditation programs to pay attention to research which supports the co-existence and integration of evaluative-settlement and transformative-relational approaches to mediation. The preceding review of three sets of practice standards suggests that the programs are not adhering to any one particular ideology or approach at the exclusion of the other. Individualistic and relational discourses were seen to exist, in varying degrees, in each of the three programs reviewed. In this vein, the concept of mediation being a plurality of practice rather than a single model approach needs to be communicated and made more explicit within the standards and guidelines offered by existing accreditation programs. There is room in mediation practice for many approaches. To have a diverse market that offers a wide variety of legitimate options for mediation buyers and sellers, accreditation programs must encourage rather than stifle innovative approaches to practice. In this regard, the development of standards within existing and future accreditation programs should evolve over time in response to changing conceptualizations of mediation,
the changing nature of disputes and as mediation expands into new arenas. These efforts will help to legitimate the broad range of mediation practice and practitioner.

5.3 Future Research:

As with most research endeavours, this thesis raises more questions and issues than it provides answers. The following represents some of the questions that can be examined in relation to the debates and issues raised in this thesis.

Will future accreditation programs help mitigate/resolve competing visions and ideologies of what mediation should accomplish, allowing for a broader, more pluralistic and integrated approach to mediation to exist within the formal justice system? In view of the continuing expansion of mediation into court-mandated programs, further research could also examine the possibility of other national mediation accreditation programs, such as Family Mediation Canada, becoming mandatory under a court-based arrangement. Will standards that exist for OMMP, for example, translate to FMC? Should different standards exist for court-mandated programs? If so, what form should these standards take? An examination of the types of standards or selection criteria used by other court-mandated mediation programs across Canada could provide further insight into these set of questions.227

There is a perception that government will seek to control or regulate the practice of mediation in the future. A possible question to consider is to what extent will greater government control or regulation of mediation impact the development of policies on standards that are currently promulgated by provincial or national accreditation programs

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227In addition to Ontario, Saskatchewan and Quebec offer general civil mediation programs at the superior court level. The Province of British Columbia has two smaller mediation programs involving motor vehicle and residential construction disputes. For a detailed analysis of these programs, please see Keet and Salamone, supra note 139.
affiliated with the formal justice system? Would government control over standards improve or hamper the adoption of a more pluralistic and integrated approach as compared to the current, individual program approach? Similarly, would government control increase or decrease the likelihood of a transformative-relational approach to practice being promoted within the context of court-based mediation programs? Or, in the event government delegated responsibility for the development and enforcement of standards to existing accreditation programs, through a partnering arrangement, would they place added pressures on current programs to implement changes to their standards/guidelines to increase the likelihood of settlement, thereby forcing the endorsement of a single model, evaluative-settlement approach? The same or a similar set of questions could be asked in a related scenario that would see the legal profession assuming control and regulation of policies on standards, guidelines and qualifications. Yet another scenario could see the legal profession and the state coming together to regulate or control the practice of mediation under an arrangement of shared responsibility.

A recent debate around standards of practice, qualifications and accreditation of mediators is the issue of whether users of mediation should be permitted to make judgements about the competency and quality of mediators. To what extent should users of mediation have involvement in the development of standards governing mediator selection and training? Other studies could also examine what role, if any, social, cultural and legal factors have played in the development of standards in Canada. For example, can any parallels be drawn to suggest that Canadian accreditation organizations are attempting to reflect in their standards the values of diversity embraced by Canadian society?
Accreditation programs, whether promulgated at the national, regional, local or governmental level, need to build standards that do not unduly restrict the practice of mediation, recognizing and respecting the need for flexibility and diversity in approaches. Such an understanding would help to encourage mediation practitioners to oscillate from one approach to another between cases and within a single case. Future research should be undertaken to classify differences and nuances in approaches to help mediation consumers understand and become more aware of the diversity of approaches used by various mediators, particularly those accredited by a sanctioned program, so they can make an informed choice about which approach would be most effective for their particular case.

A few limitations are associated with the research and writing of this thesis. The first limitation relates to the fact that this study relied on an examination of current Canadian mediation practice standards to determine whether a transformative-relational approach can exist in a legalistic, problem-solving culture. The limitation in this regard, as pointed out earlier, is an assumption that the approach(es) mediators’ use in practice is/are reflective of the standards set out under the accreditation program. Future research, such as sociological observation or survey methods, should be carried out to determine whether and to what degree mediators follow the standards set out for them in practice, or conversely, whether the standards accurately reflect how mediators operate in practice.

A second limitation is that the scope of this thesis was limited to the examination of one provincial and two national organizations affiliated with the formal justice system. Future research could examine whether and to what extent these findings are generalizable to a larger population/sample size. Examples of other organizations that could be examined
include: Academy of Family Mediators (U.S.), Association of Family and Conciliation Courts (U.S.), B.C. Arbitrators and Mediators Institute, British Columbia International Commercial Arbitration Centre, Mediation Development Association of British Columbia. It would similarly be interesting to determine whether these findings can be extrapolated to accreditation organizations and/or government agencies operating in the United States or Europe, for example. While this thesis reviewed current mediation practice standards to determine whether a transformative-relational approach to practice can exist in a legalistic, problem-solving culture, future research could examine what impact similar trends, such as the emergence of mediation as a profession and the increasing involvement of lawyers in the mediation process, are having on this development. An examination of how practice standards and qualifications for mediators are being developed at the regional or local level in Canada could also be undertaken. Finally, as pointed out earlier, this thesis did not examine the application of mediation within the context of community-based mediation programs. It would be interesting to examine the extent to which standards are being used to develop and guide approaches to practice in the context of community-based mediation programs or in privately-run mediation programs.

A pluralistic approach to mediation practice has been put forth as one possible approach to help realize the full potential of mediation. However, it may be unrealistic to expect or assume that all mediators will be able to easily reconceptualize their common approach to practice, moving away from a single ideology, whether it be relational or individualistic, and developing a more pluralistic conception of mediation practice. We learned in Picard’s study, for example, that veteran mediators were more pluralistic in how
they conceptualized their approach to mediation than were newcomer mediators. It remains to be seen whether this would remain the case if pluralism was accepted as a common approach within accreditation standards programs. Of course, the application of a pluralistic approach to mediation remains largely untested at the level of practice. Further research should be undertaken to determine how best to apply evaluative-settlement and transformative-relational approaches within the context of the formal justice system, making it accepted as a common approach. Any approach to apply and test out the application of these two approaches at the level of practice should take into consideration the needs of consumers. Consumers may not understand the concept or impetus behind a pluralistic approach to mediation, let alone the differences between an evaluative-settlement and transformative-relational approach to practice. Therefore, consumers need to be educated on how to select the mediation approach or approaches and the type of mediator that would best suit their needs. This education strategy should include efforts to concretely define the concept of a pluralistic approach to mediation in ways that would be clearly recognizable by participants in the mediation market. This type of approach will allow consumers to become more informed consumers and the field of mediation to be clearer on what it is offering.

5.4 Concluding Remarks:

This thesis based its findings on an examination of practice standards used by one provincial and two national organizations with attachments to the formal justice system. This examination revealed the existence of both transformative-relational and evaluative-settlement discourses within each of three set of practice standards. This finding gives us hope that a pluralistic conception of mediation practice will continue to exist and perhaps
become a larger part of the discourse as mediation continues to expand within the formal justice system. This development would also help to ensure the protection of the transformative-relational potential of mediation.

Mediation is fast becoming a mandatory and permanent fixture of the formal justice system. This system has arguably already seen the benefits mediation can offer inside a full case management system. Such benefits could be augmented if diverse and pluralistic approaches to practice were formally sanctioned not only within the confines of the formal justice system, but across the various contexts in which mediation is practised. The development of pluralistic and integrated practice standards has been suggested as one the ways in which to promote this concept in practice. The extent to which this development may happen will depend, in part, on whether policy makers responsible for the development and promulgation of standards will advocate the application of pluralistic approaches to mediation, along with a broader and fuller integration of various approaches at the level of practice. The full potential of mediation will be realized if and when this happens.
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Appendices

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Standards Programs

1. ADR Canada, *Education and Training - Professional Certification – Charted Mediator*

2. Family Mediation Canada, *Practice, Certification and Training Standards*

3. Ontario Mandatory Mediation Program, *Local Mediation Committee Guidelines for Selecting Mediators* (Queen’s Printer for Ontario)
To Whom It May Concern,

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Best regards,

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Judy Ballantyne, Executive Director, ADR Institute of Canada, Inc.

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CHARTERED MEDIATOR

INTRODUCTION

Mediation is a process of intervention in a dispute or negotiation by an impartial third party who has no decision making power. The third party assists disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute by structuring the negotiation, maintaining the channels of communication, assisting each party to articulate their needs, identifying the issues and assisting the parties in creating alternative ideas to resolve the dispute.

ADR Canada has obtained recognition under the Federal Trade Marks Act for the designations Chartered Mediator, C.Med., Médiateur Certifié, Médiateur Certifiée, Med.C. All other groups and individuals are prohibited from adopting or using any of these marks or any marks that might be mistaken for these marks without the consent of ADR Canada.

The Chartered Mediator designation has been established to recognize a "generalist competence", the goal being to assist the public in finding qualified mediators. ADR Canada recognizes that specific additional skills and competencies may be necessary for mediation in specific areas such as family and multi-party mediation. ADR Canada acknowledges that mediators need not be chartered in order to provide mediation services.

In order to ensure that a high, consistent, set of standards is met by the persons entitled to use this designation, the Board of Directors of ADR Canada has established general principles, a set of criteria and a protocol to be used in assessing the eligibility of a candidate for the designation and for the granting of the designation.

The ADR Institute of Canada is national in scope and is represented throughout Canada by its affiliated Regional Institutes who administer and regulate the designation C.Med/Med.C. in their respective regions.

GENERAL PRINCIPLES

A member of ADR Canada, who meets the standards required of a Chartered Mediator, may apply for the designation on the form prescribed by ADR Canada.

The following process is required to qualify an applicant for designation:

i. Satisfactory completion of the educational and practical experience and skills assessment requirements; and

ii. Review and approval by a Regional Institute's Accreditation Review Committee and ratification by the Regional Board of Directors; and

iii. Review and approval by ADR Canada's National Accreditation Committee and ratification by ADR Canada's Board of Directors.

Each successful applicant is required to complete a pledge to abide by ADR Canada's Code of Ethics.

The designation is awarded by ADR Canada and is subject to renewal or revocation in accordance with the rules established by ADR Canada.

http://www.amic.org/education/mediator1.html

2002-08-14
The certificate presented to a successful candidate remains at all times the property of ADR Canada.

CRITERIA

Definitions:

NATIONAL CHARTERED MEDIATOR ACCREDITATION COMMITTEE (NCMAC): is appointed by the Board of Directors of the ADR Institute of Canada, Inc. (hereinafter referred to as the "Institute") to review and approve recommendations for accreditation as a Chartered Mediator by the Regional Accreditation Committees and to review and approve mediation training and competency assessment programs to ensure national consistency. The Committee shall be comprised of no fewer than 3 Chartered Mediators.

REGIONAL CHARTERED MEDIATOR ACCREDITATION COMMITTEE (RCMAC): is appointed in each region by ADR Canada's regional affiliate and will comprise of no fewer than 3 mediators, with balanced representation from qualified practitioners, academics and researchers and at least one mediation trainer.

QUALIFYING MEDIATOR: Chartered Mediators or persons otherwise deemed qualified by the RCMAC and appointed by that body to carry out the function.

In appointing a Qualifying Mediator, the RCMAC should consider the following guidelines:

1. Has approximately 150 hours of mediation theory and skills training, received through recognized training programs, with at least 16 hours of that training taken within the last 12 months.
2. Has approximately 100 hours of mediation practice.
3. Experience as a mediation trainer, in the capacity of either trainer or assistant trainer/coach.

COMPETENCY ASSESSMENT PROGRAM: is a program designed to assess the competencies of mediation practitioners as set out in Appendix "A".

The following criteria and conditions must be met by an applicant:

I. EDUCATION

a. Completion of at least 80 hours mediation theory and skills training in mediation training programs approved by ADR Canada

AND

b. Completion of 100 hours of study or training in dispute resolution generally, the psychology of dispute resolution, negotiation, public consultation, mutual gains bargaining, communication, management consulting, conflict management, or specific substantive areas such as law, psychology, social work, counselling, etc. The specific requirements for this additional 100 hours shall be left to the discretion of each RCMAC.

OR

c. Where the RCMAC agrees by majority that the applicant has satisfied or exceeded the above through proven skills and competency, longevity in practice and recognition and recommendation by peers, the educational requirements listed above may be waived. The decision of the RCMAC must be supported by documented reasons for the
II. PRACTICAL EXPERIENCE

Conducted at least 10 mediations with the applicant having been the sole mediator or the mediation chairperson in at least 5 of those mediations. Furthermore, at least 5 of the mediations conducted must have been fee paid mediations (i.e. the mediator has been remunerated either by fee or by salary for services rendered as mediator).

III. SKILLS ASSESSMENT

Demonstrated competency in the process of mediation in the areas outlined in Appendix "A" as determined through:

1. Observation and approval by a Qualifying Mediator through one or more of the following: co-mediation, practicum, role playing, video taped mediation or other processes approved by ADR Canada.
   OR
2. Successful completion of a competency assessment program approved by ADR Canada.
   OR
3. an interview between the applicant and the RCMAC;
   OR
4. any other means of assessing an applicant's competency in the process of mediation, proposed by the applicant or the RCMAC and approved by ADR Canada.

IV. WAIVER

Notwithstanding the above, where the RCMAC determines that the applicant has satisfied or exceeded I, II, and III above through proven skills and competency, longevity in practice and recognition and recommendation by peers, the requirements listed above may be waived. The decision of the RCMAC must be supported by documented reasons for the recommendation.

V. PLEDGE

The applicant must pledge to comply by ADR Canada's Code of Ethics.

VI. MEMBERSHIP

Must be a member of good standing of the ADR Institute of Canada, Inc.

VII. LENGTH OF DESIGNATION

The "Chartered Mediator" designation must be renewed every 3 years.

   a. Completion of a Renewal Application;
      AND
   b. Renewed Pledge.

The "Chartered Mediator" designation will not be renewed where the applicant has breached the Pledge.

http://www.amic.org/education/mediator1.html

2002-08-14
PROTOCOL

1. Regional Institutes invite/accept applications from those members who believe they possess the standards required of a Chartered Mediator.
2. The Regional Institutes will establish their own procedures to evaluate applicants in accordance with the requirements established by ADR Canada.
3. The RCMAC shall recommend to the Regional Board all those applicants who have qualified as candidates.
4. The Regional Board shall consider and approve those candidates it deems qualified, and recommend them to the NCMAC with the following minimum information:
   i. Letter of recommendation from the Regional Institute;
   ii. Candidate's application (on prescribed form); and
   iii. Candidate's pledge (on prescribed form).
5. Each application supported by the recommendation of a Regional Institute shall be considered by the NCMAC. Each member of the NCMAC will consider the information submitted on a candidate, may discuss such information with other members of the Committee if necessary and shall vote on each candidate using the prescribed ballot form.
6. A candidate who receives a majority of the votes cast in favour shall be recommended to ADR Canada's Board of Directors for the designation Chartered Mediator (C.Med.).
7. All candidates recommended to ADR Canada's Board of Directors by the NCMAC shall be considered by the Board at its next regularly scheduled meeting or by mail ballot vote of the Board.

VOTING

Any person who also sits on a RCMAC or Regional Institute Board and has voted on any candidate at that level must refrain from voting on that candidate as a member of the NCMAC or ADR Canada Board.

APPENDIX "A" - COMPETENCIES IN MEDIATION

The following areas will form the basis of the skills assessment.

a. Ability to describe to the disputants the importance of confidentiality in the mediation process and how will that be maintained;

b. Ability to listen actively;

c. Ability to question the parties effectively and get the facts and perceptions out on the table;

d. Ability to deal with complex factual material;

e. Ability to analyze problems, identify and separate the issues involved, and frame these issues for resolution or decision-making;

f. Ability to use clear, neutral language in speaking and in writing;

g. Sensitivity to strong felt values of the disputants, including gender, ethnic, and culture differences;

h. Ability to treat the parties equally and fairly;

i. Commitment to honesty, dignified behaviour, respect for the parties and ability to create and maintain control of a diverse group of disputants;

j. Ability to identify and separate the mediator's personal values from issues under consideration;

http://www.amic.org/education/mediator1.html
k. Ability to understand and deal with power imbalances;
l. Ability to preserve parties' autonomy;
m. Ability to understand the negotiating process and the elements of effective negotiation;
n. Ability to earn trust and develop rapport;
o. Ability to uncover parties' needs and interests through questioning;
p. Ability to screen out non-mediable issues;
q. Ability to help parties invent creative options;
r. Ability to help the parties identify principles and criteria that will guide their decision-making;
s. Ability to help the parties assess their non settlement alternatives;
t. Ability to help the parties make their own informed choices;
u. Ability to help the parties assess whether their agreement can be implemented.

COMPETENCIES IN MEDIATION
(Prepared by the National Education Committee of the Arbitration and Mediation Institute of Canada, Nov. 30, 1999)

The listing below is not an exhaustive listing of competencies and is intended as a guideline of generally recognized desirable qualities for competent mediators practicing in a commercial environment.

Administrative Skills

General Definition:
The ability to organize and conduct the practice of mediation in an efficient and effective manner.

a. Ability to organize and maintain office systems
   - appointment system
   - correspondence system
   - engagement file system with monitoring feature
   - time log, billing and disbursements receivable system

b. Ability to work within the system/rules governing the accepting and handling of engagements
   - records details of appointment (terms, conditions and fee)
   - confirms appointment in writing (engagement letter or contract)
   - ensures all pertinent correspondence, sent and received, is provided to both parties
   - demonstrates a clear understanding of the applicable Rules and Ethics

c. Ability to allocate time, effort and other resources
   - expeditiously reviews and deals with documents and information received
   - develops an overall perspective of the engagement
   - draws up timetable for dealing with preparatory matters and conduct of the mediation

d. Ability to organize the required needs of the mediation
   - adequacy of session room to accommodate the parties and others
   - capability to provide privacy for private consultations and caucusing
   - suitability of the location in terms of minimizing external distractions or interruptions
   - capability of session accommodation facility to meet special needs of participants

e. Ability to bring the engagement to completion
   - has a good understanding of closure techniques and the settlement process

http://www.amic.org/education/mediator1.html 2002-08-14
- understands the importance of working co-operatively to draft the memorandum of understanding/settlement agreement
- submits fee billing in accordance with terms of engagement or within a reasonable time

Procedural Skills

General definition:
Ability to recognize the nature of the dispute and establish clear understandings, concerning the process, with and between the parties

a. Ability to determine legitimacy and jurisdiction
   - reviews contracts between the parties (if they exist)
   - ensures the issues in dispute are covered by the mediation clause or are suitable for mediation
   - determines that he/she possesses adequate knowledge of the business or industry encompassing the dispute
   - ensures there is no reason for parties to challenge the appointment
   - ensures that the appointment is not inconsistent with the applicable laws or institutional rules

b. Ability to establish clear understandings
   - clearly explains the role of the mediator
   - clearly defines and explains the mediation process
   - emphasizes the "mutually agreed to solution principle"
   - emphasizes the "rights of the parties to withdraw"
   - emphasizes the "confidentiality principle" and explains its limitations
   - determines that those persons, who hold the decision making power, will be at the table
   - reviews the engagement letter/agreement to mediate
   - in cooperation with the parties, estimates time that will be required for the mediation
   - formalizes the engagement in writing

c. Ability to supervise the preliminary meeting
   - supervises conduct of the meeting
   - explains the purpose and content of the meeting
   - brings the parties to agreement on procedural matters

d. Ability to deal with preliminary matters
   - holds preliminary meeting if required or requested
   - provides assistance to the parties in preparing for the mediation
   - determines if legal counsel, witnesses, experts or other parties will be involved
   - ensures all parties have a clear understanding of how the mediation session will be conducted and settlement effected
   - ensures all necessary procedural steps have been completed

Relationship Skills

General Definition:
The ability to instill and maintain a positive relationship and good communication

a. Ability to maintain a positive relationship
   - acts with courtesy, respect and patience and encourages the parties to do the same
   - separates mediator's personal values from issues of the mediation

http://www.amic.org/education/mediator1.html

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- earns trust
- builds rapport
- compliments progressive behavior
- indicates empathy for the issues
- does not pre-judge the parties on the issues
- is modest in attitude held towards others
- exhibits sensitivity to strongly held values of the disputants, including ethnic, gender and cultural differences
- devotes appropriate care and attention towards the parties

b. Ability to listen effectively
- listens to both parties in an passive and active manner
- exhibits an understanding of the importance of body language to the listening process
- intervenes selectively to obtain clarification, assist in understanding or maintain order
- exhibits patience and does not interrupt except in the most serious circumstances

c. Ability to speak effectively
- uses clear diction and collateral body language
- asks succinct questions when necessary
- is direct but not intimidating
- speaks in a clear audible voice
- uses simple language
- utilizes terminology that is common to the parties’ industry

d. Ability to maintain a conducive atmosphere during the session
- uses civil language
- permits humor which is beneficial to the process
- displays understanding of the factual material and submissions
- puts parties and witnesses/collaborating presenters at ease
- avoids distracting body movements or facial expressions
- discourages an excessively adversarial climate
- shows empathy

Facilitation Skills

General definition:
Ability to conduct the mediation session using fair, flexible and effective procedures, skills, and techniques

a. Ability to conduct a fair session
- maintains neutrality and impartiality
- understands the nature of power imbalances and how to deal with them
- treats parties' fairly and equally
- preserves parties' autonomy
- allows each party an opportunity to examine witnesses/collaborating presenters
- allows parties to make objections and respond fully to objections
- allows parties adequate time to deal with surprises
- deals expeditiously with parties' questions on procedural matters
- keeps interruptions to a minimum
- imparts and encourages courtesy and respect
- accepts criticism in a constructive manner

http://www.amic.org/education/mediator1.html

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b. Ability to promote an assertive tone
   - speaks in an assertive manner
   - encourages the parties to conduct themselves in an assertive manner
   - assists the deliberations by rephrasing accusatory or aggressive statements into an assertive form

c. Ability to deal with high emotion
   - recognizes the need for and advantage of venting
   - calls a recess to diffuse negative circumstances of high emotion
   - holds a caucus to deal with severe negative circumstances of high emotion

d. Ability to organize and analyze data
   - develops an overall perspective of the engagement
   - understands the sequence and nature of events contributing to the dispute
   - exhibits the ability to deal with complex factual material
   - organizes data into a logical library format
   - determines the most effective and efficient way to utilize the data to complement the mediation process
   - utilizes ancillary tools such as flip charts and white boards to assist understanding

e. Ability to deal with the issues
   - possesses an adequate knowledge of the business/industry related to the dispute
   - assists the parties to clarify and identify the issues
   - isolates those issues that are of no or little relevance
   - separates the parties claims and issues
   - assists the parties to establish an objective methodology to evaluate claims
   - reconstructs the issues in terms that will assist understanding
   - screens out non-mediable issues

f. Ability to surface needs and interests
   - exhibits an understanding of the importance of surfacing needs and interest and
   - conveys this importance to the parties
   - exhibits an ability to identify symptoms
   - asks probing questions directed to uncover potential needs and interests
   - asks open ended questions directed to uncover potential needs and interests
   - encourages candid responses
   - holds caucuses focused on uncovering needs and interests

g. Ability to advance the process
   - empowers the parties to own and actively participate in the process
   - separates the people from the problem
   - assists parties to maintain focus and momentum
   - assists the parties to evaluate submissions and the relevant material
   - is open and flexible to suggestions and ideas presented by the parties
   - assists the parties to generate creative options
   - assists the parties to evaluate their positions using BATNA's and Reality Checks
   - assists parties to make their own informed choices
   - utilizes appropriate tools and techniques to break impasse, achieve understanding and steer the process to settlement

h. Ability to bring closure and achieve settlement
   - recognizes the optimum moment when the parties express a desire to deal/compromise
- assists the parties to bargain a solution
- utilizes appropriate tools and techniques to achieve closure
- assists the parties to move from closure to settlement
- assists the parties to assess whether their proposed settlement terms can be implemented
- assists the parties/their advisors to draft their memorandum of understanding/settlement agreement
Family Mediation Canada (FMC)

Practice, Certification and Training Standards

November 1, 1999

Prepared by:

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The Certification Committee
Family Mediation Canada

PLEASE NOTE: THIS IS AN EVOLVING WORKING DOCUMENT
Sections 1-6: Amended by Board of Directors in October, 1998 and October 1999.
Section 7 on National Standards for Mediation Training Programs
has not been implemented and is under revision.
FAMILY MEDIATION CANADA (FMC) PRACTICE, CERTIFICATION AND TRAINING STANDARDS

FAMILY MEDIATION CANADA (FMC)

Practice Guidelines,

Family Mediator Certification Process

and

Standards for Mediation Training Programs

These practice guidelines and the certification process are the result of Family Mediation Canada's (FMC) work with provincial, territorial and international mediation associations to establish uniform national standards for family mediators that will apply across Canada. They were approved by the FMC Board of Directors and its membership at the Annual General Meeting in October 1996. Subsequently, the Board of Directors approved amendments to this document in October 1998 and October 1999. These modifications do not apply retroactively, they take effect from the date that they were passed by the Board of Directors. Applicants for certification are governed by the provisions in force on the date FMC receives the application.

1. DEFINITIONS

1. CATEGORIES OF FMC CERTIFIED FAMILY MEDIATOR
The three categories of FMC mediator are defined as follows:

a) FMC Certified Family Relations Mediator a family mediator who is a member of FMC and who also:

i) has met all FMC standards and guidelines for a family relations mediator;

ii) has agreed to adhere and does adhere to FMC ethical and practice standards;

iii) has obtained and currently holds a “FMC Certified Family Relations Mediator” designation from a Provincial/Territorial or Provincially/ Territorially-designated and FMC-approved Certifying Panel or from a FMC Certifying Panel; and

iv) has limited his or her family mediation practice to child, relationship and child support issues and excludes disputes over the entitlement, ownership, division or control of property, inheritance, businesses, corporations, trusts or debts (except
when the mediation of such disputes is incidental to child support issues or when co-mediating with a financial family mediator or a comprehensive family mediator). Mediators employed by Canadian governments who work primarily as Family Relations Mediators but who are also required, by the terms of their employment, to provide comprehensive mediation services in uncomplicated cases, may practice with this designation if the government makes available to such mediators, legal advice regarding such services.

b) **FMC Certified Financial Family Mediator** a family mediator who is a member of FMC and who also:

i) has met all FMC standards and guidelines for Financial Family mediator;

ii) has agreed to adhere and does adhere to FMC ethical and practice guidelines;

iii) has obtained and currently holds a “FMC Certified Financial Family Mediator” designation from a Provincial/Territorial or Provincial/Territorially-designated and FMC-approved Certifying Panel or from a FMC Certifying Panel; and

iv) has limited his or her family mediation practice to helping people resolve family conflicts about the entitlement, ownership, division or control of finances, property, inheritances, businesses, corporations, trusts or debts. (The financial and property mediator does not mediate conflicts about access, custody and adoption of children and does not mediate conflicts requiring mental health expertise except when co-mediating with a family relations mediator.)

c) **FMC Certified Comprehensive Family Mediator** a family mediator who is a member of FMC and who also:

i) has met all FMC standards and guidelines for a comprehensive mediator;

ii) has agreed to adhere and does adhere to FMC ethical and practice guidelines;

iii) has obtained and currently holds a “FMC Certified Comprehensive Family Mediator” designation from a Provincial/Territorial, or Province/Territorially-designated and FMC-approved Certifying Panel, or from a FMC Certifying Panel; and

iv) mediates child, relationship, financial and property issues.

2. **CAUCUS** a separate session or meeting held at the beginning of or during the mediation process, in which the mediator meets with fewer than all participants.

3. **CULTURE** the values, norms, behaviours and symbols shared by a group of people, including morals, customs and laws. Ethnicity, gender, age, socio-economic status, national
origin, religion, recency of immigration, sexual orientation, disability, and unique family norms all help to shape our cultural identities.

4. **CULTURAL TRAINING** promotes awareness and acceptance of, and respect for: cultural values, biases and differences; an understanding of the “dynamics of difference and similarity” that may exist between the mediator and the mediation participants or between the participants themselves and how this may affect the mediation process; and an ability to provide a mediation process that is sensitive to cultural differences.

5. **FAMILY MEDIATION** is a facilitative, non-adversarial conflict-resolution process in which one or more family mediators intervene in family conflict in order to help the family change its communication and negotiation styles from adversarial and confrontational to cooperative and integrative, with a view to assisting the family in the development and design of its own solutions to its own conflicts. Family mediation includes, but is not limited to disputes and conflicts about: pre-nuptial issues, the reorganization of the family after separation and divorce, the particulars of future parenting plans for children (including custody, access and guardianship issues), financial support and property matters connected to separation or divorce. Family mediators also mediate child protection matters, family business matters, and disputes within intact families about issues such as: the division of responsibility for the care of elderly parents, parental conflict with or about children, family finances, estate matters, adoption, educational matters. Indeed family mediators are well placed to mediate interpersonal issues in many other contexts. Ordinarily, family mediation is a confidential (closed) process unless all participants agree to open mediation as defined below.

6. **FAMILY MEDIATOR** - an impartial third party, who possesses expertise in non-adversarial conflict and dispute-resolution processes and techniques who assists in the management, control and resolution of inter-personal conflicts.

7. **FMC CERTIFIED FAMILY MEDIATOR** an individual who satisfies the requirements set out in section 1, categories (1.a), (1.b) or (1.c).

8. **INTERESTS** are of three broad types: substantive (such as money or time), procedural (the process design for the mediation negotiations and communications), and psychological (such as needs, desires, concerns, fears or hopes).

9. **MEDIATION TRAINER** an individual who, either alone or as a member of a group, company or association, provides mediation training to members of the public. It does not include someone who offers an occasional lecture, role play, or specialized workshop within a mediation training program under the direction or supervision of one or more mediation trainers.

10. **OPEN MEDIATION** is a process that may result in the mediator preparing a report about the mediation and/or making recommendations. Mediation processes are presumed to be confidential and closed unless all participants have agreed to open mediation and the terms thereof expressly in writing or a court has ordered open mediation.
11. **PARTICIPANTS** in mediation are the parties to the conflict or dispute, the mediator or mediators and may include others (such as experts or interested third parties with an interest in the conflict or its outcome.

12. **PRACTICUM SUPERVISOR** is an experienced family mediator who provides an organized supervision of mediation experience (outlined in 5.7 below) to a person learning how to apply the knowledge, skills and techniques of mediation.  
   *(Note: In 1999 mediators are continuing to report difficulties finding supervised practicum placements. It is anticipated that the FMC may, in the future, require that all supervisors be certified.)*

## 2. PRACTICE GUIDELINES FOR FMC FAMILY MEDIATORS

Family mediators shall work with the participants to establish and maintain a mediation process that will:

1. be client centered;

2. facilitate the participants' involvement in the mediation while taking into consideration their respective:
   
   a) abilities to negotiate;
   b) abilities to make decisions in accordance with their own individual interests;
   c) powers to influence family decision making;
   d) psychological, emotional and economic states;
   e) access to and understandings of relevant information; and
   f) access to appropriate support services such as independent legal advice;

3. ensure that the participants have adequate time fully to discuss and to attempt to resolve their disputes and conflicts;

4. ensure that families with histories of abuse or unmanageable power imbalances are assessed for appropriateness of mediation and are referred to other services if necessary;

5. ensure that culturally appropriate forms of dispute resolution may be considered and included where appropriate;

6. ensure that the interests of all persons having a personal interest in the dispute or conflict are considered;

7. ensure confidentiality of the process is maintained except when:
   
   a) the family mediator suspects that a child is in need of protection;
b) the mediator determines there is a need to inform a potential victim and the police about an imminent danger;
c) there is a mutual agreement that the information may be released, as in an open mediation;
d) the mediator may need to breach confidentiality in order to comply with a duty to disclose the whereabouts of a child in cases of abduction;

8. use language which is meaningful and appropriate to the participants' level of understanding;
9. be equitable to all people;
10. recognize the special interests of children and ensure these will be considered in parental agreements;
11. assist people to resolve family problems in a way that respects each family's interests, values, and rights to self-determination, while also respecting the interests and rights of others who may be affected;
12. be sensitive to the participants' cultural needs and understandings of fairness;
13. ensure that agreements reached in mediation reflect the range of options considered acceptable in law and in the event that the participants wish to enter an agreement falling outside that range of options, mediators shall encourage the participants to obtain independent legal advice and to reflect for a period of time before concluding the agreement; and
14. attempt to ensure that no one suffers physical or emotional abuse as a result of participating in mediation.

3. THE TASKS OF A FMC FAMILY MEDIATOR

3.1 Pre-Mediation Tasks

1. Receive and read case file and information for intake when appropriate;
2. Encourage and, in appropriate circumstances, require participants to obtain independent legal advice prior to or at the beginning of the mediation process;
3. Assess for the appropriateness of mediation and refer cases to other services unless the mediator can ensure that:
   a) there is/has been no family abuse, or that the abuse that occurred in the past will not affect mediation negatively;
3.2 Core Family Mediation Tasks

1. ESTABLISH AN EMPATHIC, EFFECTIVE WORKING RELATIONSHIP WITH THE PARTICIPANTS, and in particular:
   a) maintain impartiality and objectivity;
   b) build rapport and trust through demonstration of understanding of the participants;
   c) enhance the quality of the participants' communication with each other;
   d) set a cooperative tone;
   e) promote each participant's understanding of the conflict and enhance each participant's insight into and empathy for the views and personal situations of the other;
f) encourage and support self empowerment of the participants;

g) respect the participants' self-determination;

h) be sensitive to culture as it relates to the process;

i) manage the emotional climate (particularly feelings associated with the experience of separation and divorce for adults and children);

j) encourage the participants throughout the process;

k) refocus the participants on the needs of the children in cases where this is applicable;

l) maintain safety and terminate the mediation if anyone's safety cannot be assured;

m) create an environment of mutual exploration;

n) speak in a way the participants can understand and assist the participants to do likewise;

o) identify the participants' values;

p) facilitate and model active listening;

q) obtain and process information from the participants;

r) manage power imbalances throughout the process; and

s) use neutral interpreters when necessary.

2. FACILITATE THE PARTICIPANTS' NEGOTIATIONS AND RESOLUTIONS, in particular:

a) ensure that the participants understand and are satisfied with the structure and form of the conflict resolution process;

b) guide the participants through the mediation process;

c) assess when to make appropriate changes in the process (such as when to: bring in partisan support for participants having difficulty dealing with power or negotiation imbalances, include experts in mediation for information purposes, include children or stepparents or extended family members, employ individual or group caucuses, refer participants to other professionals or procedures for information or support) and negotiate changes in procedure with the participants;

d) facilitate the full disclosure of all information relevant to the dispute;

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e) maintain a productive present and future focus (focus on the past only when helpful to participants in their efforts to resolve the conflict);

f) when dealing with families separating or divorcing, seek information from the participants about the impact of separation and divorce in their family;

g) whenever appropriate, provide information to the participants about the impact and effect of separation and divorce on parents and children;

h) guide the participants' discussions from positions to interests;

i) help the participants develop options and evaluate their feasibility;

j) ensure the participants understand the options available to them if agreement is not reached;

k) ensure the participants measure solutions against criteria of fairness and the interests of all affected others;

l) work with the participants to enable them to implement any decision or agreement;

m) draft a concluding document that will record the results of the mediation;

n) strongly encourage participants to seek independent legal advice before concluding mediation and before signing any concluding document if legal issues are involved;

o) make referrals, when appropriate, to specialists, other services and other sources of information;

p) determine when, if and how the mediator must withdraw from mediation, acting always in accordance with the FMC Code of Professional Conduct;

q) assist the participants to create a plan (such as returning to mediation at a later date or utilizing other dispute resolution processes) to resolve issues which have not been settled in mediation; and

r) adhere to FMC's Professional Code of Conduct.

4. KNOWLEDGE, SKILLS, ABILITY AND OTHER ATTRIBUTES REQUIRED FOR PERFORMANCE OF THE ABOVE TASKS

To obtain any of the FMC Family Mediator Certifications, the applicant must be able to demonstrate:

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1. the appropriate skills and the ability (set out in sections 4.2, 4.3, 4.4, 4.5, 4.6) to perform the mediation tasks as set out in sections 2 and 3 above;

2. an understanding of the knowledge in section 4.1 below; and

3. personal qualities important to mediation (listed in 4.7).

4.1 Literature, Research, Skills and Techniques

All Family Mediators must be able to demonstrate knowledge of the literature, research, skills and techniques associated with the following:

1. negotiation, conciliation, conflict management and mediation;
2. family dynamics;
3. legal information pertaining to the issues being mediated;
4. the economic realities of separation and divorce;
5. the effects of separation and divorce on parents, children and extended families;
6. the dynamics and effects of abuse, coercion and control in families;
7. professional, academic, community and educational resources for referral or use within the mediation process;
8. the implications of gender in mediation, particularly in terms of power imbalances and family dynamics, participant negotiating styles and mediator - participant interaction;
9. public concerns regarding mediation practice;
10. other conflict resolution options;
11. ethical and moral issues in mediation;
12. multicultural issues; and
13. (if mediating child issues) the normal and abnormal growth and development patterns of children.

4.2 Communication Skills

FMC family mediators shall be able to demonstrate the abilities: to use and apply each of the following communication skills effectively, to assess the cultural relevance and appropriateness of each skill, to choose from and apply only the skills appropriate to the particular mediation and to the particular participants, to know when and how to model communications skills for mediation participants.

1. listening and responding accurately and non-judgmental to feelings, thoughts and situations;
2. speaking in terms of the interests, rather than in terms of the positions;
3. reframing negative comments in positive terms;
4. clarifying information and assumptions;
5. summarizing communications and consolidating areas of agreement;
6. questioning to elicit information, feelings, fears and perspectives;
7. confronting and challenging the participants' discrepancies, distortions or inconsistencies and bringing those to the floor for discussion;
8. displaying empathy and understanding without personal partiality or bias;
9. discerning strongly held values and acting to "set aside one's own values and judgments and not substitute them for those of the parties" (Bush, 1993);
10. acknowledging the importance and validity of a multiplicity of participant perspectives;
11. giving constructive feedback;
12. working effectively with an interpreter;
13. demonstrating and promoting sensitivity to verbal and non-verbal cues;
14. speaking clearly, simply and effectively at the communication and comprehension level of the participants; and
15. regulating the pace and the flow of the communication.

4.3 Relationship Skills

FMC Family Mediators shall be able to form, support and maintain effective relationships with the participants, more particularly family mediators shall:

1. create rapport;
2. establish trust;
3. respect the participants;
4. encourage mutual respect among all participants;
5. be objective and impartial; and
6. encourage the participants' self determination.

4.4 Content Management Skills

FMC Family Mediators shall be able to:

1. obtain, identify, organize, analyze, prioritize and evaluate information;
2. assess the issues and options and reason logically;
3. read, comprehend and use relevant written materials;
4. write clearly and concisely, using neutral language;
5. organize records and materials;
6. elicit information from other professionals (such as appraisers, actuaries, accountants, mental health professionals, child protection professionals, lawyers) in the mediation process; and
7. use and exchange information in a manner that broadens rather than limits the participants' options.
4.5 Process Skills

The following skills and techniques are required of all FMC Family Mediators:

1. assisting the clients in negotiating the process, ground rules and agenda for mediation sessions;

2. evaluating self, parties and the process;

3. ascertaining whether or not he or she is:
   a) capable to mediate the issues in dispute;
   b) the best mediator for the participants, and acting accordingly;

4. assisting the participants in exploring their interests;

5. making explicit and managing power imbalances;

6. assisting the participants in converting positions into interests;

7. knowing when and how to use caucuses;

8. knowing when and how to use co-mediation or conciliation skills;

9. assisting the participants to adhere to the agenda and/or renegotiating agenda;

10. managing high levels of conflict by knowing how and when to:
    a) allow or control emotional ventilation
    b) focus the attention of the participants on the future rather than the past
    c) focus participant attention on the problem, not on the people
    d) defuse participant tension and distress;

11. controlling the process without overriding the parties' self determination;

12. managing crises;

13. assisting the participants to alter their negotiation styles from adversarial and confrontational to integrative and cooperative;

14. helping the participants understand the best and worst alternatives to a mediated settlement;

15. assisting participants to break impasses;

16. using encouragement to guide the participants through the mediation process;
17. assisting participants in working with other professionals/experts in the mediation as required;

18. assisting participants in understanding the consequences of their plans;

19. assisting the participants with option building techniques such as:

   a) broadening the number or scope of options,
   b) building new solutions by integrating the interests of all participants,
   c) trading concessions of lesser importance for concessions of greater importance,
   d) bridging the positions and interests of the participants; and

20. knowing when and how to terminate the sessions or the mediation effectively and safely.

4.6. Ability

"The innate personal quality to manage effectively complex human interactions.” (Christopher Honeyman 1994)

"No matter how much we try to develop 'scientific' standards, it is difficult to qualify or even specify sometimes that 'je ne sais quoi' that is the 'art' of mediation, a particularly tactful intervention, a serendipitous orchestration of possible solutions or communication patterns, a cheerful outlook that keeps the parties working (or the contrary slightly ominous presence that keeps the parties working).” (Menkel-Meadow)

This is the subjective part of mediation. It is the mediator's personal presence, status, acceptance, spiritual sense, etc. It is tangible and palpable but not fully measurable. These are the building blocks of the superlative mediator, without which no amount of education and training or practice will suffice.

4.7 Personal Attributes

FMC family mediators should possess the following personal attributes or qualities:

1. a non-directive, non-judgmental nature in respecting the individuality and autonomy of others together with an ability to allow others to make their own decisions in their own ways;

2. personal warmth, an empathetic nature and a genuine liking of people;

3. an ability to be firm and assertive when needed to control the mediation process, without the need to control the outcome or the participants;
4. an ability to separate the professional from the personal while retaining professional warmth, empathy and objectivity and keeping personal feelings and experiences in abeyance;

5. self awareness, including an awareness of one's own inter-personal communication style, its effect on others, and one's own culture, values and biases;

6. flexibility, both cognitive and behavioural, a lack of rigidity, an ability to adapt readily to unexpected changes;

7. experience with the diversity of life and acceptance of differences;

8. interpersonal understanding and intelligence;

9. an ability to remain calm, level-headed and caring in the face of hostility, adversity and tension;

10. well-developed lateral thinking and problem-solving skills and the abilities to be clear, creative and imaginative;

11. clarity and an inherent ability to demystify and simplify human problems;

12. common sense;

13. intuition and perception;

14. comfort with ambivalence, the tension of uncertainty and ambiguity;

15. patience;

16. a sense of humour;

17. a willingness to learn by asking and listening;

18. sense of humility; and

19. a responsible, ethical and honest nature.

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5. TRAINING OF FMC FAMILY MEDIATORS

5.1 Pre-requisites

While no formal degree is required as a prerequisite to mediation training, a university degree or appropriate work experience is strongly recommended as are the Personal Attributes listed in section 4.7.
5.2 Explanatory Comments

1. The FMC certification process will not prevent anyone from practicing family mediation but merely will prevent family mediators who are not certified by FMC from claiming FMC certification or accreditation.

2. FMC encourages all potential family mediators who seek certification, to obtain mediation training from a FMC endorsed training programs. However, training taken elsewhere and other relevant experience, may, with FMC approval, be counted towards certification and will not preclude the mediator from applying for FMC Certification.

3. With FMC approval, applicants for certification may be able to count as related training under 5.3, 5.4 and 5.5, courses taken in professional training or taught at community colleges or universities, workshops, training institutes or conferences, if the courses or sessions specifically address the subjects listed. In granting or withholding its approval, FMC shall consider the length of time since the course or session was completed or taught. The 80 hours of conflict resolution and mediation training may be counted only if taken in a course or courses specific to mediation.

4. Students learn how to apply the theory and skills taught in basic family mediation training if they are given an opportunity to mediate under the supervision and guidance of an experienced family mediator. Consequently, subject to the exceptions in sections 5.3 (3), 5.4 (3) and 5.5 (3), a supervised practicum will be required of all beginning family mediators seeking certification.

5.3 Minimum Training for Applicants Seeking Certification as a Family Relations Mediator

1. AT LEAST 80 hours of basic conflict resolution and mediation theory education and skills training, including intercultural training; and

2. AT LEAST 100 hours of further related education and training including:

   a) AT LEAST 35 hours of training on the family dynamics of separation and divorce including:

      i) the psychological effects of family breakdown on family members;
      ii) stages of the separation and divorce process;
      iii) appropriate custody, access and visitation arrangements by age and maturity of the child;
      iv) child development issues as those relate to the specifics of family re-organization and parenting plans;

   b) AT LEAST 14 hours relating to family and child law - custody, access, guardianship, support, child protection and abduction law (Canadian and International);
c) AT LEAST 21 hours of training on abuse and control issues including instruction on power imbalances, the dynamics and effects of abuse on family members, indicators of danger in abuse cases, child protection matters associated with family abuse and violence, safety issues in mediation, the use of tools and techniques to detect and assess family abuse before and during mediation, the use and application of assessment tools to screen inappropriate family abuse cases from mediation, referral techniques, and information about sources of help for abused family members in communities;

d) AT LEAST 7 hours training on financial issues relating to separation, divorce and family reorganization;

e) AT LEAST 7 hours of training on ethical issues relating to the mediation process;

f) AT LEAST 3 hours on drafting memoranda of understanding; and

3. Completion of an approved mediation practicum in accordance with FMC standards as set out in section 5.7 below, or, for a period of two years following the implementation of this certification process, if the applicant has been a practising family mediator for at least two years, in lieu of completion of a practicum, the applicant may submit two positive peer evaluations from referees competent to assess mediation and conflict resolution work who can attest to the applicant’s mediation skills, knowledge and experience; and

4. 20 hours of continuing family mediation education each year; with at least 14 hours of conflict resolution or mediation skills training in the last three years. Other continuing family mediation education and training may include teaching and coaching, writing, reading, taking relevant courses, doing relevant volunteer work and attending relevant conferences.

5.4 Minimum Training for Applicants Seeking Certification as a Family Financial Mediator

1. AT LEAST 80 hours of basic conflict resolution and mediation theory education and skills training, including cultural training; and

2. AT LEAST 100 hours of further related education and training including:

   a) AT LEAST 14 hours of training on the family dynamics of separation and divorce including:

   i) the psychological effects of family breakdown on family members;

   ii) stages of the separation and divorce process;

   b) AT LEAST 7 hours on child support law;
c) AT LEAST 21 hours of training on abuse and control issues including instruction on power imbalances, the dynamics and effects of abuse on family members, indicators of danger in abuse cases, child protection matters associated with family abuse and violence, safety issues in mediation, the use of tools and techniques to detect and assess family abuse before and during mediation, the use and application of assessment tools to screen inappropriate family abuse cases from mediation, referral techniques, and information about sources of help for abused family members in communities;

d) AT LEAST 42 hours training on legal and financial issues relating to separation, divorce and family reorganization, including: the law with respect to the division and allocation of the family’s income and property on separation an divorce; income tax law with respect to transfers of money and property between family and former family members; a basic understanding of joint and severe liability for family debts; a basic understanding of company and partnership law; of appraisal and valuation methods and problems; of insurance, trust and inheritance law and finally, enough evidentiary and property law to enable mediators to cope with disclosure problems;

e) AT LEAST 7 hours of training on ethical issues relating to the mediation process;

f) AT LEAST 3 hours on drafting memoranda of understanding; and

3. Completion of an approved mediation practicum in accordance with FMC standards as set out in section 5.7 below, or, for a period of two years following the implementation of this certification process, if the applicant has been a practising family mediator for at least two years, in lieu of completion of a practicum, the applicant may submit two positive peer evaluations from referees competent to assess mediation and conflict resolution work who can attest to the applicant’s mediation skills, knowledge and experience; and

4. 20 hours of continuing family mediation education each year; with at least 14 hours of conflict resolution or mediation skills training in the last three years. Other continuing family mediation education and training may include teaching and coaching, writing, reading, taking relevant courses, doing relevant volunteer work and attending relevant conferences.

5.5 Minimum Training for an Applicant Seeking Certification as a Comprehensive Family Mediator

1. AT LEAST 80 hours of basic conflict resolution and mediation theory education and skills training, including cultural training; and

2. AT LEAST 150 hours of further related education and training including:
a) AT LEAST 35 hours of training on the family dynamics of separation and divorce including:

   i) the psychological effects of family breakdown on family members;
   ii) stages of the separation and divorce process;
   iii) appropriate custody, access and visitation arrangements by age and maturity of the child;
   iv) child development issues as those relate to the specifics of family reorganization and parenting plans;

b) AT LEAST 21 hours on child law - custody, access, guardianship, support, child protection and abduction law;

c) AT LEAST 21 hours of training on abuse and control issues including instruction on power imbalances (out, the dynamics and effects of abuse on family members, indicators of danger in abuse cases, child protection matters associated with family abuse and violence, safety issues in mediation, the use of tools and techniques to detect and assess family abuse before and during mediation, the use and application of assessment tools to screen inappropriate family abuse cases from mediation, referral techniques, and information about sources of help for abused family members in communities;

d) AT LEAST 42 hours training on legal and financial issues relating to separation, divorce and family reorganization, including: the law with respect to the division and allocation of the family's income and property on separation an divorce; income tax law with respect to transfers of money and property between family and former family members; a basic understanding of joint and several liability for family debts; a basic understanding of company and partnership law; of appraisal and valuation methods; of insurance, trust and inheritance law and finally, enough evidentiary and property law to enable mediators to handle disclosure problems;

e) AT LEAST 7 hours of training on ethical issues relating to the mediation process;

f) AT LEAST 3 hours on drafting memoranda of understanding; and

3. Completion of an approved mediation practicum in accordance with FMC standards as set out in section 5.7 below, or, for a period of two years following the implementation of this certification process, if the applicant has been a practising family mediator for at least two years, in lieu of completion of a practicum, the applicant may submit two positive peer evaluations from referees competent to assess mediation and conflict resolution work who can attest to the applicant’s mediation skills, knowledge and experience; and

4. 20 hours of continuing family mediation education each year; with at least 14 hours of conflict resolution or mediation skills training in the last three years. Other continuing family mediation education and training may include teaching and coaching, writing,
reading, taking relevant courses, doing relevant volunteer work and attending relevant conferences.

5.6 Family Specialties

In order to mediate in specialized areas of practice, mediators must prepare themselves by acquiring appropriate specific knowledge and skills. For instance, in areas such as adoption mediation or child protection mediation, the mediator must be familiar with the appropriate legislation, court rulings, social and psychological literature, risk factors, assessment methods and professional procedures associated with that specialty. It is the responsibility of family mediators to prepare themselves appropriately and to not engage in mediations outside of the realm of their expertise.

5.7 Supervised Practicum Standards

Subject to the exception in subsection (3) of sections 5.3, 5.4, and 5.5, applicants for Certification should seek one or more practicum placements with one or more practicum supervisors as outlined in section 1 (12). Applicants for certification will be expected to have completed a 30 hour supervised practicum to include:

1. 20 hours involvement in actual mediation sessions, or, with FMC approval, simulated mediation sessions;

2. 10 hours of consultation with the practicum supervisor; and

3. the opportunity to progress from observing experienced mediators in mediation sessions, to co-mediating with an experienced mediator, to mediating under supervision.

At the end of each practicum supervision, the student should ask the practicum supervisor to sign a form specifying the components successfully completed.

6. THE FMC FAMILY MEDIATOR CERTIFICATION PROCESS

Nothing herein prevents Provincial or Territorial Associations, or other certifying bodies from establishing their own certification processes. This document applies only to FMC family mediator certification.

FMC Board of Directors has created a national Certifying Panel composed on the certifying administrator and the certifying assessors. The Certifying Panel members shall work with the Executive Director on the day to day business to manage the finances and organization of certification. The Certifying Panel members shall report to the Certification Committee. The Certification Committee is a Committee of the Board. The members of the Certification Committee shall include the Chair of the Education and Standards Committee, the Executive Director, members of the Certifying Panel and regional representatives from provincial and
territorial affiliates of FMC. The Chair of the Certification Committee will be elected from and by the committee members. Each Provincial or Territorial Association may create its own Certifying Panel (with a Provincial/Territorial Certifying Administrator and Provincial/Territorial Certifying Assessor) or may delegate this responsibility to FMC. FMC shall encourage mediators to apply to Provincial/Territorial associations for FMC certification, wherever Provincial/Territorial certification bodies exist, but may certify (or refuse to certify) applicants at the national level (such as when an applicant perceives a personal or professional conflict with members of a Provincial/Territorial certifying body).

6.1 Responsibilities of the Provincial/Territorial and National Certifying Administrator(s)

The certification process (either Provincially/Territorially or Nationally) will be managed by a Certifying Administrator(s) who shall:

1. work with the Executive Director of FMC and the Certification Committee of FMC;
2. work with the pool of qualified certifying assessor(s);
3. receive and process applications for certification in accordance with section 6.4 (1);
4. maintain the certification records;
and
5. handle complaints and establish a decertification panel if necessary.

6.2 Suggested Qualifications of Certifying Administrator(s)

Certifying administrator(s) shall have:

1. substantial experience in the family mediation qualifications and standards movement within the last five years;
2. a working knowledge of ethical issues in mediation;
3. extensive experience in the training and substance of family mediation practice;
4. demonstrated administrative skills and abilities including a proven ability to work in an impartial manner;
5. good personnel management and organizational skills; and
6. good interpersonal communication skills.

6.3 Suggested Qualifications of Certifying Assessors(s)

Certifying assessor(s) shall have:

1. at least 100 hours of family mediation practice per year in the past five years;
2. at least 20 hours of continuing education in mediation theory and skills taken or taught within the preceding year;
FAMILY MEDIATION CANADA (FMC) PRACTICE, CERTIFICATION AND
TRAINING STANDARDS

3. current knowledge of theory and skills of mediation (i.e., through recent training, readings, conferences);
4. a clear working familiarity with the knowledge and skills necessary to demonstrate competence in the area of family mediation;
5. FMC certification as a family mediator; and
6. successfully completed a training program for FMC certifying assessors.

6.4 The Certifying Process

1. Applicants will submit an application to the Certifying Administrator including:

   a) evidence of completion of the appropriate minimum number of hours of mediation training and a FMC-approved practicum in accordance with the provisions of sections 5.3 (3), 5.4 (3), and 5.5 (3);
   b) a curriculum vitae outlining educational and professional qualifications and achievements;
   c) a written, signed consent allowing the certifying administrator to make enquiries about disciplinary proceedings and criminal code convictions involving the applicant;
   d) three letters of reference discussing personal and professional attributes on FMC-approved reference forms;
   e) evidence of professional liability insurance coverage; and
   f) an affidavit or solemn declaration verifying that: all information in the application is true, the applicant is a member in good standing of FMC and agrees to comply with the provisions contained in these Standards and in the FMC code of Professional Conduct.

2. Family Mediation Canada may refuse to certify an applicant who does not provide a consent allowing the Certifying Administrator to inquire about disciplinary or criminal matters involving the applicant. Family Mediation Canada may also refuse to certify an applicant who has been convicted of a criminal offence, or has been disciplined by a professional body on ethical grounds unless the applicant can demonstrate that the conviction or disciplinary matter is not relevant to professional and ethical issues associated with the practice of mediation;

3. If the applicant has met the application requirements, he or she shall complete the FMC performance-based assessment process (in person or by videotape). An interview (in person or by phone) with the assessor who viewed their work, may be necessary to clarify portions of the demonstration or to give feedback that the candidate did not meet the required performance level. The candidate must achieve a minimum score of at least 60% rating on the ethics and the power balancing sections and at least 60% on the overall total mark for the performance based assessment. The assessor's evaluation of the skills demonstration will be sent to the Certifying Administrator who sends a copy to the candidate. Unsuccessful candidates do not continue the certification process.

4. If the candidate has successfully demonstrated the required mediation skills, he or she shall be asked to complete a written test designed to assess his/her understanding of the...
applicable substantive knowledge set out in sections 5.3, 5.4 or 5.5. (Candidates who are unable to complete a written test because of disability or a medical condition may be offered the option of an oral substantive knowledge test). The assessor will mark the substantive knowledge test; a passing grade of at least 60% will be required on the ethics and power imbalance/domestic abuse sections of the test as well as overall.

5. The Assessors will send the reports of the skills based and substantive knowledge assessments (and a report of the interview if it was needed) to the Certifying Administrator. The Certifying Administrator will check to make sure that the candidate’s application documents are in order and that the candidate successfully has completed the assessments and all stages of the certification process. Then the Certifying Administrator will send the successful candidate’s name to the Certification Committee who recommend the certification to the Board of Directors of FMC.

6. The Board of Directors shall accept the recommendations unless there is evidence of bias in the assessment process or there is evidence that the assessment tools were not used appropriately (in accordance with standard FMC policies and procedures) in which case the Board of Directors shall have the option of having the candidate assessed by another assessor, whose assessment, if the same as the first, shall be binding on the Board. If second assessment is different from the first, the Board may rely on the second assessment.

7. The Board of Directors may refuse to certify a candidate if, at the time the name is submitted by the Certification Committee, the Board has knowledge that a candidate has not complied with the requirements for certification or has not complied with these standards. In this case, if an agreement cannot be reached with the candidate through mediation, disputes will be settled by arbitration as outlined in Paragraph 8.

PLEASE NOTE THE FOLLOWING SECTION (6.4.8) HAS BEEN APPROVED BY THE EXECUTIVE COMMITTEE IN PRINCIPLE BUT THE APPEAL PROVISIONS ARE UNDER REVIEW

8. When disputes between candidates and the Certifying Panel or between candidates and the Board cannot be resolved informally or in mediation, the following provisions shall apply. Applicants for Certification (applicants) shall be entitled to choose one experienced mediator who satisfies the criteria set out in section 1 (1) (a), (b) or (c) of this Standards document - to sit on the arbitration panel. The Board of Directors or Certifying Panel of Family Mediation Canada shall be entitled to choose a second experienced mediator who is not a member of the Board of Directors of FMC but who satisfies the same criteria to sit on the arbitration panel. Together, the two arbitration panel members shall choose a third panel member. Both the applicant and Certifying Panel or the Board of Family Mediation Canada shall be entitled to present their arguments to the arbitration panel in person or in writing. In reaching its decision, the arbitration panel shall consider and apply the provisions of this document. The proceedings of the arbitration panel shall be governed by the provisions of the Arbitration Act 1991, Statutes of Ontario, Chapter 17. After considering any arguments presented to it, the decision of the arbitration panel in support of the applicant or in support
of the Panel or Board of Directors of Family Mediation Canada, or part one and part the other, shall be binding all parties concerned.

9. Successful candidates shall be notified of certification by the President of FMC and shall be entitled to receive a certification document. FMC shall maintain a current list of names addresses and telephone numbers of FMC Certified Family Mediators. The list will be made available to the general public, subject to a fee charged by FMC to cover its costs;

10. In order to maintain and renew FMC certification, at the end of the five years, the certified family mediator shall provide evidence and sign a statutory declaration that he or she has:

a) maintained a yearly membership in FMC;
b) completed the prescribed hours of continuing family mediation education each year with at least 14 hours of conflict resolution or mediation skills training in the last three years, and
c) completed at least 30 hours of family mediations per year during the last five years;

11. Certified family mediators seeking to renew certification after five years, who have not been able to record at least 30 hours of mediation per year, for the last five years, (due to lack of available clients, for example) will have the option of completing, upon payment of the costs of the assessment, a second performance-based assessment in lieu of completing the 30 hours of practice per year;

12. Applicants who received a “needs further training or experience” outcome may re-apply after obtaining further training or experience AND after a period of six months; and

13. The performance and the substantive knowledge assessments shall be recorded in an appropriate manner and SHALL be made available to applicants, mediators or arbitrators seeking to attempt to settle disagreements under the terms of this document. Following resolution of a disagreement, the assessment records are to be returned to the Certifying Administrator.

6.5 Grandparenting

All family mediators who wish to be certified by FMC SHALL complete the certifying process.

6.6 Certification and Ethics Review

PLEASE NOTE: SUBSECTIONS 2, 4, AND 5 OF SECTION 6.6 HAVE BEEN APPROVED BY THE BOARD AND BY THE EXECUTIVE IN PRINCIPLE. HOWEVER THE STRUCTURE OF THE APPEAL PROCESS IS UNDER REVIEW
1. Any professional and or ethical complaints about a mediator certified by FMC received by a provincial or national mediation body shall be forwarded to the appropriate Certifying Administrator(s). Complaints about non certified, FMC-member, mediation practitioners are to be sent to the President of FMC.

2. If the Certifying Administrator(s) or President determines that there is validity to the complaint s/he shall give the certified family mediator or the non certified practitioner an opportunity to respond. If the Certifying Administrator(s) or President determines that there is a need for FMC to respond to the complaint in a formal manner, s/he shall convene and chair a decertifying Panel (or in the case of non certified practitioners, a Panel of enquiry [the Panel]). In the Case of certified practitioners the Panel shall be comprised of certifying assessor(s) who did not originally assess the mediator. In the case of non certified member practitioners, members of the panel, other than the President shall consist of two experienced family mediators who are not members of FMC’s Board of Directors.

3. The following activities may result in a hearing before the Panel:

   a) failing to adhere to FMC Code of Professional Conduct;
   b) failing to adhere to the provisions of this document;
   c) claiming FMC certification in the absence of certification and or practicing mediation outside the scope of certification;
   d) continuing to practice mediation as a “certified mediator” while certification is suspended, has lapsed or has been revoked; or
   e) being disciplined on ethical grounds by any professional association or being convicted of a criminal offense, unless the mediator can establish that the disciplinary action or criminal conviction is not associated with professional or ethical duties expected of mediators.

4. The Panel process shall be based upon the following guidelines:

   a) all certified and non certified family mediation practitioners shall have the right to be physically present, and/or be represented by legal counsel; submissions and arguments may be presented orally or in writing;
   b) the work of the panel shall be recorded in an appropriate manner and shall be open to participants' scrutiny;
   c) all decisions reached by the Panel shall be recorded in writing giving reasons;
   d) the Panel may:
      i) dismiss the complaint;
      ii) issue an informal warning;
      iii) suspend certification and/or membership in FMC pending satisfactory completion of conditions laid out by the panel; or
      iv) revoke certification and, or membership in FMC.

5. Participants dissatisfied with the decision reached by the Panel have the right to request that the matter go to binding arbitration. The certified or uncertified mediation practitioner shall be entitled to choose one experienced mediator who satisfies the criteria set out in section 1.
(1) (a), (b) or (c) of this report to sit on the arbitration panel. The Board of Directors of Family Mediation Canada shall be entitled to choose a second experienced mediator who satisfies the same criteria and is not a member of the Board of Directors to sit on the panel. Together, the two panel members shall choose a third panel member. Both the applicant and the Board of Directors shall be entitled to present their arguments to the arbitration panel in person or in writing. In reaching its decision, the Arbitration Panel shall apply the provisions set out in this document. In all other respects, the proceedings of the Arbitration Panel shall be governed by the provisions of the Arbitration Act 1991, Statutes of Ontario, Chapter 17. After considering any arguments presented to it, the decision of the arbitration panel in support of the mediator or in support of the Board of Directors of Family Mediation Canada, or part one and part the other, shall be binding all parties concerned.

6.5 Protocol for establishing and maintaining Certifying Administrator(s) and Certifying Assessor(s).

FMC shall:

1. assist Provinces/Territories to establish and maintain Certifying Administrators and Certifying Assessor(s), or will provide the service to Provinces/Territories who are not ready to develop their own Administrators and Assessors;

2. invite feedback on the certification process and monitor, evaluate and revise the standards and the certification process on an ongoing basis; and

3. encourage access to continuing education for certifying personnel.
Local Mediation Committee

Guidelines for Selecting Mediators

Ontario Mandatory Mediation Program

INTRODUCTION

The Mandatory Mediation Program is intended to provide an alternative dispute resolution process within the traditional civil justice system. Rule 24.1 of the Rules of Civil Procedure requires mediation in civil (non-family), case managed cases. Rule 75.1 requires mediation in estates, trusts and substitute decision cases. In order to serve litigants effectively and to ensure the credibility of the program, it is critical that mediation services performed under this program adhere to high standards of quality.

THE ROLE OF LOCAL MEDIATION COMMITTEES

Local Mediation Committees have been appointed in the City of Toronto and the Regional Municipality of Ottawa-Carleton to supervise a consistent system of mandatory referral to mediation in their respective communities. The responsibilities of the Local Mediation Committees, as stipulated under the Mandatory Mediation Rule 24.1, include:

- compiling and keeping current a list of mediators in accordance with guidelines approved by the Attorney General;
- monitoring the performance of mediators named in the list; and
- receiving and responding to complaints about mediators named in the list.

Committees will ensure that the roster of mediators meets the particular needs of the community and that there are mediators who are capable of working in both official languages.

THE PURPOSE OF THE GUIDELINES

In an attempt to assist Local Mediation Committees with their responsibilities, the Ministry has developed a set of provincial standards. The guidelines will aid Committees when assessing the qualifications of candidates who seek placement on the roster. The selection guidelines identify the following criteria for assessing individual applicants:

- experience as mediator;
- training in mediation;
- educational background;
- familiarity with the civil justice system; and
- references

The Ministry has designed a score sheet for the Local Mediation Committees to evaluate applicants (see Appendix A).
BASIC UNDERPINNINGS OF THE MANDATORY MEDIATION PROGRAM

To be considered for the roster of mediators, applicants must agree to abide by the following provisions noted under this section.

**Commitments:**

Mediators who are on the mandatory mediation roster are required to make a number of commitments as a condition of being on the roster including:

- providing mediation services at a fee stipulated by regulation under the Administration of Justice Act;
- attending an orientation session and any other training that may be required for roster mediators under the Mandatory Mediation Program;
- abiding by the Code of Conduct, Complaints Procedure and any other policies and procedures under the Mandatory Mediation Program;
- maintaining with proof, professional liability insurance with a minimum coverage of one million dollars;
- agreeing to conduct up to twelve hours of pro bono mediations per year in accordance with the Program's Access Plan;
- acting as a mentor, if requested, in accordance with the Program's mentoring policy;
- participating in program evaluations as required, including providing statistical information as may be requested; and
- paying any fees that may be required.

**Mediation Process:**

The mediation process involves the use of collaborative techniques by a mediator who is a neutral third party. The mediator informally assists disputing parties in voluntarily reaching their own mutually acceptable settlement of some or all of the issues in dispute by structuring the negotiation, maintaining the channels of communication, articulating the needs of each party, and identifying the issues. Mediators must be committed to a process that is: voluntary; private; confidential; self-determining; creative; practical and flexible.

**Mediator Skills:**

Mediators are not decision-makers or judges. Generally speaking, mediators display the following attributes: patience; acceptance of individual differences; flexibility; creativity/inventiveness; practicality; task-oriented; objectivity; focus; ability to analyse; intelligence; ability to recognize and manage power; strong verbal skills; active listening skills; ability to control the process without dominating the parties; and, confidence in the ability of the process to generate a satisfactory result.

**THE SELECTION PROCESS**

The Local Mediation Committee will have the sole discretion to determine who will be selected for the roster. Mediators wanting to be considered for the mediation roster must complete a prescribed application form. The application will then be assessed by members of the applicable Local Mediation Committee in accordance with the Ministry's selection criteria noted below.

A mediator may be appointed to the roster without an interview.

However, Local Mediation Committees may decide to interview certain candidates.

The Local Mediation Committees will notify applicants in writing if they are selected to be on the
Mandatory Mediation Program roster.

**SELECTION CRITERIA:**

The following criteria will considered by Local Mediation Committees in the selection of mediators:

1. **EXPERIENCE AS A MEDIATOR; TRAINING IN MEDIATION; and EDUCATIONAL BACKGROUND**
2. **FAMILIARITY WITH THE CIVIL JUSTICE SYSTEM**
3. **REFERENCES**

**1. EXPERIENCE AS A MEDIATOR; TRAINING IN MEDIATION; and EDUCATIONAL BACKGROUND**

**Experience as a Mediator:**

It is important that parties who retain mediators in the Mandatory Mediation Program have confidence in the skill and competence of the mediator. The "Experience as a Mediator" criterion is designed to recognize direct and indirect experience in dispute resolution and to ensure an inclusive selection process. It also recognizes as suitable candidates those individuals who have experience that is closely related to mediation and which is indicative of potential success as a mediator.

Relevant factors under the experience criterion include:

- the number of times the candidate has been retained as a mediator;
- candidate's role in mediation (i.e., sole mediator, co-mediator, observer or student with feedback from an instructor);
- involvement in the mediation community;
- complexity of the mediated disputes;
- types of cases mediated.

Consideration can be given to candidates with mediation experience in counseling, pastoral care, social work, law, work with or within agencies, boards, commissions or tribunals and workplace settings where dispute resolution or conflict management was part of their responsibility. Mediation experience can include paid and volunteer mediations.

Candidates should have conducted at least five mediations as a sole or co-mediator.

**Training in Mediation:**

This criterion is intended to identify candidates who have demonstrated a commitment to acquiring and upgrading professional skills in mediation and dispute resolution theory and techniques. Candidates will be scored on the basis of their experience in learning skills in diverse areas of dispute resolution topics.

Factors which will be considered relevant for selecting candidates to the roster include:

- the type of training program(s) taken;
- the numbers of hours of training received;
- the nature of the training – whether theoretical, practical or a combination;
- the extent to which the training covered such topics as interest-based mediation, conflict analysis, negotiation, ethics, confidentiality, role-playing, cross-cultural sensitivity and power imbalances;
- involvement in dispute resolution mentoring or training programs, including the role of the
candidate (lead, assistant etc.) and the nature and length of their involvement;
- public speaking or teaching on the issues of dispute resolution at schools, colleges, universities or in any other community forums;
- role in development of training courses and material.

Normally, candidates are to have a minimum of 40 hours of training. For individuals who may not meet this training criterion but are long-standing practitioners of mediation or trainers in mediation, the Local Mediation Committee may, in its discretion, accept those qualifications in place of the formal training requirements.

Educational Background:

This category is intended to recognize a variety of professional designations.

Relevant factors include the educational history of the candidate, the disciplines in which the candidate is trained and their connection to mediation skills.

2. FAMILIARITY WITH THE CIVIL JUSTICE SYSTEM

This criterion assesses a candidate’s knowledge of civil procedure and the role of mediation in the civil justice system.

Candidates should demonstrate an understanding of how mediation supports the civil justice system. Applicants must have appropriate familiarity with the rules of civil procedure, the litigation process, the judicial system, and case management rules. Mediators selected for the roster will participate in an orientation session and receive a manual for reference purposes.

3. REFERENCES

Candidates will be asked to provide three references who can address the candidate’s mediation skills and commitment to the values and principles of mediation.

Appendix A

CRITERIA AND SCORE SHEET

FOR

EVALUATING APPLICANTS

FOR THE MANDATORY MEDIATION ROSTER

For the purposes of appointment to the roster, mediator qualifications will be assessed on the following criteria: experience as a mediator/dispute resolver, training, educational background, familiarity with the civil justice system and references. The maximum possible score is 100 points. Candidates should score a minimum of 60 points in order to qualify for appointment to the roster and must also satisfy the qualifications below. (Some candidates may also be asked to participate in an interview).

1. EXPERIENCE AS A MEDIATOR, TRAINING IN MEDIATION & EDUCATIONAL BACKGROUND

There are a maximum of 65 points that may be scored for the criteria in this section. To qualify for the roster, a mediator must:

http://www.attorneygeneral.jus.gov.on.ca/html/MANMED/guide.htm 2002-08-14
1) have conducted at least 5 mediations as a sole or co-mediator;

2) have a minimum overall aggregate score of 40 points out of 65; and

3) have a minimum overall aggregate score of 20 points out of 45 for the combined criteria (a + c) in this section of experience as a mediator and training as a mediator.

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Number of Mediations (score for one class only):</td>
<td>up to 10 points</td>
</tr>
<tr>
<td>• 5-10</td>
<td>up to 10 points</td>
</tr>
<tr>
<td>• 11-20</td>
<td>up to 15 points</td>
</tr>
<tr>
<td>• 21+</td>
<td>up to 20 points</td>
</tr>
<tr>
<td>b. Role in mediations (score for one class only):</td>
<td>up to 5 points</td>
</tr>
<tr>
<td>• if 60% + of mediations done as observer or student with feedback from instructor</td>
<td>up to 10 points</td>
</tr>
<tr>
<td>• if 60% + of mediations done as co-mediator</td>
<td>up to 15 points</td>
</tr>
<tr>
<td>• if 60% + of mediations done as sole mediator</td>
<td>up to 15 points</td>
</tr>
<tr>
<td>c. Training in Mediation (score for one class only):</td>
<td>up to 15 points</td>
</tr>
<tr>
<td>• 40 - 50 hours of mediation training</td>
<td>up to 25 points</td>
</tr>
<tr>
<td>• 51+ hours of training</td>
<td></td>
</tr>
<tr>
<td>d. Educational Background and Related Experience:</td>
<td>up to 5 points</td>
</tr>
</tbody>
</table>

2. FAMILIARITY WITH THE CIVIL JUSTICE SYSTEM

A maximum of 30 points may be scored for this criterion, and to qualify, a candidate must score at least 20 points.

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Familiarity with civil justice system/procedures/rules</td>
<td>up to 30 points</td>
</tr>
</tbody>
</table>

3. REFERENCES

Referee's assessment of the candidate's aptitude and skill in mediating (significant involvement in the mediation community may also be considered under this criterion).
Criteria                          Score
Referees' assessment of the candidate's aptitude and skill in mediating  up to 5 points

Significant involvement in the mediation community

TOTAL POSSIBLE POINTS 100 points