

Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program

By: Dr. Julie Macfarlane

This paper was prepared for the Law Commission of Canada. The views expressed are those of the author and do not necessarily reflect the views of the Commission. The accuracy of the information contained in the paper is the sole responsibility of the author.

Ce document est également disponible en français sous le titre : Changement culturel? Les avocats-plaideurs en droit commercial et le Programme de médiation obligatoire de l'Ontario.

ACKNOWLEDGEMENTS

I am indebted to my collaborators, Professors Cynthia Chataway (York University), John Manwaring (University of Ottawa), Craig McEwen (Bowdoin College) and Jennifer Schulz (University of Windsor), for both their support and substantive input and to Research Associates Ellen Travis (York University) and Caron George, who conducted the interviews with me. I would especially like to thank Ellen Travis for her work on the development of the research instrument and her comments on this paper; and Professor Archie Zariski of Murdoch University for his comments on an earlier draft of this text. Grateful thanks also to Susan Rotondi-Yousef and Jennifer Rochleau for their work on transcribing the interviews. Finally, I would like to thank our forty interview subjects for giving so generously of their time and ideas. This research was made possible by a grant from the Law Commission of Canada and the Social Science and Humanities Research Council under their "Social Relationships" research initiative, 2000/2001.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	iii
I. Legal Practice as a Barometer of Change	1
A. Legal practice as a reflection of social institutions and disputing cultures.....	4
B. A Dominant Model Of Adversarial Lawyering	6
C. The influence of local legal culture.....	8
II. Project Methodology	10
III. A Range of Practice Paradigms: Five "Ideal Types"	12
A. The Pragmatist.....	14
B. The True Believer.....	16
C. The Instrumentalist	17
D. The Dismissal	18
E. The Oppositionist	19
IV. How lawyers use mediation	22
A. Pre-mediation practices	22
B. Goals for the mediation process.....	26
C. The relationship of mediation to end goals/outcomes sought in litigation	31
D. Client role and involvement	34
E. The uses of mediation : a summary.....	42
V. Evaluations of mediation and mediators.....	44
A. On Mediation	44
B. On Mediators	51
VI. Systemic Changes in Practice.....	57
A. File Management.....	59
B. Changes in client roles and relationships	63
C. Changes in settlement strategies and behaviours	67
D. Changes in attitudes towards the use of mediation	71
VII. Reconciling Mediation within the Culture of Commercial Litigation	74
A. At a personal level : the "ideal types" and their experiences of role dissonance.....	74
B. At a systemic level : the mutual impact of mandatory mediation and traditional commercial litigation.....	82
C. Some possible variables.....	89
VIII. Conclusions	96

I. Legal Practice as a Barometer of Change

In the Canadian civil justice system, most litigants are represented by counsel.¹ In the area of legal practice - commercial litigation - examined in this study, self-representation is virtually unknown. Litigation is essentially disputing carried out by agents.² Jacqueline Nolan-Haley describes lawyers as "...the dominant players in the adversary system"³ and few would disagree. These agents and their professional cultures exert a powerful control over the "climate of entitlement"⁴ created by civil disputing. At the same time, the lawyer's role is itself shaped by the social and economic interests served by law including changes in economic structures (for example, corporatisation, globalisation), political climate (for example, Charter litigation) and disputing cultures. While they must adapt in order to survive, lawyers also play a critical role in legitimising new ideas and practices, and mediating between these ideas and their clients. As a result, their assimilation, acceptance, rejection, integration, or other response to alternatives to established norms of litigation practice is critical to both the practical consequences and the impact of civil justice reform and innovation.⁵

¹ Although the numbers of self-represented litigants are growing as legal costs increase, these still account for only a small number of general civil litigants (especially once family cases are excluded in which the rate of pro se representation appears higher). A study of 45 United States general jurisdiction trial courts found that self-represented litigants were involved in 5% or more of tort and contract cases in just 16 of those courts. The largest proportion was 13%. See Goerdts, J. et. al., "Litigation Dimensions: Torts and Contracts in Large Urban Counties", *State Court Journal* 19 (1), 1995, 43.

² Gibson, R. & Mnookin R. "Disputing Through Agents : Co-operation and Conflict Between Lawyers in Litigation" 94 *Columbia Law Review* (1994) 509.

³ Nolan-Haley J. "Lawyers, Clients and Mediation" 73 *Notre Dame Law Review* (1998) 1369 at 1372

⁴ Miller, Richard & Sarat, Austin "Grievances, Claims and Disputes : Assessing the Adversary Culture" 15 *Law & Society Review* (1980-81) 525.

⁵ Throughout this study, the point of comparison is traditional adjudication and conventional "litigotiation" (negotiation in the shadow of the law : see Galanter M., 'Worlds of Deals : Using Legal Process to Teach Negotiation' *Journal of Legal Education* 34 *Journal of Legal Education* (1984) 268), uninterrupted by either case management or mandatory mediation. Everything else is characterised as "alternative".

The study which this paper describes focused on the ways in which the practices, strategies and attitudes of commercial litigators have been changed - if at all - by the introduction of a new rule of civil procedure in Toronto and Ottawa which requires the parties (lawyers and clients) to attend mediation within 90 days of the filing of the statement of defence in a Superior Court action.⁶ Just what Rule 24.1 - described by the Chair of the Civil Rules Committee at the time as “the largest single change in civil procedure since the institution of the Rules (of Civil Procedure) in the 1880’s”⁷ - intends to achieve, and why, is a matter of intense debate. For government, primary objectives are cost savings and a reduction in the court backlog. The potential that mandatory mediation appears to offer for early negotiated settlement can also be understood as enhancing access to justice for disputants either unwilling or unable to finance protracted litigation. Others see the introduction of Rule 24.1 as a fundamental challenge to the adversary model, with the Rule’s requirement of early settlement appraisal⁸ and direct client participation in seeking a consensual solution via negotiation.⁹ Advocates of restorative (collaborative, relationship-building, or problem-solving) models of dispute resolution regard the introduction of mandatory mediation in Ontario with a mixture of optimism and skepticism. On the one hand, this might be a unique opportunity for “culture change” in civil litigation. On the other, there is concern that the formal adoption of mediation, whether via court-connected programs such as Rule 24.1 or in increasing numbers of private commercial mediations, might lead to the tainting, or perhaps

⁶ Rule 24.1 Ontario Rules of Civil Procedure, RRO 1990, known as the Ontario Mandatory Mediation Program (hereinafter MMP). Similar procedural reforms have been introduced in other provinces - see for example The Queens Bench (Mediation) Amendment Act, c.20, SS 1994, and Mediation Rules of the Provincial Court, Civil Division for Alberta, 1997 in and in numerous US states (see the review of developments in the United States in Sander, F. “The Future of ADR” 1 Journal of Dispute Resolution (2000) 3).

⁷ Attributed to former Associate Chief Justice John Morden, Chair of the Civil Rules Committee during the debate over the formulation and introduction of Rule 24.1 (email correspondence with Leslie MacLeod, former Assistant Deputy Minister at the Ministry of the Attorney-General and a government representative on the Rules Committee).

⁸ Research shows that lawyers do not generally commence serious settlement discussions until after discoveries have been completed, or later; and that most settlement takes place on the eve of trial. See Barkai, John L. & Kassebaum, Gene, “Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation”, 16 Pepperdine Law Review (1989), 45 at 47. The experience of this lawyer may not be all that uncommon: AI was involved in one case, it was half way through a trial I think before some of the lawyers really turned their mind to what this case was about” (Ottawa-19: text unit 39).

⁹ Research shows that clients are not generally included in negotiations as direct participants. See for example, Clarke, S., Ellen, E. & McCormick, K. “Court-Ordered Civil Case Mediation in North Carolina: Court Efficiency and Litigant Satisfaction” Institute of Government, University of North Carolina 1995.

the co-option, of the transformative goals of mediation. Ten years ago, as court-connected mediation was being introduced across the United States in much the same way as it is now being introduced into Canada, one leading scholar wrote “(A)n important question that must be confronted is whether forcing ADR to adapt to a legal culture or environment may be counterproductive to the transformations proponents of ADR would like to see in our disputing practices.”¹⁰ This question has now come of age in Canada.

Many different understandings of the goals of mediation within litigation, and the objectives of Rule 24.1 in particular, are present in the legal profession itself and reflected in the results of this research. This is the first study to ask Canadian lawyers to describe in depth what they really think about mediation and the impact it has had on their litigation practices.¹¹ Their responses are incredibly rich and diverse, and this paper will be a first attempt to describe some of the major themes that emerge from this data. First, however, it is useful to sketch the major theoretical premises of this study and to relate these to previous research on the legal profession. Three aspects of this earlier work appear to be especially pertinent to the interpretation of data produced by this study: the relationship between ideologies of legal practice and changes in the social and economic environment; the dominance of an adversarial model of lawyering; and the variables produced by so-called “local legal culture”. The insights offered by this work appear to be highly relevant to the future of Rule 24.1, and its parallel initiatives elsewhere.

¹⁰ Menkel-Meadow, C. “Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or ‘The Law of ADR’” 19 Florida State University Law Review (1991) 1 at 3.

¹¹ For American studies see McAdoo, B., Welsh, N., “Does ADR Really Have A Place On The Lawyer’s Philosophical Map?” (1992) 18 Journal of Public Law & Policy 376; Zariski, A. “Disputing Culture: Lawyers and ADR” 7 Murdoch University Electronic Journal of Law (2000); McEwen, C. et al ‘Bring in the Lawyers : Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation’ 79 Minnesota Law Review (1995) 1317; Medley M. & Schellenberg, J. ‘Attitudes of Attorneys Towards Mediation’ 12 Mediation Quarterly (1994) 185.

A. Legal practice as a reflection of social institutions and disputing cultures

Heinz and Laumann describe the legal profession as an “overdetermined social system”,¹² arguing that it is uniquely shaped by the changing social institutions of the external world. Donald Landon describe the profession as “more creature than creator of events and environment”.¹³ Changes at both structural and practical levels imply that the delivery of legal services and legal professionalism is uniquely shaped by the social and economic trends of the external world. Moreover changes in law reflect changing expectations of what lawyers might do for clients. In studying the legal profession we are in effect studying the changes in social institutions, relationships and expectations that are relevant to law. Thus, adjustments and reorientations in legal practice - whether administrative, procedural, philosophical or strategic - are at least in part a response to changes in the environment and specifically, in the case of commercial litigation, changes in client demands and needs. Some of these adjustments have the potential to significantly impact the way in which litigation is conducted. The shift towards early mandatory settlement processes - epitomised in Ontario’s Rule 24.1 - is an example of the latter. Parallel developments within the profession itself include the emergence of specialist “settlement counsel”,¹⁴ the establishment of “ADR Departments” in big litigation firms; and the development of collaborative lawyering networks, where lawyers are retained by their clients exclusively to negotiate, and are barred from litigating.¹⁵

An increasing appetite for early reporting, strategic settlement planning, and early dispute resolution has been noted in relationships between commercial lawyers and their institutional clients (for example financial institutions, insurance companies and so on). Sometimes this is attributed to the increasing influence of in-house counsel who is obliged to account for and justify all litigation

¹² Heinz, J. & Laumann, E. Chicago Lawyers : The Social Structure of the Bar American Bar Foundation 1982.

¹³ Landon, D. Country Lawyers : The Impact of Context on Professional Practice Preager, New York, 1990 at 5.

¹⁴ Coyne, W. “The Case for Settlement Counsel” 14 Ohio State Journal on Dispute Resolution (1999) 367.

¹⁵ See for example Skolar, T. “Collaborative Law - A Method for the Madness?” 23 Memphis State University Law

expenditure to his or her manager.¹⁶ Another clear force for change has been the introduction in many jurisdictions of mandatory early settlement processes - whether mediation, early neutral evaluation, or settlement conferences with a judge - where the objective of early resolution reflects government interest in reducing court backlogs and saving the public costs of the justice system. In jurisdictions where ADR has become a mandatory part of the court process, the local Bar appears to accommodate these new requirements accordingly.¹⁷ Richard Abel¹⁸ notes that once new knowledge and skills are recognised as legitimate and important, the profession will buy into this as a significant means of ensuring their continued professional status - dominance even - in the field of dispute resolution.¹⁹ This might be understood as an economic investment by the profession in the future of legal practice; or perhaps an opportunity to enhance job satisfaction.²⁰ Furthermore, a broad consensus on issues seen to be of normative significance is critical to the stability of the profession's monopoly over their market.²¹ Whatever the motivation, it seems that once change has become inevitable, lawyers will embrace it. The question for this study is, if early mediation is viewed (and this is not a view shared by all) as an inevitable change in legal practice, what type of change does it represent? And what does mediation become once it is incorporated within an adversarial model of lawyering?

Review (1993) 667.

¹⁶ McEwen, C. "Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation" 14 Ohio State Journal on DR (1998) 1.

¹⁷ See for example, The Impact of Rule 114 on Civil Litigation Practice in Minnesota McAdoo, B. Minnesota Supreme Court Office of Continuing Education, 1997.

¹⁸ Abel, R. American Lawyers (1989) Oxford University Press.

¹⁹ Demonstrated in Canada and the United States by the proliferation of Continuing Legal Education courses on ADR which, albeit superficial often, have become a "must have" for legal practitioners.

²⁰ McEwen, C. et al "Lawyers, Mediation and the Management of Divorce Practice" 28 Law & Society Review (1994) 156.

²¹ Larson, M. The Rise of Professionalism : A Sociological Analysis Berkeley University Press, 1977 and see the review of marketplace theories in Lande, J. above note 11 at 157-158.

B. A Dominant Model Of Adversarial Lawyering

The dominant cultural context for lawyering practice assumes win/lose outcomes which are substantially determined by the expertise of those versed in the normative principles of law. Within a zero-sum game where the potential outcome is either winning or losing (as in a trial or via positional negotiations played out in the shadow of a trial), there is clearly only one acceptable outcome for the competent professional: winning. It is an evaluative process in which one or other view is chosen as “trumping” all others. While acknowledging that there is a strong pragmatic component to dispute resolution - in particular that many commercial conflicts simply need a “business solution” - lawyers rapidly assume and assimilate the merit-based arguments that their clients can advance, and are generally comfortable with a positional approach to bargaining and an adversarial mode, whether or not this is also “aggressive” in nature.²² The principle of “zealous advocacy” enshrined at the heart of professional codes of conduct²³ is thus understood as counsel’s zealous efforts to achieve a “win” for the client. This means that in preparing a case for trial, counsel must collect information that makes the rights-based case, and that inevitably this information (aces up the sleeve) becomes relatively less valuable if it is shared with the other side.²⁴ Information (evidence) is gathered in order to assert or defend a particular version of events; any other information that is deemed irrelevant is discarded or ignored. Presenting information as evidence means presenting it as “fact”, and requires the denial of any ambiguity, circumstances or context (unless self-serving). In a rationalist, zero-sum model, the side with the most complete and well-constructed information edifice looks best placed to carry the day. In this paradigm, information is for winning, not for sharing, and certainly not for enhancing the possible

²² See Heumann, M. & Hyman, J. “Negotiation Methods and Litigation Settlement Methods in New Jersey: You Can’t Always Get What You Want” 12 Ohio State Journal on Dispute Resolution (1997) 253 for a discussion of the relationship between the adversarial system and the tendency to positional legal negotiations.

²³ Model Rules of Professional Conduct, American Bar Association, 1983. For a classic exposition and a critique, see Simon, William H., “The Ideology of Advocacy: Procedural Justice and Professional Ethics” (1978) Wisconsin Law Review 29.

²⁴ Simon, W. The Practice of Justice Harvard University Press 1998, at 64-65; and see Macfarlane, J. “Legal Practice and Teaching Practice: What Does the Changing Culture of Legal Practice Mean for Legal Education?” in Burrige, R. (ed) Effective Teaching and Learning in Law Kogan Page UK, forthcoming 2001.

options available to the parties. This understanding of the nature and function of information is inherent to traditional notions of zealous (and understood as responsible) advocacy.²⁵

Early settlement efforts which include interests-based bargaining in mediation imply not only a different analysis of the conflict itself and its appropriate resolution, but also a reconceptualisation of the traditional role of the lawyer as zealous advocate. As Carrie Menkel-Meadow has written, “The zealous advocate who jealously guards (and does not share) information, who does not reveal adverse facts (and in some cases, adverse law) to the other side, who seeks to maximise gains for his client, may be successful in arbitrations and some forms of mini-trials and summary jury trials. However, the zealous advocate will likely prove a failure in mediation, where creativity, focus on the opposing sides’ interests and a broadening, not a narrowing of issues, may be more valued skills.”²⁶

Another key element of the adversarial lawyering philosophy is the type of lawyer/client relations that are implicated. The relationship between counsel and client in a predictive bargaining model is one of (substantive) expert/ naif and this is reflected in assumptions about decision-making, judgment and autonomy. Predictive negotiations focused on legal rules and principles “...both grow from and reinforce the professional expertise of lawyers.”²⁷ Rosenthal’s classic work on the dynamics of lawyer/client decision-making suggests two models of lawyer-client relations. These are the “traditional” in which the client is passive and the lawyer is fairly autonomous, and the “participatory” in which the client plays a more active role. Rosenthal’s analysis suggests that the passive client - who follows the lawyers’ instructions and is detached from the problem-solving process - is the conventional model, and that departures from this norm - clients who want to participate actively in anything other

²⁵ For a classic exposition and a critique, see Simon, William H., “The Ideology of Advocacy: Procedural Justice and Professional Ethics” (1978) *Wisconsin Law Review* 29.

²⁶ Menkel-Meadow, C. “Ethics in Alternative Dispute Resolution : New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities” 38 *South Texas Law Review* ((1997) 407 at 427

²⁷ McEwen, C. “Pursuing Problem-Solving or Predictive Settlement” 19 *Florida State University Law Review* (1991) 77 at 81

than established areas of client input - are seen as aberrant and even disruptive by many lawyers.²⁸ While sophisticated commercial clients, especially repeat players, may be generally less prepared to be passive and more inclined to assert their wishes, historically they appear to have chosen to nominate their legal representatives to be both managers and agents in disputing.²⁹ However there is increasing evidence - reinforced by this study - that these traditional expectations of the lawyer/client relationship are changing for these types of clients.³⁰ The introduction in Ontario of mandatory early mediation requiring the attendance - and often the direct participation - of the client is a further challenge to the traditional model of autonomous, lawyer-driven decision-making.

C. The influence of local legal culture

The third area of legal profession research that appears highly pertinent to the co-ordinates of this study is work on the impact of local legal culture on practice norms. Local legal culture is more than simply differences in formal rules or practices, but reflects a “how we do things here” perception in relation to particular rules and practices. These perceptions arise from local expectations and assumptions (for example, an expectation that one will generally be dealing with counsel that one has previously dealt with, or not; an assumption that the judge will be flexible, or inflexible on this issue; shared mores on the urgency of case disposition, etc.)³¹ Local legal culture may be important to

²⁸ Rosenthal, D. Lawyer and Client : Who's in Charge? Russell Sage Foundation, New York, 1974. See also Hosticka, C. “We Don't Care About What Happened, We Only care About What Is Going To Happen: Lawyer-Client Negotiations of Reality” 26 *Social Problems* (1979) 559 (examining relationships between legal clinic lawyers and their clients) .

²⁹ See Gilson, R. & Mnookin, R. “Disputing Through Agents : Cooperation and Conflict Between Lawyers in Litigation” 94 *Columbia Law Review* (1994) 509.

³⁰ See for example Abel, R. American Lawyers (1989) at 204 and Flood, J. “Anatomy of lawyering: An Ethnography of a Corporate Law Firm” (1987) unpublished PhD thesis, Northwestern University.

³¹ See for example Kritzer H. & Zemans F. “Local Legal Culture and the Control of Litigation” 27 *Law & Society Review* (1993) 535 (where a change in the rules of civil procedure making lawyers more accountable for frivolous actions was differentially applied across several jurisdictions); Church, T. “Examining Local Legal Culture” *American Bar Foundation Research Journal* (1985) 449 (arguing that there is most apparent local culture and agreement in relation to procedural issues such as the need for trial to dispose of an issue); and most recently Sherwoode, D. & Clarke, M. “Toward an Understanding of >Local Legal Culture” *The Justice System Journal* 2000 (arguing that local legal culture can be used to explain differences in case processing timelines and delays and backlogs between different courts).

understanding the dynamics of cultural change within the legal profession wherever there are apparent distinguishable “arenas of professionalism”, for example, the area of substantive specialism, a particular client base, the culture of the firm, and the culture of the local Bar.³²

Of particular relevance to this study are the number of characteristics which appear to distinguish practice in larger urban settings - where lawyers will occasionally, but infrequently re-encounter one another in professional settings - and practice as a member of a smaller and more cohesive Bar. Research conducted by Donald Landon in the late 1980's illustrates a number of differences that appear in smaller Bars including greater collegiality, and greater accountability (one's reputation is more affected by day-to-day repeat dealing, along with the greater potential for multiplex relationships, where lawyers will interact with each other and their clients in a variety of roles other than lawyer/client eg local Rotary club, other professional services etc). Smaller Bars may also be more accustomed to informality in their approach to procedural and administrative matters, where insiders operate on the basis of informal understandings. The difference in size in the Toronto and Ottawa Bars, where this study was conducted,³³ suggests that some of these features may be significant to understanding differences between these two groups of respondents. The concept of local legal culture may also be helpful in understanding differences in both the form and level of the legitimization of mediation in the two cities. One manifestation of the extent of change is the extent to which the leadership of the profession is prepared to be supportive of it.³⁴ In larger commercial firms, this means the elite partners of the firm itself and the type of approach they promote in relation to dispute resolution; in smaller practice communities, it may mean the leaders of the local Bar association. The

³² Nelson, R. & Trubek, D. “Arenas of Professionalism: the Professional Ideologies of Lawyers in Context” in Nelson, R. Trubek, D. & Solomon, R. Lawyers' Ideals/ Lawyers' Practices, Cornell University Press, 1992 at 177.

³³ The Toronto Bar is significantly larger than Ottawa, serving a much larger population (2.2 million in the Greater Toronto Area compared with 500,000 in Ottawa-Carleton). The size of individual forms within each city reflects these differences of scale. A “large” firm in Ottawa would be more than 30 lawyers, whereas this would be considered “mid-size” in Toronto. A “large” firm in Toronto would be closer to 200 lawyers.

³⁴ Lande, J. “Getting the Faith: Why Lawyers and Executives Believe in Mediation” 5 Harvard Negotiation Law Review (2000) 137.

prevailing attitudes of individual firms towards mediation will also constitute a significant “arena of professionalism” and hence an additional variable for this study.

II. Project Methodology

In order to screen out some potential variables, it was determined in advance that the research subjects for this study would be lawyers whose practice is wholly or primarily in commercial litigation. Commercial litigation is defined here as the representation of (primarily although not exclusively) corporate clients who are litigating over breach of contract and other contentious transactional matters. It also includes insurance practice where a lawyer works for an institutional defendant insurer. The assumption here was that lawyers representing corporate or institutional clients would have a different experience of mediation than those who generally represent individual litigants. Commercial litigation dominates civil court lists and the rapid growth of legal work on behalf of corporate clients is a significant trend across North America.³⁵ By concentrating on commercial litigators this study focuses on a rapidly expanding sector of the practising Bar whose influence is critical to the culture of civil disputing.

The sample was also limited to lawyers who had participated in a minimum of ten mediations either under the auspices of Ontario’s mandatory mediation program³⁶ or in private commercial mediations. Volunteers were sought via larger law firms and the Canadian Bar Association’s Civil Litigation and ADR Sections. The sample was then drawn with an effort to be attentive to representativeness regarding gender and length of time in practice.³⁷ The final sample comprised 40

³⁵ The Heinz, Nelson and Laumann study of Chicago lawyers, conducted in 1975 and again in 1995, showed that the corporate sector of practice (both litigation and non-contentious work) grew from 54% of respondent lawyers time in 1975 to 61% in 1995. Some preliminary results from the 1995 study are available on the American Bar Foundation webpage at www.abf-sociolegal.org.

³⁶ For background information on this program, see www.attorney-general.on.ca.

³⁷ Around 20% of the practising population in Ontario are in their first 5 years of practice; approximately 20% have practised for 6-10 years; approximately 30% for 10-20 years; and 30% for more than 20 years. See the

commercial litigators, 20 in each centre. Face-to-face interviews with each subject, lasting between 60 and 90 minutes, were conducted between September 2000 - December 2000 (in Ottawa) and September 2000 - February 2001 (in Toronto). An elicitive style was adopted, in order to discover as much as possible about the impact of mediation on these litigators' practice, strategies and attitudes. A central role for the interviewer was to encourage reflexivity, using a general facilitative approach (employing where appropriate communicative techniques such as summarising, probing, open-ended questions, focusing; identifying and clarifying context changes; encouraging storytelling; and exploring narrative linkages). The interviews were not regarded as a neutral, fact-gathering process. Instead, they were conceived of as "a project for producing meaning",³⁸ a dialogue between interviewer and respondent which actively constructs meaning from experiences of mediation, rather than adopting a closed or a semi-structured questioning format. It was further assumed that the perceptions of respondents would be critically affected by their learned behaviours and cultural patterns, which here include the internal culture of commercial litigation, the firm in which they practised, and their legal education. We were interested, therefore, both in data regarding the consequences of exposure to mediation on commercial litigation practice, and data regarding how our respondents assimilate, frame and organise their experiences (for example, what cultural variables and institutional values affect this framing? What interpretive lenses are used?). This reflects the further assumption that the contexts within which each respondent has experienced mediation will vary tremendously, as will individual experiences of mediation.

The interviews were structured around 14 prompt questions developed following considerable discussion among the research team (see Appendix A). These questions reflected a set of preliminary hypotheses about the critical role played by lawyers in shaping values and perceptions about civil

Canadian Federation of Law Societies Webpage, 1998 data for Ontario at www.lawnet.com/law.html. There is no data that establishes how many women practise as commercial litigators, but it is clear that their numbers, relative to their male colleagues, are very small. By including five women in each of the sample groups of 20, we probably erred towards the over-representation of women, but wanted to ensure that their voice was a part of the data.

³⁸ Holstein, J. & Gubrium, J. "The Active Interview" Sage Publications 1989.

disputing and the ways in which an alternative paradigm of dispute resolution might alter the assumptions, values and practices of litigation. Each interview was audio-taped in order to produce a complete transcript. Subjects were anonymised, with each tape and transcript identified only by base data (gender, year of Call, numbers of mediation experiences), a centre locator (Ottawa or Toronto) and a number (1-20).

III. A Range of Practice Paradigms: Five “Ideal Types”

A critical preliminary question for the design of this study, and to the development of a methodological approach to analysing the 1200 pages of interview transcripts produced, was whether the introduction of mandatory mediation assumed or implied any single, coherent model of dispute resolution which was in effect a substitute “paradigm”³⁹ for the traditional approach to commercial litigation. At the outset of the project, this question seemed premature. Moreover, it was evident that there were a wide range of views on the goals and objectives of mediation, as has been noted above. Whatever the strength of the various perspectives and their proponents, there appeared to be no orthodoxy or consensus about the purpose or impact of either Rule 24.1 in particular, or commercial mediation in general. In truth, policy-makers may not really care which philosophical rationale for mediation becomes dominant as long as their goal of more efficient, earlier settlement is achieved. The only common reference point might be said to be the “old paradigm”, or the traditional litigation process, although this too has variations (for example, the management of cases under the Commercial List Practice Direction in Toronto). It may be that all that can be said about a “new model” of dispute resolution in the context of Rule 24.1 is that it interjects a new procedural step, requiring disputants to attempt mediation at an early stage in the life of the litigation. What becomes most important, then, is how litigators respond and adapt to this new procedural step, and the actual uses

³⁹ Kuhn, T. The Structure of Scientific Revolution 1962, University of Chicago Press.

they make of mediation and how they understand the types of conflict resolution which may be possible using a mediation process.

Reflecting this reality, this paper will not offer a normative appraisal of what a new single model of dispute resolution “should” look like. What actually goes on inside mediation and individual experiences of mediation are highly variable and many different mediation styles are practised (for example, predictive,⁴⁰ problem-solving,⁴¹ evaluative, facilitative⁴² etc). There are many debates in the literature about what constitutes “real” mediation, and many value-based arguments about which paradigm is “better”. This study does not engage with these debates. Instead it attempts to assess the real impact of mediation on commercial litigation practice, exploring what, if any, differences mediation makes to traditional norms of adversarial lawyering, and the many ways in which commercial litigators are “making sense” of mediation within their own ideologies of practice.

The variations in practice paradigms which emerged from this study may be too complex to be simplified in the form of typologies, but the following five “ideal types”⁴³ offer one means of analysing the diversity of experiences and views represented by the forty interview respondents. It is important to note, however, that many respondents appeared to align themselves with more than one of these “attitudes” during the course of a single conversation, without clear reasons for the shift. This suggests

⁴⁰ McEwen, C. "Pursuing Problem -Solving or Predictive Settlement" above note 27.

⁴¹ Menkel-Meadow, C. "Towards a New Approach to Problem-Solving" UCLA Law Review (1984).

⁴² See for example the volume of the Journal of Dispute Resolution devoted to the facilitative/ evaluative debate. "Symposium", 2 Journal of Dispute Resolution (2000) 245-371.

⁴³ Note that Weber's original notion of "ideal types" was as an imaginary representation of the essential characteristics of a particular phenomenon, for the purposes of distinguishing between those phenomena and was therefore not intended as a sketch of an actual person or persons. It was intended to illuminate reality by separating and, in so doing, clarifying its dimensions. It is also important to realise that the word "ideal" as Weber used it referred only to the conceptual nature of the "types" and did not suggest in any way the other, now more common, sense of "ideal: as a desirable or even perfect "type" of something. This idea if used in the same sense here, and an ideal type is not therefore intended to imply an actual person or persons. Weber, M. The Protestant Ethic and the Spirit of Capitalism 1904/1930, translated by Talcott Parsons, New York.

pervasive ambiguity, which may in turn reflect the relatively new, changeable and unproblematised conceptualisations of mediation held by many commercial litigators.

A. The Pragmatist

The Pragmatist is generally positive about mediation, seeing it as a useful opportunity for exploring settlement in many, although not all, cases, and as making practical “sense” in the light of the extraordinary legal costs which are becoming the norm. The Pragmatist sees his⁴⁴ clients embracing the idea of mediation for the same reasons, and this further consolidates his practical orientation towards mediation. He has always been very pragmatic about settlement - if a matter is going to settle, which it generally will, then why not get it done as quickly as possible at minimal expense?

The Pragmatist talks about his experiences of mediation in a way that suggests that his practice has not significantly changed as a result, and that he does not understand himself as doing anything very different - now he simply applies his negotiation skills to mediation. The Pragmatist does acknowledge that mediation sometimes - but only occasionally⁴⁵ - produces significant results that come as something of a surprise, and in particular he recognises the impact of more actively including some clients at least in the negotiation itself.⁴⁶ This next lawyer acknowledged that mediation does take away some of the lawyer’s traditional control of the negotiation process, but otherwise his response to questions about “difference” suggest that he sees mediation not as so much as a *different* process as a new, earlier process. This quote also captures the essence of the Pragmatic view that mediation is a response to increasing client scrutiny about costs.

Toronto-16 : text units 95-98

⁴⁴ The “ideal types” are described here as males, not to exclude females but as a reflection of the reality of the commercial litigation Bar which is comprised significantly of men.

⁴⁵ For example, “I have to say I’ve had very, very few where there has been what you can truly call a win-win situation.....I have to say, unfortunately, that most of the mediations that I’ve been involved with have not had that win-win aspect to it”. Toronto-16: text units 348, 351.

⁴⁶ Toronto-18 : text unit 15.

“(Mediation) does take away part of the control. On some level it also provides a forum. It introduces a new element into the process that otherwise isn't there. (T)he usual process is that... the first time you have a serious discussion about settlement is either at discovery where the parties are there, the lawyers are there and all the paper is there and you've spent a lot of time and energy getting there....now more and more clients are asking for an assessment right at the top from a timing stand point, and asking you to analyse what's the best time to get a resolution of the thing and especially with in-house counsel involved. They are very conscious of the costs and they want to know up front where the thing is going.”

Nonetheless, the Pragmatist generally assumes that he will play the dominant role in the mediation process. Pragmatists prefer to engineer mediation to take place after discoveries and are often quite dismissive of mandatory mediation which takes place before prior to discoveries.

The Pragmatist does not hanker after or covet trial work, and would do this only where necessary (he may even regard this as a self-indulgence for litigators that is no longer appropriate). He would say that since early exploration of settlement is the way that legal practice is going, lawyers should get with it, and adapt accordingly. As he sees it, the clients set the agenda and here is an innovation that meshes with their interests.

Ottawa-8 : text units 280-283

“...mediation doesn't mean you have to settle...(W)e just have to remember that it's our clients who tell us what to do.”

The Pragmatist identifies real changes in client expectations, especially corporate and institutional clients, and less in the professional culture of litigators. He has a general preference for evaluative mediators, but will mix and match and acknowledges that it is occasionally useful to deploy a facilitative approach, for example where a client is particularly emotional, and/or has a weak case.

B. The True Believer

The True Believer has made a strong personal commitment to the usefulness of the mediation process which goes further than simply reorienting their practice strategies to new client expectations

and requirements. The True Believer speaks about mediation in terms that suggest that it has had a significant impact on his attitudes towards practice, clients and conflict. He may even use quasi-religious metaphors like “converted’ or “transformed” (“I got religion”;⁴⁷ “I think you’ll find that I’m a person who has now converted and I admit to being a believer in mediation”⁴⁸) to describe this process of personal and professional change. He sees mediation as having a transformative effect on relationships, outcomes and on the role of the advocacy itself which goes beyond an instrumental use of the process.⁴⁹ One True Believer described “... a completely different form of adversary process.”⁵⁰ Another in comparing mediation to traditional settlement negotiations asserted that “...(M)y role has significantly changed. All of those things are done quite differently at the mediation”.⁵¹

The True Believer identifies what he thinks are signs of systemic change in the litigation environment and is perhaps more conscious or preoccupied with these than any of the other attitude types. The True Believer even sometimes takes on the role of proselytizer; for example, “I’ve got into the practice of taking on the education of the lawyers on the other side with respect to mandatory mediation”.⁵² Because of his changed perspectives on conflict resolution and the role of counsel, the True Believer sometimes experiences a strong feeling of tension between his adversarial role and his settlement role.

C. The Instrumentalist

⁴⁷ Toronto-5: text unit 107.

⁴⁸ Toronto-20: text unit 608.

⁴⁹ Lande J. “Getting the Faith” above note 35.

⁵⁰ Toronto-5: text units 202-203.

⁵¹ Toronto-20: text units 186-190.

⁵² Ottawa-8: text unit 190.

The Instrumentalist regards mediation and mediators as a process or a tool to be “captured” and used to advance the clients’ mostly unchanged adversarial goals.⁵³ This lawyer has assimilated mediation as a procedural tool to be efficiently utilised or alternatively avoided or neutralised (by showing up but not engaging). Favourite instrumental strategies include using mediation to reduce the expectations of the other side, or as a “fishing expedition” to obtain early discovery. He does not see any particular role for a client in a mediation unless heavily orchestrated by himself. He will likely have had little experience of any style of mediation other than a predictive, evaluative approach. He will move flexibly, with little effort and no apparent discomfort between an adversarial role and a more conciliatory role, regarding the second as a “game” rather than a genuine change in orientation. Nonetheless, he is sometimes taken aback at what emerges from mediation, and in particular, acknowledges its usefulness for some clients as a cathartic process. These experiences are not, however, integrated in any way into practice norms but acknowledged in passing as a separate phenomenon.

Ottawa-11 : text units 167-168

“Mediation is the perfect opportunity for the fishing expedition, which prior to this was not available to counsel”

⁵³ This is Dean Pruitt’s notion of an “attitudinal structuring tactic” (for example a tactical apology) in which the goal of the tactic is fundamentally competitive, not co-operative. Pruitt, D. “Negotiation Behaviour” (1981) at 80.

Toronto-3: text unit 127

“You can tie everyone up and keep them further away from getting their dispute resolved through...a mediation process than anything else”

D. The Dismisser

The Dismisser regards mediation as a new “fad”, which in fact presents little different to the traditional model of negotiation towards settlement and therefore presents no special challenges to the role of counsel. Lawyers have always negotiated - at a time at which they feel that it is in the client’s best interests - and most cases have always settled (which demonstrates that lawyers must be good negotiators).

Ottawa-12 : text units 83-83

“(L)ook, we're big people and we can settle the darn thing, what do we need a third party and why do our clients have to be there?”

The only substantive and important difference that is a result of mandatory mediation is that some aspects of file preparation occur earlier, and timelines are now set and enforced by the court (which the Dismisser generally resents, seeing this as an intrusion into counsel’s autonomy and control).

Faced with this requirement, the Dismisser complies by simply “going through the motions”.⁵⁴

Client relationships are unchanged - just like before some get involved in the file and others do not - and outcomes are unchanged also, although results may consolidate more rapidly in some cases as a result of the new system. Mediation is probably most useful for providing clients with a “reality-check” when they are either not listening to their lawyers or are being poorly advised. As a result, this attitude stream has a strong preference for evaluative mediators who have judge-like authority.

⁵⁴ Toronto-6: text units 233-235. Compare John Lande’s description of the “non-believers” ...going through the motions”. Lande, J. “Getting the Faith” above note 35 at 223.

E. The Oppositionist

Whereas the Dismissers' resistance to mediation, especially mandatory mediation, is somewhat passive-negative, the Oppositionist is far more vocal on the dangers and pitfalls of a shift towards consensus-building as an alternative to adjudication. The Oppositionist sees the mediation process and the role of the lawyer within that process as a distortion of the proper identity and professional responsibility of counsel. The lawyer's central and most authentic role is to manage a war on behalf of clients. He is very comfortable in this role and experiences no role dissonance or discomfort. Conflict is inevitable, it is ugly, and the adjudicative system has been developed to recognise these realities. He does not believe that mediation is anything other than a front for government efficiencies and clearing the court backlog. At the same time, he considers the movement towards ADR - especially where it is "touchy-feely"- to threaten the integrity of counsel's advocacy role. He sees mediators as bogus, manipulative and unskilled - yet at the same time he feels that mediation is a risky place for himself and his clients, since it is a place where he is not fully in control.⁵⁵

Toronto-2: text units 354 & 375

"(I)t's easier to settle out a case than press on principle, so then you have a watered down legal system....you'll find mediation is going to be the way to go, but we'll have a watered down legal system".

Toronto-6 : text units 375 - 380

So you'll find mediation is going to be the way to go, but we have a watered down legal system. Our system was built on the adversarial process and that will die, and that's great, if that's what people want but I'm not sure that's going to be the best system in the end of day. The best system should be getting the best results through some sense of adversarial process with experienced lawyers, so at the end of the day clients can feel that they got the right result, as opposed to a manufactured result that no-one's crazy about."

These five "ideal types" are referred to throughout this paper in order to illustrate the most distinctive and distinguishable versions of counsel's approaches to mediation. They represent the self-

⁵⁵

For example, Ottawa-7: text unit 93; Toronto-7 : text units 288-290 "Mediation tends to focus people's energies and they get there and if you get into a mediation that's longer than a half a day, people get really focused on the task of settling as opposed to deciding if I really should. They just get so caught up in the process of settling that they forget the greater context of it, so people will suggest things that may be they can't prove or just throw out ideas or lies that they know they can't prove in an effort to get to the end of the settlement."

understanding of the respondents themselves, and are used to contrast some of the major differences in attitude and approach. The critical axes around which the five ideal types have been constructed include: what if any differences counsel sees between traditional lawyer-to-lawyer negotiation and mediation, and especially what impact the role of the mediator has on dispute resolution process and outcomes; how the lawyer understands the nature of his relationship with his client and the client's role in dispute resolution; his personal conception of professional role (including any role tension or dissonance experienced in mediation); the extent of attention and effort he gives to finding outcomes beyond the purely legal-adjudicative; and his preference for a particular mediator style (reflective of the understood purpose of the mediation process).

There are some assumptions built into the construction of these five ideal types which might be questioned. One is that there is a relationship of some consistency and logic between how each of these axes is handled by any one "ideal type". For example, counsel who believes that clients have a critical role to play in mediation are more likely to be searching for business outcomes beyond litigation, and so on. The ideal types do not differentiate between attitudes towards mandatory and private commercial mediation. In Toronto, counsel's opinions about mediation - including, most significantly, how much weight was attached to preparing for and participating in a mediation session - was affected by whether it was a Rule 24.1 mediation or a voluntary process. In these cases counsel would likely sound much more positive and engaged in private mediation than in early mandatory mediation. This is reflected somewhat in the differentiation between "Pragmatists" and "True Believers" - the latter are open to try mediation in almost any circumstances, whereas a Pragmatic approach would be more likely to be committed to using mediation in circumstances where counsel is in control of when and how the process occurs. Finally, the distinctions between the types themselves are naturally not watertight. Holding one attitude does not necessarily exclude holding another. Most respondents make comments which suggest at least two and maybe more of the ideal type orientations during the

course of their interview. Sometimes they do this within the same sentence. As another lawyer put it, "In mediation, one goal in my mind is to settle. Another, is to smoke the other side out".⁵⁶

This makes it all the more important to emphasise that in this use of "ideal types", few if any of the respondents in this study fell clearly and consistently into one "type" throughout their interview. Instead, there appears to be significant improvisation taking place as counsel struggle to explain and rationalise their use of mediation, and some testing out of different attitudes and viewpoints.⁵⁷ More often, one finds (as in the example below) snatches of a Pragmatic orientation, glimpses of the Instrumentalist perspective and perhaps a few lines of musing which sounds like a True Believer, all within one interview. One respondent made the following three statements- and repeated similar ideas to each of these a number of times at different points of the interview:

"...(M)ediation has changed the way I practice law, it changes the way I look at things, it offers me the opportunity to look at different perspectives in a way that wouldn't have occurred to me had I been on either one-to-one negotiations with the lawyers on the other side because usually we're walking to the same world views."⁵⁸

"The first job in the mediation is to intimidate the other side."⁵⁹

"Why would you want to spend an extra year dealing with me and my legal bills when you can have certainty today ... In my experience, most clients would rather have certainty than uncertainly."⁶⁰

IV. How lawyers use mediation

⁵⁶ Instrumentalist, True Believer or both? Toronto-8: text units 215-216.

⁵⁷ This appears to generally bear out Zariski's argument that "...professional norms favouring ADR are not yet backed up by consistent explanations of why, when and where it should be used". Zariski, A. "Disputing Culture: Lawyers and ADR" 7 Murdoch University Electronic Journal of Law (2000). See also the more extended discussion below at 7 (III).

⁵⁸ Toronto-1: text unit 150.

⁵⁹ Toronto-1: text unit 9.

⁶⁰ Toronto-1: text units 201-202.

A central question for the study was how lawyers used the opportunity (or, under Rule 24.1, the requirement) to mediate. A premise here is that mediation is not a monolithic process, but can take an infinite number of different shapes and forms depending upon the ways that the parties use it.⁶¹ In coding the interview transcripts, categories were created which reflected the uses of mediation that seemed most important to the respondents, and which thus appeared to be most significant to both their actual conduct in mediation and their understanding of how to use the mediation process. The categories developed consist of a range of lawyer strategies (or plans) and practices, and reflections on the underlying purposes of mediation.

A. Pre-mediation practices

Lawyers were asked to describe what they did to prepare for mediation. Some of their comments relate directly to the role and involvement of the client, and these are described below at (IV). The most prevalent theme was that files needed far more “front-end loading” (early research and assessment) as a result of mandatory mediation. This may mean that somewhat different standards are set for the appraisal of information. For example,

Toronto-4: text units 29-31

“It forces you to, if it's going to be meaningful...to do that whole assessing of the evidence before you even have discovery, often mediation comes up before you do the discovery. So it does change the way that you have to approach the triggers for settlement because the client hasn't really had that opportunity to see what the other side's documents look like, what the witness looks like. Although it's much harder to do it, I find, at this stage - of necessity - you have to try and assess those things early on and you often have to try and assess them more as a matter of practice.

⁶¹ This was the conclusion of the empirical study described in McEwen, C. “Managing Corporate Disputing : Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation” above note 17. The implications of this for research agendas is described in McEwen, C. “Toward a Program-Based ADR Research Agenda” 15(4) *Negotiation Journal* (1999) 325.

Interviewer Without information that you'd otherwise use?

Interviewee That's right".

There was widespread consensus on this point, which came up over and over again. Comparing mandatory mediation with cases that proceeded by the traditional route, one Toronto lawyer commented that "(I)n the non-mandatory mediation cases you just barrel ahead and ultimately you get to discovery, but there's nothing to force you to actually learn your case and have a theory about it in hand in a really informed way".⁶² The only exception were those lawyers who candidly stated that they did not put time into preparing for mediation where settlement did not appear to them to be a possibility (characteristic of the Dismissers). There are numerous implications of additional up-front work. These include billing impacts, client roles, and file management strategies, as well as the potential for systemic changes in the way lawyers think about "essential" information before commencing dialogue over settlement. These questions are explored further below in Section 6 .

There appear to be a range of practices developing regarding documentary disclosure and exchange prior to mediation. Some counsel suggest that they routinely prepare an affidavit of documents before mediation, and expect the other side to do the same. Others simply said that they would disclose whatever might prove useful at this stage, with little regard to the formalities. This will often reflect a commitment to maximising the settlement potential of mediation, as seen, for example, in the following quote:

Ottawa-8: text units 289-290

"I really do believe that mandatory mediation does create a forum for earlier disclosure, and in cases where really your pivotal documentation is really one or two facts, and where there's not a lot of money involved, and where the story is clear from the outset, I think that mandatory mediation and disclosure at that stage is a win/win for everyone."

⁶² Toronto-11: text unit 425.

The Ottawa Bar appears to have a more established culture of documentary disclosure and exchange prior to mediation than Toronto.⁶³ In Toronto, practices seem to be more variable and likely to reflect individual attitudes towards the value of mediation. A few Toronto counsel told us that they have developed their own *modus operandi* for documentary exchange before mediation (beyond what the Rule requires) as a practical effort to maximise the utility of the mediation. However, as one experienced Toronto litigator commented, “Do I feel uncomfortable giving the other side everything very early on? It depends on the circumstances. Do I want to start off by saying, here are all of my documents, let's talk settlement? Generally no.”⁶⁴ And in the same vein, “You can go into mediation as someone who wants to play their cards close to the chest and only let out the information you want to let out. That's very similar to the trial role - you don't have to let your hair down just because you're in mediation”.⁶⁵

The requirement of Rule 24.1 that cases are mediated within 90 days of the filing of the first statement of defence means that usually the date for mediation comes up before discoveries have been scheduled. Practices in relation to documentary disclosure and exchange tended to relate to counsel's views about the appropriateness of using mediation before the discovery process has either commenced or concluded. Many Toronto counsel expressed the view that mediation is a waste of time at this early stage, especially in larger and more complex commercial cases. One lawyer - who was generally very positive about mediation - made the following comment regarding the critical variables in assessing the usefulness of early mediation:

⁶³ See for example Ottawa-20: text unit 76. Serious preparation and willingness to disclosure and exchange information is often exemplified in the use of the mediation brief in Ottawa, see for example, Ottawa-11, text unit 57, Ottawa-19: text unit 158 & Ottawa-20, text units 114-116. Note that the preparation of a mediation brief (a vehicle for the exchange of information) seemed to play a more significant role in Ottawa than in Toronto - mentioned in a total of 53 text units, “mediation brief” came up 43 times in Ottawa interviews and just 10 times in Toronto interviews.

⁶⁴ Toronto 18: text units 313-314.

⁶⁵ Toronto-9: text units 453-454.

Toronto-17 : text units 60-63

“It has been my experience that negotiating or mediating early is useful but it's only meaningful if the clients have a fairly level playing field in terms of information - and if there isn't a level playing field then almost certainly there's a level of distrust, and it's been my experience that I just can't often convince a client that it's in their best interest to settle because they are convinced that there's more information out there. And I can't tell them that there isn't...”

It is possible to apply for an adjournment of the date of mediation, but a number of Toronto counsel told us that rather than go through the time and cost of seeking such an order from a Master, they would agree with the other side to meet briefly (the “20 minute mediation”, see also the discussion below) in order to satisfy the requirements of the Rule. A few added that they might try mediation later; for example,

Toronto-18: text units 85-87

“What is happening now I find, more and more often, is I attend the mandatory mediation only to have it last a very short period of time but, entering into an agreement with the other side that says look, we both understand the benefits of mediation, lets go through discoveries, lets exchange our documents and then let's agree that within one month after that we will go to mediation. I'm doing that very, very regularly.”

It appears to be much more straightforward to obtain an adjournment of mediation in Ottawa, often allowing mediation to be put off until after discoveries. Evidently many Ottawa counsel now routinely seek such an order, or alternatively agree with the other side to hold off filing a statement of defence (which triggers the timing of referral into mediation) in order to organise discoveries. This practice led one Ottawa lawyer to comment that “you're kind of back into that old put-it-off-until-it-really-needs-to-be-done”.⁶⁶ - suggesting that the entrenchment of mediation in Ottawa may now be leading the Bar back to the earlier norm of negotiation post-discovery.

⁶⁶ Ottawa-14: text unit 67.

B. Goals for the mediation process

The transcripts were analysed to discover what psychological, procedural and substantive goals the respondents articulated for the mediation session itself (as opposed to the place of mediation in a larger strategic plan for the course of the litigation, or in relation to an end goal for the dispute: see (III) below). Much of the mediation literature emphasises the usefulness of mediation as a means of actually rebuilding or repairing an existing relationship.⁶⁷ Among our respondents, actual relationship restoration came up infrequently,⁶⁸ although there was often an acknowledgment that mediation enabled business clients to have face-to-face discussions that might ultimately enable future relationships.⁶⁹ Instead, far greater emphasis was given by counsel to the emotional/ psychological dimensions of a face-to-face mediation session as a single experience. Many lawyers spoke of the usefulness of mediation as an opportunity for clients to “vent”, “table thump”, or “purge” strong feelings of anger, with several describing mediation as “a cathartic process”. At the same time, some counsel recognised the importance of the less emotionally involved party (for example, an insurer) in acknowledging these strong feelings, in terms such as, “(P)lease understand that this is where we are coming from”.⁷⁰ The same lawyer said that he advised his defendant clients that they must “relate to them (the other side) on the level that they are relating to you” and that it was critical, in his experience, “that my client speak to the insured to make them understand that they’re human and that they’re not this cold callous name on a letter continually telling them no”.⁷¹ Generally, the sentiment of the following quote was echoed by a large number of respondents:

⁶⁷ For example, Bush, R.B. & Folger, J. The Promise of Mediation Jossey-Bass 1997.

⁶⁸ Although see for example the story of relationship restoration in Toronto-16: text units 357-362.

⁶⁹ See also the discussion at Section 4(IV) below.

⁷⁰ Ottawa-13: text unit 253.

⁷¹ Ottawa-13: text unit 246. Similarly in employment disputes, another litigator emphasised the importance of the plaintiff seeing a real person in mediation and not simply imagining a “faceless corporation” (Toronto-19: text unit 111).

Ottawa-8: text units 209

“The presence of the clients in the rooms looking at each other...makes a huge difference in terms of settlement.”

Several lawyers described subsequent resolutions in mediation that they attributed to the interaction between the clients and which came as a surprise to them. For example:

Ottawa-14: text units 296-298

“(Y)ou go and you realise *this* (my italics) is what this is all about....it’s all about an apology or an acceptance of why somebody did something the way they did it...it’s astounding”.

Another process goal for mediation which was frequently cited was the usefulness of the mediation process in providing a “reality check” - either for their client, or the other side, or perhaps both parties. This was sometimes referred to as a way in which clients were persuaded to try mediation - for example, “I think a lot of employers are ... happy to have somebody talk some sense into the plaintiff”.⁷² In some cases, reality-checking was clearly related to the emotional and psychological impact of sitting across the table from the other side, and listening to what they had to say - perhaps understanding that they felt strongly about their position also, or having the practical limitations of the remedy sought (for example, the other side’s limited ability to pay an award of damages) exposed. For example,

Toronto-12: text units 440-442

“A lot of the times the negotiating is as much with your own client as with the other side, so mandatory mediation would bring the client into the process - they would have to participate in it and often times the dynamics of mediation will change how people behave once they start hearing the reality of their case from other people. You notice a difference....”

“Reality checking” was also sometimes related to a preference for evaluative mediation.⁷³ For example,

⁷² Toronto-19: text unit 120.

⁷³ See also the discussion at Section 5(II) below.

Toronto-9 : text unit 218

“Having an objective third party and especially someone with a stature of a retired judge or a competent lawyer in the industry helps a lot to make the client see reality and make the client therefore appreciate that he is being reasonable in settling”.

Some lawyers also described some secondary benefits to participating in mediation, even if full resolution did not result. These included obtaining further and better information about the other side’s motivations and interests; sizing up the other side; watching one’s one client “perform” and possibly reveal new information that had not come up in previous discussions; process planning; and perhaps narrowing the issues for the next negotiation. One Toronto lawyer who regularly represents employers said that he considers mediation to be worthwhile in almost all cases, whether or not settlement results:

Toronto-19 : text unit 274

“But short of that (settlement), if they've learned some new information that they're now going to be able to use, if they've managed to narrow the process, or if they've managed to agree on other aspects of the process, then those are all possible outcomes that are worthwhile.”

For those adopting a Pragmatic approach, these secondary purposes appear as the “consolation prize’ following genuine but unsuccessful efforts to settle. In other cases counsel appears to be motivated less by a desire to settle and more by a desire to use the mediation process to gain an advantage (the Instrumentalist). Another set of process goals relate to the instrumental - some would say manipulative - use of the mediation process, where settlement is clearly neither the primary, nor the anticipated, objective. There is ample evidence that lawyers are using the mediation process in a variety of strategically instrumental ways. Unsurprisingly, this seems to be most prevalent where the mediation is required under Rule 24.1, and a strict timetable imposed. Most prevalent of these was the use of the mediation process to “smoke the other side out”,⁷⁴ or “gain leverage for later on”,⁷⁵ where there was little or no intention to settle in mediation. For example,

⁷⁴ Toronto-8: text unit 215.

⁷⁵ Toronto-8: text unit 88.

Ottawa-11: text units 167-168

“(T)his (mediation) is a perfect opportunity for the fishing expedition, which prior to this was not available to counsel.”

Another lawyer mentioned that a further advantage (presumably for his own side’s declarations and responses) was that statements made in mediation were not sworn under oath.⁷⁶

A second tactic referred to was the use of mediation to delay or stall proceedings. This might mean suggesting mediation (where mediation falls outside the Rule), and then adopting delaying tactics towards disclosure of documents in advance of mediation. It may also mean using knowledge of the “jargon” to imply that mediation is being taken seriously as a settlement opportunity, when really it is not. For example,

Toronto-3: text units 121-127

“The worst, negative aspect of it is, if ...I act for the Big Bad Wolf against Little Red Riding Hood and I don't want this dispute resolved, I want to tie it up as long as I possibly can, and mandatory mediation is custom made. I can waste more time, I can string it along, I can make sure this thing never gets resolved because as you've already figured out, I know the language. I know how to make it look like I'm heading in that direction. I make it look like I can make all the right noises in the world, like this is the most wonderful thing to be involved in when I have no intention of ever resolving this. I have the intention of making this the most expensive, longest process but is it going to feel good. It's going to feel so nice, we're going to be here and we're going to talk the talk but we're not going to walk the walk. You can tie anybody up and keep them farther away from getting their dispute resolved through mandatory mediation process or a mediation process than anything else.”

Another tactic used to disguise intent was to “...present what appears to be the most superficially important issues, sometimes they’re the real issues but often they’re not”.⁷⁷ Yet another way described to us of knowingly using the process to counsel’s advantage is to “capture” the mediator, and to use him or her to “educate” the other side on the weakness of their case.⁷⁸ All these instrumental uses of

⁷⁶ Toronto-7: text unit 297.

⁷⁷ Toronto-2: text unit 63.

⁷⁸ For example, Ottawa-13 : text units 649-659, Toronto-7: text unit 261.

the mediation were referred to frequently by Toronto litigators, but significantly less often by those in the Ottawa sample. Ottawa lawyers tended to generally disparage the use made of mediation by Toronto counsel.⁷⁹

Many lawyers in Toronto - where during the research period cases were selected randomly for mandatory mediation and case management on a one in four basis - also told us about what we have dubbed their "filing games". These are strategies to avoid being selected for mandatory mediation, or once selected, to withdraw the case and refile in the hope of escaping selection a second time. These "games" include: having clerks take multiple files to the court counter in order to ensure which is assigned to mediation, and which is not; filing outside the jurisdiction (for example in Milton or Newmarket) so that Rule 24.1 does not apply; amending pleadings after selection for case management in order that the matter is refiled under a new case file number; and the defendant agreeing with the other side not to file a defence so that selection is not triggered. These filing games (other than going outside the jurisdiction, which was not mentioned by any Ottawa counsel) are not possible in Ottawa, where 100% of files are case managed and sent to mandatory mediation. One further tactic talked about by Toronto lawyers to deal with reluctance to go to mandatory mediation was also mentioned in Ottawa - the so-called "20 minute mediation", where counsel agree to show up (and thus satisfy their obligation under the Rule), but with no preparation and only to leave again after 20 minutes (or so).⁸⁰

In summary, the most frequently identified process goal for mediation was the potential psychological and emotional benefit of direct discussion between the disputants. Related to this was a regular reference to the usefulness of mediation for reality-checking, whether this was by listening to the mediator, counsel for the other side or hearing from the other disputant. Just as prevalent,

⁷⁹ See for example Ottawa-4: text units 119-124, Ottawa-5: text units 147-151.

⁸⁰ See for example Ottawa-1: text units 233-239, Toronto -8: text unit 129, Toronto-17: text unit 64.

however, were comments that reflect the instrumental use (as means to another end) of the mediation process, rather than the achievement of any discrete settlement goals within mediation.

C. The relationship of mediation to end goals/outcomes sought in litigation

A set of possible outcome goals - reflecting the various ways that counsel understand the role of the mediation process as a part of a larger litigation strategy - also emerged from the data. The instrumental goals described above at (I) might also be understood in this light, but these generally relate to mediation as a single event, rather than as part of a long-term plan. In this section, the focus is on the long-term goals that emerge from counsels' comments about the use of mediation as part of an overall strategic approach.

The most consistently articulated outcome goal was the achievement of a business solution that would offer a commercially viable end to the dispute, without the accumulation of excessive legal fees. In theory, these types of outcomes are possible in any negotiated settlement; as one counsel put it, "(S)ettlement allows you to divide the baby into eight parts and to do all kinds of wonderful things".⁸¹

The types of business outcomes that were specifically mentioned as the result of mediation included : the continuation of a commercial relationship; a new commercial relationship such as trade partners or joint venturing; the completion of a (disputed) sale and purchase agreement; access on preferred terms to a new supplier; agreement to a forbearance period; consent to judgment for a lesser sum; agreement to vacate to avoid eviction proceedings; settlements structured to maximise tax advantages for the parties. One lawyer described a case which settled because she was able to discover exactly what the plaintiff wanted to do with the money she was claiming (purchase a laundromat), and having researched the costs of landromats in the area was able to present an acceptable offer.⁸² While some respondents said that they did not see these types of creative outcomes arise regularly in mediation,

⁸¹ Toronto-17: text unit 129.

most acknowledged that they did occur from time to time, and many had illustrative stories on this point. A number commented that these types of creative outcomes sometimes took them by surprise, especially when they were new to mediation. One said that every mediation “offers an element of surprise to me.”⁸³ One bemused lawyer made reference to “...these often bizarre situations where the parties walk away and carry on in business.”⁸⁴

Many counsel recognised that these types of solutions required that their commercial clients participate directly in mediation. One said “The clients take much more of an active role because they understand their business better than I do. I understand it the least.”⁸⁵ Some reflected on the reasons why commercial parties favoured these types of “quick and dirty” solutions to a trial outcome, emphasising in particular the obvious desire to avoid legal costs but also the need for finality; the loss of profitable time that litigation represents for senior business executives; and also some impatience on the part of business people for the convoluted ways of the law. Deals between business people often seemed to be much simpler and straightforward than anything the litigation lawyer could offer.

Ottawa-1: text units 148-149

“I mean, you have to have like a 27 page settlement with all the ye'old and releases and stuff, with all that language that you know no one understands, because you're afraid that the guy is going to try to pull a fast one because they're not happy, they've been forced to sign a deal. Whereas business people who do it voluntarily can do it in four paragraphs in that agreement.”

While the greatest emphasis was placed on the generation of workable business solutions - unsurprising given that the sample group is comprised of commercial litigators with primarily corporate or institutional clients - other types of outcome or end goals described by respondents included: the preservation of goodwill; restoring credibility in the eyes of clients (especially important for insurers and financial institutions); ending a “nuisance” matter; and avoiding future appeals. A number mentioned

⁸² Toronto-20: text units 130-133.

⁸³ Toronto-17: text unit 136.

⁸⁴ Ottawa-6: text units 140-141.

the importance that an apology, an expression of regret, or some form of affirmation or reaffirmation made both to the process of settlement and the outcome that then was possible. As one put it,

Toronto-4: text units 131-132

“There are a lot of things you can do within the context of a consensual mediation that a court can’t. Things that relate to business issues between the parties - and sometimes silly things, that one party wants the other party to say or write or do, that just wouldn’t play any role in a trial outcome.”

In addition, several talked about the fact that mediation provided a means to bring about rapid and efficient closure for the parties.

Ottawa-4: text units 179-18

“Both of them can end it that day. No letters going back and forth, that you receive five days after you sent something to some other lawyer, then the other lawyer goes to somebody else and gets back two weeks after... On that day, this whole thing can be over with. That day you don't have to talk to your lawyer anymore if you're the client. That day you can easily walk out of there with this problem over.”

In summary, the data provides strong evidence that outcomes beyond litigation, especially those that reflect business realities, are being achieved via mediation. What is less clear is how much more creativity and flexibility is uniquely encouraged or enhanced by mediation, compared with traditional lawyer-to-lawyer negotiations. One possibly significant observation that can be made is that many of the comments that related to business outcomes also referred to the role of clients in developing these solutions. As a matter of practice, clients are far more likely to be directly involved in mediation, than in settlement negotiations in a traditional adversarial model.⁸⁶ The data suggests that clients are the source of many of the ideas and solutions that come out of mediation, and that mediation is in effect the facilitation of negotiation between business clients. Second, almost all counsel interviewed saw the presence of an *effective* third party as making a positive difference to the

⁸⁵ Ottawa-7: text unit 102-103.

⁸⁶ See the discussion at (IV) below.

settlement process, if not to its actual outcomes. These comments are described below at Section Five.

D. Client role and involvement

Many lawyers commented on the increased and different role of clients in mediation, where it seems that legal expertise may sometimes move into the background and business knowledge into the foreground of framing a solution. However, lawyers are extremely diverse in the roles they see for their clients in mediation. Many made the point that the nature and extent of client involvement in any file would reflect individual circumstances (for example, is this client a repeat player? A manager on a tight budget? A personal litigant, or a businessperson or corporate representative? Is the file complex or relatively simply? and so on). Beyond these circumstantial variables, we wanted to discover more about the ways in which our respondents understood and made sense of their shared responsibilities with their clients, including the larger question of “ownership” of the dispute, within the context of mediation. In order to get to these issues, respondents were asked to describe in some detail the ways in which they worked with clients in preparation for, and during mediation, and to explain their perception of the impact of this role on both the dynamics of mediation and settlement, and the professional relationship between lawyer and client.

There was a frequent acknowledgment that mandatory mediation, because it usually came before discoveries, changed the relative positions of lawyer and client, with counsel obliged to rely more on what their clients could tell them - both what might be relevant to a legal appraisal and relevant business information - than they might at a later investigative stage. For example:

Ottawa-6: text units 77-81

“Mediations in pre-discovery the clients have more involvement. They are going to because they know the facts. If it's an accounting fight, if whatever the case, we have to rely upon them more. I may not have all of the facts even though I can do a fairly detailed interview, get all of the documents.”

And in making a legal appraisal,

Toronto-4: text units 47-48

“(T)he client has to be more involved because you have to rely on the client more to determine what their expectations should be. Whereas you can tell them after the other stages what you think they should be expecting, when it's really just at the pleadings stage you have to rely on them for what a reasonable attitude should be.

Interviewer Does this change the balance of the relationship?

Interviewee It does, and it changes the dynamic, I think, in the sense that it is a reliance thing and I sort of feel like I have to rely or rather trust the client's instinct. But they're engaged more in the process because of that. They have to be the ones driving the numbers and the negotiation because I really have very little to say at that point, other than what I have put in the pleadings.”

Aside from the practical dimensions of relying on clients at this early stage, a number of lawyers pointed to the constructiveness of having clients - especially commercial clients - involved in negotiating early resolution. This reasoning related to the generation of business solutions in some cases, for example:

Ottawa-1: text units 80-87

“With mandatory mediation they understand how to settle things, they understand how to negotiate, they understand how to negotiate contracts, they understand how to build relationships, they understand more about the ongoing relationship than I do - so instead of just hiring a general to fight the battle for them, which is all litigation is - war by other means - they know how to deal and negotiate a relationship and that's really what you're negotiating. ... In that context, they almost run the mediation and maybe I'll need to be the actor and they don't want to say a thing, but they tell me what they want overall, they tell me their bottom lines and all that and they really participate in a big way in the mandatory mediation.”

When a mediation is looking for a business solution, it may be important to have not only the business decision-makers present, but also those individuals who understand the specific details of the dispute. One lawyer described the contribution to the negotiation made by clients as “the intangibles that a lawyer can't bring. Like what was said at a particular meeting when the deal was done, or what everybody's perceptions were of what was going to transpire. So that you can sort of retrace the chain

of events that lead to the dispute, and see where everybody's expectations have fallen short, not just the claimants expectations."⁸⁷

Some respondents seemed to enjoy the greater engagement of clients in the process, pointing to closer client relationships as a result. One remarked:

Ottawa-2: text units 86-89

"When you're doing interests-based litigation and interests-based mediation I think you come down to the personal level, you come down to what's important to them, you have to understand their business and their life and they are involved so early on. They have a sense of ownership of the case, they're more involved and more interested and feel more part of it than they do when you do the rights-based work and "I'll contact you regarding your discoveries..."

A further articulated benefit of client involvement was the value of having the parties sit down face-to-face; sometimes to clarify, sometimes to "reality-check".

Ottawa-4: text units 84-84

"They never actually get to see the defendant; they just got papers from the lawyers. Now suddenly they see that person that they can imagine in the stand giving evidence against them and that has a real impact. They don't have to talk legalese or anything like that, they just talk about whatever it is that the case is about, and I find that they can often be their best advocate on their own behalf at the mediation."

The significance of clients being physically present and caught up in the bargaining dynamic is captured in the following anecdote.⁸⁸

Toronto-12: text units 437-449

"(M)andatory mediation would bring the client into the process - they would have to participate in it and often times the dynamics of mediation will change how people behave once they start hearing the reality of their case from other people.... I don't think that it was coincidence that two of the defendants brought their clients and the third one just had their client on the telephone, and the one on the telephone was the one who was holding out because his client wasn't there participating in the dynamic and appreciating the risks of proceeding to trial, whereas the other two were there and can see it more readily and they are saying, we'd better settle."

⁸⁷ Ottawa-20 : text units 142-143.

⁸⁸ And see also Ottawa-19: text units 388-390.

Another lawyer commented,

Toronto-17: text units 135-137

“I can think of at least two or three commercial disputes that were personality conflicts and hurt feelings played a very pivotal role, even though at the end of the day it was about money, and mediation allowed the parties not only to meet face to face and go through a mediation but also go right into a settlement and everything, that there would be a letter of apology delivered, that kind of thing.”

This same lawyer also noted the importance of the client feeling like they had some control over the process.⁸⁹ For these reasons it seemed obvious to many lawyers that clients should participate actively in mediation, and for many, especially the more experienced Ottawa group, this was a critical element if mediation was to work: “I actually believe that if a mediation is going to be effective that the client has to talk”.⁹⁰ The effort to exclude clients was regarded by some counsel as entirely counter-productive, for example:

Ottawa-10: text units 317-320

“You can see some lawyers come in and they don't let the clients talk, they read the brief, they dominate the discussion, they're trying to push the mediator. And when that happens I go okay, we're not going anywhere, fine..... I think it's too bad generally because it robs the process of much of its practical value when you do that, because it controls the understanding of the clients too heavily”.

Whereas these lawyers seemed to place store on the participation of the clients as a useful end in itself, others, in contrast, said that they would get the client directly involved in the mediation only where this was strategic; otherwise, the lawyer would always take the lead.

⁸⁹ This is a consideration consistently borne out by research on the importance of procedural justice issues to disputants. See for example Thibaut J, Walker, L., LaTour, S. & Houlden, S. ‘Procedural Justice as Fairness’ 26 Stanford Law Review (1974) 1271; Thibaut, J. & Walker, L. “Procedural Justice : A Psychological Analysis” New York, Erlbaum, 1975 . For a more recent exposition of the application of principles of procedural justice to court-connected mediation, see Welsh, N. “Making Deals in Court-Connected Mediation : What’s Justice Got to Do With It?” forthcoming (paper on file with the author).

⁹⁰ Ottawa-8: text unit 106. Professor Jean Sternlight makes the important point that mediation allows clients to assess one another’s stories directly, as well as their lawyers. See Sternlight, J. “Lawyers Representation of Clients in Mediation : Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting “ 14 Ohio State Journal on Dispute Resolution (199) 269, 343-344.

Toronto-9 : text units 232-238

“For example, if my client has a particularly sympathetic case I will let my client put it, particularly if there is a personal element to it. If, for example, there were a personal injury. Here's what happened to me, here's the physical pain I've lived with. I can't tell that, the client has to tell it, but, most cases it's business, it's not personal, so I can tell it.”

Some of the fears expressed by lawyers about having their clients participate relate directly to concerns over confidentiality. While mediation discussions are not directly admissible into evidence, lawyers recognise that information divulged cannot be “put back in the bag”, and that mediation may reveal important directions for discovery. Typical is the comment, “You don't want the client to blurt something out - even though the mediation itself is without prejudice, any knowledge you gain from it you can use later”.⁹¹ A smaller group appear more sanguine about this risk. Again, this may reflect their deeper attitudes towards mediation as much as any formal assessment of risk, as seen in the following comment :

Toronto-18: text units 109-113

“...I don't see the harm in it, if my client says off the record "so you think those things we delivered didn't work?", I don't really see that as really hurting me because probably my clients going to have to say that on discovery, or it's going to be proven out one way or another. So if my client says that in those circumstances, I don't think you're giving much away. It's going to come out anyway and quite frankly, sometimes showing that bit of weakness is worthwhile if the object is to settle this. Somebody's got to give something.”

Some lawyers expressed serious misgivings about “client control” in mediation. There are also signs of ambivalence too; for example, the same lawyer who advocated for direct client participation above, also spoke of simply instructing those clients who didn't want to “be involved” in what to do and say in mediation.⁹² Inevitably, mediation in the context of litigation means that counsel also has to be prepared for a possible trial. The following anecdote illustrates this dilemma.

Toronto-7: text units 147-159

⁹¹ Toronto-9: text unit 248.

⁹² Ottawa-10 : text units 102-103.

"I am much more involved with the client in terms of what we're going to say and what we're not going to say in a mediation case as opposed to a standard litigation, because you just have to micro-manage what you client's saying in a mediation because if it doesn't settle, you've let time bombs loose. So you really have to instruct clients with literally, not just with verbal cues but things like physical cues. I'll tell a client if I do this, you stop talking through mediation and I've resorted to kicking a client, trying to talk through a mediation and I don't want them to because they're revealing too much. Because people go into mediation and think oh well may be it will settle so the more I talk the better it'll be - no, if it's not going to settle you've just made it worse, because then the cat's out of the bag.

Interviewer: Can you tell me a little bit more about the incident where you kicked the client?

Interviewee: He was opening up a whole can of worms - so I just kicked him and he stopped. It's what you have to do sometimes".

Finally, there was a small group of interviewees who did not see participation in mediation as making any real difference to their working relationship with their clients, or the manner in which clients participated in developing outcomes. These lawyers did not see the client as playing an active role in mediation - in fact they positively resisted this idea. For example:

Toronto-3 : text units 170-173

"Is there anything different that you're doing in terms of preparing the client or anything that you can think that affects your relationship with the client when you are preparing for mediation?

Interviewee: I teach them to "shut-up".

Interviewer: So you would still see yourself as the principal player?

Interviewee: Absolutely."

This group were generally not enthusiastic about mediation, and this may be reflected in their clients' lack of engagement in and enthusiasm for the process. Members of this group sound like Oppositionists, or at minimum Dismissers. Sometimes their perspective is justified by reference to what clients want - and the assertion that they know what they want and it is not mediation. For example,

Toronto-6: text units 163-164

"They (clients) feel that they're smart enough to know when they want to settle. The lawyer they have confidence in will do their best to either go to court or settle. They

don't need another person now telling them when to settle, they just think it's an added expense that's not necessary... "

Alternately or as well, their clients may be unenthusiastic about mediation because they feel that they would have to give something up in order to settle. If so, these lawyers are unlikely to challenge that appraisal.

Toronto-6: text units 151-160:

Interviewer: What type of input do you expect from the client in mediation?

Interviewee: Not much. All the client wants to do...let me back up and I'll tell you. First of all, the clients are generally not too keen to go to mediation, they generally perceive it's a waste of time and it's the fault of the lawyer, sometimes, but I even find that lawyers are dying to settle. They can't get their clients there because they think it's a day where they just have to give away the store, that's their perception. It's not a perception they're going to get a good result that day - it's how much I have to give away. So they don't like that, they don't like anyone telling them they have to give away unless they have to. So I haven't found many clients who really want to go to mediation".

In summary, notwithstanding occasional comments such as this one, most counsel acknowledge that the assumption that clients will attend and probably participate in mediation represents a significant change, and one that is more than merely procedural or mechanical. The potential for different dynamics in bargaining, and different types of outcomes, is widely recognised (especially in the Ottawa sample). There is some evidence that many lawyers, especially those less experienced with mediation, will adopt a fairly conservative attitude towards client involvement, and that there are real concerns about both control and confidentiality. Interestingly, those who have gone further in encouraging client participation speak of it in very positive terms, both in relation to their own job satisfaction and in relation to outcomes. It is important to remember that this adjustment is highly counter-intuitive for counsel; the assumption that in the absence of mediation, lawyers will "manage" the litigation with relatively little involvement from clients runs deep, as the following quote - from a mediation-friendly litigator - illustrates:

Ottawa-1 : text units 76-78

“Well if you're not taking a case to mediation the client has put their case in your hands and says, this is your field, you just basically do what you think is right and get me the results I expect. Frankly, that's the only way you can really handle litigation based cases. Clients ...run the rest of their lives, they want you to run the litigation - and you say, have a nice day”.

E. The uses of mediation : a summary

One might hypothesise a relationship between the four aspects of uses of mediation described in this section; that is, between how lawyers understand the process of mediation, how they see mediation as part of an overall strategy in litigation, how they prepare and plan for mediation and how they choose to involve their clients. One might expect that how counsel conceptualises and translates into practice each one of these aspects of the use of mediation would be congruent with the other three. For example, one would not expect a lawyer to advocate for mediation as a cathartic process in which clients confront one another and then instruct her client to say nothing in mediation and let her take charge. Or for counsel to regard mediation primarily as a hurdle to leap over, and then take considerable time preparing his own submissions and arguments in mediation. For most lawyers, however, it may be that these links are not yet made consciously. In most interviews, there is some apparent inconsistency (or indecisiveness?) regarding these aspects of mediation usage and some pervasive ambiguity. This suggests, as noted earlier, that there is no clear or uniform paradigm shift taking place here, but instead many diverse and discrete reactions to the phenomenon of mediation. There is no complete replacement of the “old” paradigm,⁹³ but rather some building on it (for example by the Instrumentalists), some rejection (by the True Believers), and some assimilation (for example by the Dismissers).

Two further observations can be made from the data. The first is the overarching importance of context. The actual use made of mediation will depend which case, what clients, what set of objectives

⁹³ In the sense that Thomas Kuhn's original conception of “paradigm shift” made the old paradigm obsolete. See Kuhn, T. The Structure of Scientific Revolution above note 39.

and so on is being talked about, and these considerations may also change over the life of a litigation file. Second, many counsel seem to be proceeding on a fairly *ad hoc* basis, based on their instincts about what each case requires, rather than consciously connecting these different elements of their use of mediation. There may be emerging orthodoxies of procedure and process (for example, who gets selected as a mediator; see below), but there are as yet no established normative or conceptual pathways through the range of practice choices that are available over the use of the process, outcome goals, preparation and client involvement for court-related mediation (whether mandatory or private). This means that (for example) within any one interview one lawyer may talk about the importance of client venting in a mediation he attended; the use of another mediation as a “fishing expedition”; an absence of anything other than distributive (legal) outcomes from mediation lack of outcomes; his surprise at an outcome in one case in which a future business relationship was forged; and his desire to keep the client quiet if at all present in mediation. It suggests as well that relatively few of the lawyers in our sample could be said to represent in a pure and consistent sense of one of the five profile types suggested above, but may rather reflect more than one of these in their attitudes.

One anticipated relationship that does emerge with some clarity from the data coding is that lawyers who indicate that they have identified important psychological and emotional benefits from mediation are more likely to speak to the importance of having clients participate actively and directly in the mediation. Some of these respondents also describe, in tentative language that suggests that they are still reflecting and actively processing this, a dynamic which occurs when clients communicate in mediation which is a significant factor in settlement and lies outside a rational, legal model for predicting settlement. For example, one lawyer noted the very different reactions of clients who are present at mediation (although couched in terms of “risks at trial”) and those participating by telephone.⁹⁴ Another notes that “...the clients have to... come together, *it creates the outcome...*”⁹⁵ (my italics). This data suggests that there is a relationship between how counsel understands what may

⁹⁴ Toronto-12 : text units 437-449 and see above at 37.

⁹⁵ Ottawa-8 : text unit 218.

happen in mediation and how they then conceptualise - or reconceptualise - the role of the client. This must in turn lead them to reconsider their own role.⁹⁶

Finally, there is some basis for saying that the norms of mediation usage are both more settled, and more accepting of the use of mediation in Ottawa than they are in Toronto. This is especially apparent in relation to the instrumental uses of the mediation process, which seem to be far more prevalent in Toronto than in Ottawa. Ottawa counsel were also more likely to talk about a positive active role that they had seen the client taking in mediation, and to suggest a deeper sense of comfort with this.

V. Evaluations of mediation and mediators

A. On Mediation

Generally positive comments about mediation were coded throughout the transcripts, and these can be described in several categories. The first relates to the impetus mediation provides for early case appraisal and settlement discussion. A number of respondents, especially among the Ottawa sample, made the point that mandatory mediation gets over the reluctance - on the part of both clients and counsel - to talk about settlement and to communicate settlement offers. As one put it, "(M)andatory mediation earns its wings from me right at the start because it gets over that hurdle".⁹⁷ Another remarked that "they (his commercial clients) want an excuse to settle and if you have mandatory mediation it gives them a reason to continue talking".⁹⁸ Many also commented that mediation, especially mandatory mediation, imposed a discipline on both sides to get the case ready for serious negotiations, which was generally welcomed. Some of these lawyers commented that the

⁹⁶ See the further discussion in Section 7 (I) below.

⁹⁷ Ottawa-1: text unit 34.

⁹⁸ Ottawa-1 :text unit 16-19.

front-ending loading of work on a file that early mediation demands makes sense both for larger institutional clients who do not want reserves tied up with protracted litigation, and for smaller commercial clients who need fast, cost-effective solutions. One lawyer pointed out that this was work “...that you would have to do in any event to prepare for discovery, or certainly to prepare for a pre-trial. So it’s not wasted time or wasted money for the client..”⁹⁹ Another remarked that the impact of Rule 24.1 was to “change peoples’ habits...in the right direction...making them practice in a better way”.¹⁰⁰ Key to this assessment is counsel’s view on the appropriate timing of mediation, especially when imposed via Rule 24.1. Receptivity towards mandatory mediation was consistently linked to the potential for flexibility in the timing of mediation. This is discussed further below.

Another cluster of positive evaluative comments reflect a recognition that even where mediation does not result in settlement, it may have other, secondary benefits, including the exchange of information and the informal assessment of the credibility of each side’s case. Some of those reporting this benefit may have intentionally constructed mediation as a “fishing expedition” rather than a genuine effort at settlement (an Instrumentalist approach) - others may have participated in good faith but recognise other constructive consequences in the event of failure to negotiate a resolution (a Pragmatic approach). Whatever motivation is construed, a number of counsel, especially in the Ottawa sample, talked about their willingness to see mediation as a constructive and useful exchange, regardless of whether settlement resulted either at that time, or subsequently. As one put it, “(I)f nothing else, you’ve got to have saved time becauseeveryone walks away afterwards (from the mediation), and they know exactly what the issue is for this case.”¹⁰¹ In addition, the importance of including the clients directly in bargaining - providing them an opportunity for a face-to-face discussion, and possibly some reality-checking - came up frequently as a reason to go early to mediation, even if

⁹⁹ Toronto-17 : text unit 65.

¹⁰⁰ Ottawa-2 : text units 43 & 49.

¹⁰¹ Ottawa-13: text units 544-545.

full settlement at this stage might be premature (the impact of client participation is discussed at length above at Section 4 (IV)).

Many of the negative attitudes adopted by counsel appear to reflect discomfort with - or resistance to - the requirements imposed by mandatory mediation, in particular in relation to the timing of the actual mediation, the roster of “approved” mediators and the overall supervisory role of the court. One Ottawa counsel, regretting the end of the era when a file could be left to “sit” awhile, told us frankly:

Ottawa-5 : text unit 160

“At a human level, it was nice to be able to put some things aside from time to time. You can’t do that anymore. So I feel like there’s somebody out there, the thought’s almost paranoid, who is calling the shots...”

A number of lawyers - especially in the Toronto sample - felt that the requirement that mediation under Rule 24.1 take place so early in the life of a file frequently rendered it useless for settlement purposes, leaving them with only instrumental reasons for using the process (see above at Section 4(II)). One lawyer described his conceptualisation of settlement as something that was incremental, was not tied to any one event, and only rarely could occur early in the life of the file, but instead evolved over time as trust and disclosure developed.¹⁰² Many counsel, especially in Toronto, appeared to accept the principle of mediation but wanted to control when it took place. As one would expect, the most common explanation advanced for why mediation before discoveries was premature was that there is an insufficient basis on which to assess the best chances of settlement. Counsel described needing information they did not yet have: “(Y)ou do not want to go in cold, just based on the pleadings”¹⁰³ and as well, needing an opportunity to “digest” it before they could meaningfully negotiate. If this information was not available to them, they were simply “going through the motions” and would not invest in any significant way in the mediation process by, for example, selecting a

¹⁰² Toronto-18: text units 67 & 303.

¹⁰³ Toronto 12: text unit 270.

mediator of their choice (instead allowing a mediator to be simply assigned) or doing any significant preparation for the mediation session.

There are a number of possible variables which might explain different attitudes towards the timing of mediation. As a practical matter, the problem of being obliged to attend mediation before counsel feel “ready” is obviated in Ottawa by the willingness of the Ottawa Case Management Master to be flexible in adjourning mediation until after discoveries. This approach by the Ottawa master appears to be highly significant in reducing resentment towards being obliged to mediate before discoveries. In Toronto, counsel complained that the cost and effort of seeking an adjournment meant that it was more cost-effective to do a “20 minute mediation”.¹⁰⁴ Another distinction which may be important here is between lawyers with commercial clients - those with greatest mediation experience often felt that mediation could usefully take place as early as possible - and those serving personal injury clients, whose concerns relate to the stable calculation of damages, and therefore frequently wanted to wait until this amount could be definitively assessed.¹⁰⁵ An additional factor may be how counsel understands the relationship between information collection and final outcomes, and her deeper attitudes towards the collection and analysis of information as part of an overall litigation strategy. This is discussed further at Section 6 (I) below.

Aside from criticism about the timing of mandatory mediation, a number of negative comments suggested concerns about the changing nature of the role of the lawyer as advocate. These concerns were expressed in a number of different ways and at different levels of interest. One is a fear that profession is losing a key skill - trial advocacy - as fewer and fewer cases go to trial. In addition one lawyer suggested that the use of mediation may reduce lawyers' negotiation skills, as they become “over-dependent” on the intervention of a mediator to develop a negotiated solution.¹⁰⁶ Others

¹⁰⁴ See the further discussion above at Section 4 (II).

¹⁰⁵ See Ottawa-14 : text units 25-28.

¹⁰⁶ For example Toronto-14 : text unit 224; Toronto-10: text unit 474.

confess that trial work is more exciting and interesting: “I mean, being in court is a lot of fun, but otherwise it’s a pretty boring job”.¹⁰⁷ At a deeper level, concern about the professional role is reflected in negative comments about the substitution of informalism for a rights-based, adjudicative model. For example,

Toronto-2: text units 281-282

“The right philosophy is that we’re going to have disputes, and conducting serious disputes is going to cost a lot of money and the trick is to get me before a judge as fast as possible, and have a decision. Mediation is not the solution.”

The advent of mediation, and in particular mandatory mediation, was regarded by these lawyers as improperly usurping this “true” model. The result would be a “watered down legal system” in which “generally only wealthy people and wealthy corporations are going to get their day in court.”¹⁰⁸ Holding back the tide against a “touchy-feely” mediation philosophy was seen as a struggle over values for dispute resolution.

Toronto-13: text units 179-183

Interviewer: Do you see trying cases as the key way to resolve disputes?

Interviewee: It’s a very important way which the system tried mightily to take away from us....(B)y having things like mandatory mediation.”

This approach can be equated with the Oppositionist perspective describe earlier. In this view the adversarial model and a trial advocacy approach to running litigation is characterised as the practical, real-world approach to dispute resolution, which is contrasted with the “softie” style of mediation - “...the lovey dovey approach to the world...”¹⁰⁹ - and other efforts at early settlement. Lawyers who like mediation are described as “gun shy”.¹¹⁰ Another lawyer remarked that “It’s easier to mediate, let’s

¹⁰⁷ Toronto-6 : text unit 210.

¹⁰⁸ Toronto-6 : text units 357 & 375.

¹⁰⁹ Toronto-8: text unit 226.

¹¹⁰ Toronto-6: text unit 324.

face it, than take a risk. Most people aren't risk-takers. Going to court is a risk".¹¹¹ Within this framework of values, taking risks is the "path of the warrior" (one lawyer described the role of the lawyer as "manager of the war"¹¹²), rather than a possibly ineffectual or inappropriate use of client funds. Also according to this view, holding out - engaging in extensive discoveries, bringing motions, or other acts of guerilla warfare - represents the best course for a good outcome. This is an interesting juxtaposition, especially in the light of the many comments that were made (some by these same lawyers) about the importance of reconciling the real world and often urgent concerns of commercial clients with the litigation system. One lawyer even ascribed his "softie" orientation (self-described) to his "business background", completing this intriguing series of conceptual connections.¹¹³

This group also regards the court (in its supervisory capacity) and the mediator as a threat to their professional autonomy to make judgements about the right way to run the file. For example,

Toronto-6: text units 163-164, 192

"They (clients) feel that they're smart enough to know when they want to settle. The lawyer they have confidence in will do their best to either go to court or settle. They don't need another person now telling them when to settle, they just think it's an added expense that's not necessary....I always consider settlement options at various stages of litigation...no Rule has to tell me when to do it."

¹¹¹ Toronto-3: text units 370 - 393. Although note that other comments suggested that some lawyers - generally Dismissers and Oppositionists - saw mediation itself as a risky place because of the loosening of counsel's control over the process. See for example Ottawa-7: text unit 93 and Toronto-14: text unit 230.

¹¹² Toronto-2: text unit 134. Note that this respondent used the word "war" 11 times in the course of a 45 minute interview.

¹¹³ Ottawa-7: text units 231-233. One possible explanation for the relationship drawn here between a business background and being "soft" (in the sense of looking for negotiated settlements) is the antipathy felt by many experienced business people towards a fixed and potentially constraining system of precedent or rules (such as the legal system). In John Lande's study of in-house counsel, one remarked "As I look back at my business career, I have an antipathy for precedent at times because I find it constraining in terms of the ability to break new ground." So I don't necessarily always look for "Well, how was it done before? Or what did some previous court decide? Or what did some previous regulatory body conclude on this?" as opposed to "Give me the facts and circumstances today and where we want to go in the future. Try to define a problem or the opportunity in terms of the visions of the future as opposed to the precedent in the past." Lande, J. "Failing Faith in Litigation" A Survey of Business lawyers and Executives Opinions" 3 Harvard Negotiation Law Review (1998) 1 at 6.

Finally, concerns over the possible dilution of the traditional advocacy role of counsel were also expressed - although usually discretely and often tangentially - with reference to the billing impact of early settlement. Several lawyers referred to this as a problem in the abstract, maintaining that their client base was so strong that they would not be affected - but that others might be. For example, one commented that early settlement

Toronto-5 : text units 43-44

“... kick(s) me squarely in the pocket book, or not me because I have clients that want to fight those big numbers, but....if you're being entirely selfish, just looking at the lawyer's interest, then why do I want this?”

Another lawyer speaks of what he calls “innate fear” that mediation will “reduce their business”¹¹⁴. The same lawyer (Toronto-5) who suggested that possibly 97% of what lawyers did was “wasted” followed up this comment by musing about the 100 boxes of litigation material currently crowding his office. Thinking aloud, perhaps, he then asked the rhetorical question “But how am I am going to pay for the 100 boxes?”¹¹⁵

While it seems inevitable that if mediation saves clients costs, it will reduce legal fees in relation to any one file, some lawyers do not accept that mediation will save clients money at all; several in both cities describe mediation as adding “unnecessary” extra costs for the client.¹¹⁶

B. On Mediators

¹¹⁴ Ottawa-4: text unit 244. Craig McEwen's study of in-house counsel found little evidence that fear over lower billings was driving antipathy towards mediation. This may be partly explained by a reluctance to confess to this fear : as one of our interviewees put it, “it's not brotherhood” (Toronto-6). See McEwen, C. “Managing Corporate Disputing : Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation” above note 17.

¹¹⁵ Toronto-5: text unit 39.

¹¹⁶ In her 1982 study of personal injuries negotiation in the United Kingdom, Hazel Genn considered the question of how far the desire to drive up costs conflicted with the wish to push for settlement. She concluded that “The general uncertainty which pervaded the whole area of personal injury litigation in relation to liability and quantum...creates perfect conditions for the explicit or implicit justification of almost any strategy”. Genn, H. Hard Bargaining Oxford University Press 1982, 108.

Oppositionists, and a lesser extent Dismissers whose comments about mediation are generally negative, are also more likely to denigrate mediators as unskilled and ineffectual. This is expressed partly as a pervasive skepticism about mediator qualifications. Some believe that mediators invent or overblow their qualifications and experience, others question the extent of screening that takes place before a person is added to the mandatory mediation roster (there were particular concerns over non-lawyer mediators, with one remarking, “they (the clients) are not going to talk to someone who doesn’t have a practice, and neither am I.”,¹¹⁷ and several suggested that mediators were persons who had failed in legal practice. It is worth noting that numerous lawyers - *including* those who were generally positive about mediation - said that they were unhappy with the standard and quality of mediation training, and many made the comment that simply taking a training program did not necessarily make someone a good mediator. A smaller group made the point repeatedly that they did not “need” mediators to settle disputes, that counsel did this all the time anyway. This sentiment may contribute to a feeling among this group that mediators are the 21st century version of the shaman, trafficking in bogus goods. One compared mediators to life insurance salesman, “...who will explain to you why you really need life insurance and giving you projections of what’s helpful to you, and you spend a lot of time trying to sort out the numbers and you realise, it’s not that good...”¹¹⁸ The same lawyer also asserted that “(P)art of what ... mediators are trained to do is to lie. This is to get parties who are giving something up to feel they’re gaining something or the other party is losing a lot more than they are, to make them feel better - that’s part of the training process”.¹¹⁹ Others make reference, albeit in somewhat less hostile terms, to mediator “manipulation”. Others complain about mediators being transparent in their desire to effect settlement, at any cost, and labouring unnecessarily the “obvious” points about the costs and uncertainty of continuing with litigation.

¹¹⁷ See for example Toronto-6: text unit 96, Toronto-11: text units 438-442.

¹¹⁸ Toronto-2: text unit 91.

¹¹⁹ Toronto-2: text units 74-75.

For the most negative group, mediation appears to be seen as relatively “safe” when it is evaluative (emphasising the known, that is, anticipated legal outcomes) and “risky” when it is facilitative (emphasising the unknown, that is, other factors in settlement besides legal evaluations). Paradoxically those who would deride “True Believers” as risk-averse also make their own appraisals of risk, and avoid facilitative mediation for this very reason.¹²⁰ This group has a clear preference for authoritative, credible, evaluative mediators, who are both willing and able to offer legal evaluations, because they structure the discourse in a way familiar and comfortable to counsel - they “...get to the merits”, where “merits” are understood to be legal merits.¹²¹ Outside the Oppositionists, however, there is a strong preference for evaluative mediators within the entire Toronto sample. Only one respondent¹²² in this group stated that he preferred non-lawyer mediators; virtually every other Toronto lawyer, no matter what their overall approach to mediation, made it clear that they would almost always (see below) prefer a lawyer-mediator who could offer at least the potential of an expert opinion of the law (even if they were sometimes facilitative also or instead), they preferred lawyer-mediators. This relates directly to understanding a primary purpose of mediation to be “...to determine the worthiness of your case. That ... only happens with mediators who are prepared to give you an evaluative assessment of your case.”¹²³

Adopting a Pragmatic approach, some counsel reason that clients need to hear from a credible person “I think you’re going to win or I think you’re going to lose”,¹²⁴ and that this is sometimes necessary in order to overcome the clients’ inflated expectations: “(S)o that it brings it home to the client that it’s not just the lawyer being pessimistic but some objective third party says that’s a real

¹²⁰ See the discussion above at 5 (l) and in particular note 113.

¹²¹ Toronto-9: text unit 410. Further to this point, Professor Archie Zariski asks “how often are (the words) ‘legal merits’ amongst lawyers codewords for “that may be true but you can’t prove it in court?”. Email correspondence with the author, 15.06.01.

¹²² Toronto-18.

¹²³ Toronto-1 : text unit 70.

¹²⁴ Toronto-2 : text unit 111.

issue...".¹²⁵ Some put it in stronger terms: "...they (the judge-evaluator) read the riot act to the client and it helps bring them on board."¹²⁶ The lawyer above also made the more reflective observation that an evaluative mediator could provide a client with crucial reassurance that settlement was a reasonable course:

Toronto-9: text units 219-220

"The client tentatively thinks that they are being unreasonable when they settle, they think they are giving in. What they need is the reinforcement to believe that they are being reasonable in a settlement."

While the preference for evaluative mediators was strong, especially in Toronto, a few interesting alternate views were expressed. Several lawyers remarked that there often seemed little point in counsel rehearsing their (previously stated) rights-based arguments in mediation. Several commented that while they had earlier assumed that a legal evaluation would be the most effective way to resolve a case, their experience had convinced them otherwise. For example, one lawyer remarked,

Toronto-12: text units 356-360

"I've discovered, to my astonishment, that it (a legal evaluation) doesn't help both ways in terms of trying to settle the case. If you're the one he (the evaluator) has told "You're going to win", you'd say "Why should I compromise?". And if you're the ones he told "You're going to lose", you say, "What does he know?"

In acknowledging the actual impact on disputants of hearing an evaluative opinion, this comment seems to recognise the limits of a purely predictive approach to settlement.¹²⁷ Another, related theme that emerges from some interviews is that a mediated settlement has to be principled in some way, if it is to be sellable to both parties and to counsel.

Toronto-3: text unit 154-157

"...(Y)ou're not going to settle unless you can come up with a principled basis to settle...unlike when I'm into an out-and-out third party resolution of a dispute, (where) I

¹²⁵ Toronto-9 : text unit 210.

¹²⁶ Toronto-1 : text unit 62.

¹²⁷ Macfarlane, J. "Why Do People Settle?" 46(2) McGill Law Journal (2001) 63.

won't admit weakness and while the process is that you'll let the third party find your weakness, ...in a mediation you will always give on some weakness that will then be the basis for your principled basis for settlement. So we went in to the mediation saying we'll take responsibility ...on this percentage basis. We will justify that percentage basis through this rigorous analysis of this background. We have an expert here who will justify that rigorous analysis of that percentage split of the primary causes of the economic damage and that is our principled basis of settlement. Mediator, you cannot present another (different) principled basis to us that is appropriate for settlement or if the other party cannot give us a principled basis that we can relate to, then there is no point in talking".

The "principles" referred to here seem to be broader than legal principles *per se*. Furthermore, the limits of a legal evaluation as they are described above suggests that a facility with problem-solving is necessary for an effective mediator to go beyond predictive evaluative approach. A number of lawyers complained that the tendency of evaluative mediators - and in particular former judges - was to bang heads and then suggest that the parties "split the difference". This approach was resented - several counsel remarked that they had sufficient legal experience to reach as credible an evaluation as the judge anyway - and regarded as ineffectual as well as unprincipled. One counsel declared "Mediators who are simply trying to split the difference are useless...".¹²⁸ It appears that when the traditional (legal) basis for a principled settlement is not accepted by the parties - and lacking any authority to impose this judgment - some evaluative mediators are unable to find an alternate principled basis for settlement (for example, the discussion and adoption of "realistic" and "fair" commercial conventions or standards). A number of lawyers observed that while ex-judges could offer expertise and authority, they were often "horrible" at facilitating dialogue and effecting compromise.

Absent this type of criticism, however, senior lawyers or judges who act as evaluative mediators clearly hold considerable persuasive powers. This next lawyer suggests that sometimes the status of the mediator can be sufficient to persuade the clients that the proposal is a reasonable one.

Toronto-10: text unit 401

"The mediator does not actually condone that (the settlement) but there is a sense especially when you use a well respected mediator that it's got to be at least

¹²⁸

Toronto-8: text unit 106.

reasonable, otherwise it wouldn't have resolved and the mediator wouldn't have perhaps pushed this point or pushed that point.”

There is also a sense that lawyers are looking for greater flexibility in moving between rights-based and interests-based approaches than practising mediators currently provide (generally, the Pragmatist's perspective). A number of lawyers who were generally positive about mediation and saw value in a facilitative model also suggested that it could be exasperating to be confronted by a mediator who had a quasi-religious attachment to one or other approach. These counsel would like to be able to call on an evaluative mediator if they believe that the situation makes this an effective approach, and are frustrated by the apparent lack of flexibility especially under Rule 24.1 (while it does not require a facilitative approach, some mediators on both rosters interpret their role as limited to facilitation). On the other hand, a somewhat smaller group who were most comfortable with an evaluative, predictive model recognised that in certain cases, an interests-based model would address important needs (examples given included parties with strong personal issues) or simply deflect attention from weaknesses in the case (for example where a disputant had a poor legal case). Furthermore, a number of lawyers expressing a clear preference for evaluative mediators also referred to the importance of the mediator being able to “connect with the parties”¹²⁹ in an acknowledgment that evaluative ability was not always sufficient in itself to produce a settlement.

Unremarkably, lawyers who are generally positive and supportive of mediation also tended to be more likely to make comments about the skillfulness of mediators that they had observed (although they all had “horror stories” to tell as well). However, the range of reasons and levels at which they supported the use of mediation is reflected in the range of assessments of just what makes for a good mediator. One cluster of comments centred around the usefulness and skill of mediators in managing a process for negotiations, with reference in particular to moving the parties in and out of caucus (and between private and joint discussions) at the appropriate time; discouraging the lawyers on each side from posturing; making an initial game plan for the mediation; and keeping the process moving along in

¹²⁹ Ottawa-14: text unit 114.

order to establish a sense of momentum. Many lawyers commented that they wanted a proactive mediator, who would participate actively in the discussions and exert some control over the process.¹³⁰

Others emphasised the importance of the mediator enhancing the constructive communication between the parties, in particular communicating each side's perspective to the other side. One commented that the best mediator he knew was a person who could "internalise their point of view" in an authentic manner;¹³¹ saving face for both clients and lawyers; gaining the trust and credibility of the parties;¹³² and providing "moral suasion".¹³³ One lawyer described this dynamic "...like having a marriage counselor almost. You have the mediator to help you communicate to somebody."¹³⁴ A third cluster of comments regarding the skills of the best mediators related to their effectiveness in generating creative outcomes, in particular outcomes that counsel may not have otherwise come up with. One lawyer commented that this is because a good mediator can get behind the presenting issues and "...find out what's really bothering the sides...".¹³⁵ Others remarked on the ability of a mediator to enable counsel and clients to "think outside the box" of conventional legal or business solutions. "A skillful mediator, legally trained or otherwise, can help pull the lawyers out of that locked-in world view and look at it another way".¹³⁶

VI. Systemic Changes in Practice

The preceding sections attempt to set out in some detail the range and diversity of responses to our questions about how lawyers use, and understand the use of, mediation. This next section tries to synthesise some of the major themes arising from the data which suggest systemic changes in

¹³⁰ See for example Toronto-19: text units 84-85.

¹³¹ Toronto-3: text unit 289.

¹³² Toronto 20: text units 439-440.

¹³³ Ottawa-7: text unit 253.

¹³⁴ Toronto-8: text unit 237.

¹³⁵ Toronto-18: text unit 213.

¹³⁶ Toronto-1: text unit 151.

practice, and which may carry implications for a deeper disputing culture. Clifford Geertz argues that in order to understand the cultural context of behaviours and attitudes, one must be aware of the important relationship between the norms of practice - what he terms the “material elements” of culture - and the meaning that actors ascribe to these. Geertz describes the meanings given to both new and established practices as the “immaterial elements” of a practice culture.¹³⁷ Moreover the range of meanings given to a particular action or practice can be extremely diverse, as they are in this study. Some of the changes in litigation practice to accommodate mandatory mediation in civil matters may appear, on face value, to be little more than functional adjustments - getting ready to negotiate earlier than usual, briefing the client on how to participate in mediation, and so on. On a functional level, there are also more apparent similarities than differences in how counsel responds to mediation. However if one explores what Geertz calls “the piled-up structures of inference and implication”¹³⁸ that are present in the meaning given to even the most mundane adjustments in practice routines, these may reflect significant shifts in thinking, depending on how the actors are understanding and making sense of their actions. Geertz argues that changes in actual practices become especially noteworthy where they appear to have an impact on notions of role and identity. In inviting our respondents to reflect on their role and how, if at all, it is impacted by mediation, we were looking “...to uncover the conceptual structures that inform our subjects’ acts, the “said” of social discourse...” from inside the culture of commercial litigation.¹³⁹ From this data it is possible to not only identify the changes that appear to have occurred in litigation practice, but also the various explanations presented for these changes by our research subjects. It is in this discussion that one might look for answers to the question: is mediation making any “real differences” to the broader disputing culture of the profession itself?

¹³⁷ This distinction is discussed in Zariski, A. “Disputing Culture: Lawyers and ADR” 7 Murdoch University Electronic Journal of Law (2000) at 2 and on the relationship between material and immaterial elements of culture generally see Geertz, C. *Thick Description: Toward an Interpretive Theory of Culture* in The Interpretation of Cultures, Basic Books 1973.

¹³⁸ Geertz, C. The Interpretation of Cultures Basic Books 1973 at 7.

¹³⁹ Geertz, C. The Interpretation of Cultures Basic Books 1973 at 27.

In analysing the transcripts for indications of systemic change, it became quickly apparent that there were significant differences between the two sample groups in Ottawa and Toronto. This variable, and others that might explain the discrepancy between the opinions and experiences of mediation offered by our respondents are described in detail at Section 7 (III). This apparently strong differentiation between the stages of legitimacy of mediation in the two Bars is reflected in all aspects of the change data reported and analysed below.

A. File Management

Toronto-20: text units 416-418

“Before 1990 we all worked towards, you just aimed for the pre-trial and you didn't really think about settling before then. You may think about settling at the pre-trial but, you kind of liked to get to the trial. Unless it was a good case to settle. *So that meant that you could go two, three years with a file and you never once directed your mind to what is the value of this and what could I settle it for*”. (my italics) .

All respondents noted change - to which they ascribed widely differing significance and meaning - in the nature of file management under Rule 24.1. While some counsel (generally the Dismissers) saw the impact of the procedural requirements as fairly minimal because they did little work in preparation for mandatory mediation, many lawyers - and especially those in the Ottawa sample - acknowledged that the introduction of the Rule had made a more meaningful and consistent difference to their conventional file management practices (further reinforced by the deadlines set and enforced by the case management system). This change was often described as “front end loading” on litigation files, with work now being carried out at the beginning of the life of a file in order to be ready for mediation and serious settlement discussions sooner than might otherwise be the case. One Ottawa lawyer described this as follows:

Ottawa-12 : text units 93-95

“The file is front end loaded, and costs increased expeditiously to the client in the short term....long term I think that ultimate savings occurs because you're front end loadingthat's more expensive in the short term but what happens is, your chances of

succeeding and settling the file are greater and the settlement occurs in a faster time period”.

A number of counsel (this was generally the view of the Pragmatists) noted that this was work that would have to be done in any event if the case was going forward, and so there was no additional cost to themselves or the client to have the case ready for negotiations and discoveries as quickly as possible. A few complained that this early up front work was a waste of time and money (notably the Oppositionists and the Dismissers) since there was no serious chance of settlement at the point at which mediation was required, arguing that preparing for mediation simply distracted attention from other work that could be done. Some counsel in both Ottawa and Toronto indicated that in order to avoid the appointment of a mediator, they now planned for settlement discussions, often by teleconference, even before the date set for mandatory mediation. Another consequence noted by some Ottawa counsel is a trend towards fewer early procedural steps such as the filing of counter-claims and the bringing of motions, with these activities sometimes superceded by mediation.

The net impact is that more files are settling faster - they are no longer filed away and largely inactive for months on end. There is no longer always the possibility of bringing a motion and then returning the file to the cabinet. As one lawyer reflected somewhat ruefully,

Ottawa-14 : text unit 44

“We don't have these nice files sitting on our chair and on our floors which we always know we can work on them when you have a slow week, or something. All of a sudden you have to do all of this, all at once, and you think - unless you have a tremendous volume of work - what's going to happen in a month or two months?”

A number of Ottawa counsel described the “pick-it-up factor” (based on the number of occasions that lawyers are required to complete tasks within a case management regime) as leading to earlier and more intensive efforts to settle. In Ottawa, litigators told us that they generally have fewer, more active, files.

Ottawa-6: text units 3-7

“We looked at the turn over of the files under the old system as being approximately a five year turn over, which allowed me to maintain a file load of about 400 files. The new turnover we believe we should looking a 12-15 month turn over, from the start to getting to trial. Which as a result of that turn over, we have had to make a dramatic change in how we practice. Because you can no longer handle 400 files. ...the senior litigators can handle somewhere between 75-100 files depending how specialized they may be, or how you need them to quantum in this type of issue. Junior lawyers no more than 20 files.”

The significance of this change is understood by our respondents in several different ways. One perspective relates primarily to the changing economics of legal practice. One Ottawa lawyer described the billing system in his mid-size practice as changing from “billing from inventory” to “billing from results”.¹⁴⁰ This is a significant economic adjustment for many practices, and is occurring in Toronto also. One Toronto counsel commented, “... a lot of firms live off of those big files that.... go on for years, they're in discoveries for months - and the reality is that those cases have become rarer”.¹⁴¹ He went on to add “..at times, you see a file that was going to keep you into discoveries for three months and it just got settled on very good terms for the client and you kind of go, ‘wait a minute, is that the wildest thing I ever did?’ I think there's a certain tone of that, especially among senior partners that goes, ‘wait a minute’. Then there's a tension there. You can't deny that there's tension there”.¹⁴² Some litigators wonder if file volumes may need to change to protect themselves against a negative economic impact.¹⁴³ Interestingly, in Ottawa where case management is most extensive, the most frequently voiced opinion on file management is that lawyers can profitably handle fewer cases at one time because of the remuneration associated with front ending loading and early settlement.

Some lawyers described attitudinal and strategic implications as well as economic adjustments as a result of these changes in file management practices. These lawyers said that Rule 24.1 had altered their expectation that serious settlement negotiations could not take place until after

¹⁴⁰ Ottawa-7: text units 266-268.

¹⁴¹ Toronto-16: text units 451-452.

¹⁴² Toronto-16: text units 470-473.

¹⁴³ Toronto-17: text unit 183.

discoveries or even at the stage of pre-trial. Whereas litigators generally turn their minds to settlement only after discoveries have been completed, other than in small and apparently “simple” cases, Rule 24.1 requires steps that pertain to settlement to be undertaken much earlier in the process. In this way file management changes are allowing some counsel to re-evaluate the appropriate timing of settlement discussions and as a result, the relationship between settlement and conventional approaches to both theory development and fact-gathering. This may be making these counsel at least more open to the possibility of earlier settlement.¹⁴⁴ The adjudicative model - and the dominance of a complementary adversarial style of lawyering - assumes that the function of information and fact-gathering is to strengthen rights-based arguments (and conversely to repudiate those of the other side). However, information deemed pertinent to this end may, or may not, be relevant and useful in the negotiation of a pragmatic solution. Almost all the individuals in our sample indicated that in the absence of early mediation they adopted a fairly conventional, adversarial analysis of the need for information gathering and legal research before engaging in serious negotiations. However, some lawyers, and in particular those more experienced with mediation, said that they now found themselves questioning these assumptions. Some reflected that at least some of the information which they assumed to be essential to the initiation of serious settlement discussions might, in fact, not be relevant to the type of solution that could and sometimes did emerge from these very early negotiations. One characterised counsel’s preoccupation as “an almost fetishistic obsession with knowing everything about a file before you can say anything about it”.¹⁴⁵ Another made this remarkably frank comment:

Toronto-5 : Text units 35-36

¹⁴⁴ Professor Bobbi McAdoo’s study of the impact of Minnesota’s Rule 114 - a “mandatory consideration” rule which requires counsel to formally consider the possibility of ADR and allows judges to impose a requirement of ADR in some cases - on civil litigation practice suggests similar shifts in the ways some lawyers approach the question of how much information is necessary before opening settlement negotiations. Although in contrast to Rule 24.1, Minnesota’s Rule 114 (Minn. Gen.R.Prac 114 (1994) does not require, or apparently encourage, mediation to take place before discoveries, nonetheless some lawyers reported that they now considered settlement negotiations before discoveries. I think lawyers have gotten much better about not taking a lot of unnecessary discovery. I think we (now) make conscious decisions on what we call a plan of action.”. Others suggested that Rule 114 had speeded up the discovery process, with counsel trying to complete this before mediation. See [The Impact of Rule 114 on Civil Litigation Practice in Minnesota](#) McAdoo, B. above note 18 at 35-37.

¹⁴⁵ Ottawa-10: text units 252-253.

"I personally am concerned that if only 3% of the cases actually go to trial, that means 97% of the time all the pre-trial stuff is wasted to a large extent, so therefore 97% of money I make is from wasted time."

Another litigator, talking about his growing conviction that early mediated settlement is possible in appropriate cases, commented as follows:

Toronto-1: text unit 249

"(M)y radar is very much in tune to a deal that I think accords with the clients' wishes...what fits with the client, and is probably pretty close to what I would have otherwise got two years hence after thousands of dollars of money down the toilet in litigation. By the way, that toilet is my pocket."

These comments suggest that the experience of participating in settlements which occurred before the conventional fact and document gathering stages of litigation may have provoked some deeper and perhaps troubling reflections on what lawyers spend most of their time doing - that is, collecting factual and documentary evidence that may be critical to building the best case, but not necessarily securing the best outcome.¹⁴⁶

B. Changes in client roles and relationships

Some lawyers were frank about the power and control they were accustomed to having in their relationship with their clients.

Toronto-6: Text unit 213

"You basically call the shots when the client entrust their case to you. A good litigator runs the show. The clients always say, do you want to do. ...It's kind of like a director of a play, and when you're in court the biggest CEO is a witness and he's in your world - and you...direct this play to hopefully a good result at the end of the day in front of a judge."

¹⁴⁶

The highly publicised settlement of Stockwell Day's libel lawsuit with Lawyer Lorne Goddard, is an example in point. In that case, the original offer of a settlement of \$60,000 was finally accepted by Day, but by this point an additional \$700,000 had been expended in legal fees. *Globe & Mail*, January 21, 2001.

Although there is real diversity in the approaches taken¹⁴⁷ towards the participation of clients in the mediation process, there is widespread acknowledgment among lawyers that the assumption that the litigator will be simply left to run the file is now changing. In part this shift is economically motivated; changes in corporate and institutional attitudes towards the financing of protracted litigation are of course a response to the high costs incurred. Many lawyers whose clients are primarily institutions and corporations (for example, banks and insurers) spoke of changes in reporting requirements. One commented "(G)one are the days when insurers want 25 page reporting letters. They don't want that anymore. They want liability assessment, damages assessment, coverage assessment if coverage is an issue, recommendations, - and what can we settle this for and when...".¹⁴⁸ Another important factor is the growing number of in-house counsel and their role in managing litigation. In-house counsel are oriented towards the overall business efficiency of their organisation in a way that outside litigators are not.¹⁴⁹ Many litigators described having to work closely with in-house counsel in a manner that limits their accustomed autonomy and makes them more accountable for any decisions that extend the length and cost of litigation.

Naturally enough, institutional clients have always wanted efficient results.

Ottawa-4: text units 28-30

"In a more traditional approach, the institutional client generally still pushed to have the matter moved quickly. They didn't push it towards a mediation, they pushed it towards having the case run through the system more quickly. So they would be on us to make sure we had our discoveries early, got it through and down to a pretrial early and stuff like that...they wanted driven through the system so you got down to some point where the case settles."

However mandatory mediation and the growth in development of internal corporate and institutional ADR systems has fundamentally altered the way this efficiency goal is realised.

¹⁴⁷ See the discussion above at section 4(IV).

¹⁴⁸ Ottawa-14 : text units 80-82.

¹⁴⁹ McEwen, C. AManaging Corporate Disputing : Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation" above note 17.

Ottawa - 11: text units 216-218

“(C)ounsel who practiced for many years under the old style, where of course they took instructions and didn’t think without instructions...but I think that they had a stronger sense of their lead role...of their role in making all decisions on how a case should be managed.

Interviewer: Rather than sharing those decisions with the client?

Interviewee: Rather than getting the client as involved as they are involved under mandatory mediation.”

The inclusion of clients in mediation represents a reassertion of control by commercial clients over problem-solving. Increasing awareness of ADR in the business community may also be changing the assumption of commercial clients that litigation is the “business tough” default approach to conflict resolution.¹⁵⁰ One litigator reflected “I’ve noticed a few of my commercial clients recently, the old just fight-at-all-costs and don’t look at it (the legal bill), don’t even think about an approach (ie opening negotiations) just doesn’t seem to exist anymore”¹⁵¹ There is an important sense in which the types of outcomes typically captured by mediation - agreeing on a pragmatic monetary resolution to a conflict, perhaps preserving the business relationship and getting back to doing business - do not appear radical in a commercial context, but highly congruent with client needs and goals.¹⁵²

For the Pragmatist, the needs of clients to avoid costly trials provides a complete explanation and rationalisation for changes in practice behaviours:

Ottawa-15: text units 91-93

“When I came out of Law School all I wanted to do was trials....I wanted to be involved in the battle and the fray. But it became very clear to me within three or four years of practice that the people who were sitting across my desk from me didn’t want a trial. I mean, if they had to have a trial, then so be it. The vast majority came in with a problem and they needed the problem solved and if they could have the problem solved tomorrow, or, if they could have the problem solved three years later at a much

¹⁵⁰ John Lande suggests that executive toughness” is no longer equated with being highly litigious. See Lande, J. Failing Faith in Litigation” A Survey of Business Lawyers and Executives Opinions” above note 113 at 18-19.

¹⁵¹ Ottawa-19: text unit 80.

¹⁵² Here the “real world” of client needs fits with a settlement orientation. This raises an apparent paradox since some litigators explicitly equate litigation, *and not mediation or negotiation*, with “real world-tough” tactics. See also the discussion above at Section 5 (I) and below at Section 7(II) (“strange affinities”).

greater expense, but they got the same net result, they go through all this process - if I were to put the two options to them, I know that 100% of them would say, get it for me tomorrow. Once I realized that, I realized that that's my role, to get them what they need as quickly as they possibly could get it".

Toronto-9: text units 18-22

"The real assessment up front is what is the clients business goal. Does the client need litigation and in the practice we do, where we are typically the defendant's counsel and typically on for insurance companies, the answer is usually no. The client rarely needs litigation. The client typically wants to resolve some business problems, the sooner the better, and so that you're always looking for not how do I get to court to get a great result, but how do I get my client out as quickly and cheaply as possible."

Some comments go further in implying changing assumptions about the control and ownership of conflict, which suggests a fundamental philosophical shift rather than simply the pragmatic accommodation of a new client demand. A senior member of the Ottawa Bar commented as follows:

Ottawa-5: text units 85-87

When I started practicing back in the mid 60's there was a terrible arrogance in our profession. We thought all clients were not necessarily idiots but didn't know what was best for them, and the client had no idea what was going on in the legal system. People are 100% more sophisticated now, know what goes on in the system generally and are much more conscious of where their buck is going than they used to be."

A younger lawyer made the point that expectations about client control had changed in the past 20 years, and commented that unlike his senior colleagues, he had never developed an expectation that he would run the show without significant input from his clients.¹⁵³ Some of the lawyers in our sample explicitly relate this change to an evolution of the lawyer's professional role and identity. One senior Toronto lawyer describes this as, "...away from the gunslinger and more towards the client's agent as the years have gone by".¹⁵⁴

These changing ideologies of disputing - whether economic, philosophical or pragmatic or a combination of all three - are forcing adjustments within practice. The legal profession cannot afford to be out of step with these developments. Its legitimacy (especially its monopoly status) depends

¹⁵³ Ottawa-11: text units 216-228.

significantly on its ability to develop requisite expertise to meet these new client expectations. At present, commercial clients minimally expect counsel to be able to provide them with information and advice on non-adjudicative dispute resolution options and services. Increasingly, this may also include expectations about the effective strategic use of ADR processes, design knowledge skills for discrete processes and excellent mediation/ negotiation behaviors.

C. Changes in settlement strategies and behaviours

Toronto-14: text units 236-237

I think there has been an increasing acceptance of our role being dispute resolution rather than masters of the adversary system. I think there has been an increasing willingness and acceptance of alternative dispute resolution mechanisms as being a integral part of the process”.

The entire sample reflected a recognition that legal practice in general and civil litigation in particular has been significantly altered by the barrier of legal costs. Being litigious and adversarial in the context of a suit in 2001 is likely to be vastly more time-consuming and expensive than bringing a case to trial 30 years ago.¹⁵⁵ This change is well illustrated in the following quote:

Toronto-20: text units 176-182

“I used to think my role as a lawyer was to go take cases to trial and win. And I think that because I was called in 1979 in the area I practiced in that's what the first sort of 10 years in my existence was like. I did lots and lots of jury trials and we took every case to trial that we could and that's what I felt was my duty. And I loved it. It's cases that become more complex and it's larger sums of money are at stake with the increasing costs of litigation. My role now appears to be as a settler.”

There was much less unanimity when lawyers were asked whether as a consequence they had developed new and different settlement strategies, in particular in relation to mediation. We have already seen that some of the sample at both sites described changes in their settlement strategies and behaviours as limited to the requirement that they prepare more up front in order to be ready sooner

¹⁵⁴ Toronto-18 : text unit 120.

¹⁵⁵ See for example the anecdote at Ottawa- 10 : text units 59-65.

for mediation.¹⁵⁶ Typically, counsel who saw nothing really new about mediation (the “Dismissers”) and those who were opposed to mediation (the “Oppositionists”) were unlikely to identify any real changes in the ways they thought about and strategised around the prospects of settlement in any given case. Some individuals who tended to these views did acknowledge that the outcome of mediation was sometimes surprisingly good, but had apparently not changed their bargaining approach as a result. However, in contrast, lawyers who appeared to be more engaged in the mediation process - whether as Pragmatists, Instrumentalists, or True Believers - had a great deal to say about the impact of their settlement behaviours.

Some of these behaviours suggest fundamental changes in how these lawyers think about conflict and appropriate ways to find resolution, if for no other reason than continued exposure to consensus-building processes. For example,

Ottawa-16: text units 125-127

“Less and less do I find that I have to take positions that are very black and white and simply advocate that position and put blinders on and go straight ahead and say there’s an offer, take it or leave it - and may be that’s partly caused by repetitively being put in a room with a bunch of people and a mediator and sitting down and to try and work out solutions to the problems.”

One theme that emerged with some consistency from the Ottawa data was that mediation has changed both the ways and the extent to which counsel thought about and analysed the interests and perspectives of the other side in a law suit, as opposed to being focused exclusively, or almost exclusively, on his or her own client’s position. Several lawyers contrasted the adversarial attitudes they conventionally adopted towards directly dealing with the other side - for example, in cross-examination at discoveries or at trial - with the importance of being aware and interested in what was really bothering the opposing party, what “made them tick”, and what their needs and interests were at mediation. One lawyer drew this contrast as follows:

¹⁵⁶ See the discussion at Section 6 (l) above.

Toronto-14: Text units 184-185

“You don't worry about the other side as much at a trial because they're the other side. When you're working towards a consensus - then it matters.”

Two other lawyers elaborated this same point further:

Ottawa-2: text units 112-116

“I call it the new lawyering role. You do have to be in tune to the other side's interests. You start thinking about what their interests are, and what they really need out of this mediation and a lot of times it's just that, to understand or for them or your client just to see the other side and hear their side of story and see what's driving them and their personality.”

Ottawa-3: text unit 79 - 81

“Probably the biggest change I made was really thinking about... the opposing party's profile and really making an effort to put myself in his/her shoes...I do that principally as I strategise the case”.

Three other issues arose with some regularity as examples of changes in settlement behaviours. One was an increasing emphasis on the explicit development of strategy, and strategy that considered the *whole process of litigation* rather than evolved step-by-procedural step. Several Ottawa lawyers told us that they now sat down as a team at the beginning of work on a file and made a strategic plan for mediation, negotiation, discoveries and so on.¹⁵⁷ This highlighted the need for coordinated teamwork in planning - for example between the corporate and the litigation departments inside a single firm, or between lawyers and other professionals involved in the case. A number of Ottawa lawyers also commented on the way that mediation had resulted in the development of stronger and better personal and professional relationships with other lawyers.¹⁵⁸ While this emphasis on overall strategic planning was more apparent in Ottawa, a number of Toronto counsel also spoke about the shift in focus away from procedural preparation and towards settlement strategies, in light of early mandatory mediation. As this counsel put it, “(M)y practice is more and more on the phone talking

¹⁵⁷ For example Ottawa-3 : text units 277-282.

¹⁵⁸ For example, Ottawa-13 : text units 519-522.

about strategy. Less and less do I ever mention the words civil procedure".¹⁵⁹ When asked about their discussions with colleagues generally over mediation, Ottawa lawyers readily acknowledged that they often talked about strategies in and for mediation. In contrast, Toronto lawyers seemed to talk less about mediation and when they did, this was generally limited to comparing notes on mediators in order to avoid individuals seen as incompetent or ineffectual.

A number of the lawyers in the sample - and especially in Toronto - did not think that any new skills were required for mediation, seeing the process as simply an extension of the traditional role of the lawyer to responsibly pursue settlement. These counsel did not regard what they did in mediation, aside from the procedural dimension, as being different to what they had always done in negotiation. Others did make some acknowledgment of some functional and often highly instrumental new skills - for example, showing a friendly and helpful front in mediation.¹⁶⁰ Another group described discrete new skills that they were learning and which they felt made the role of mediation advocate quite distinct from their more traditional negotiator role. Most of these counsel were in the Ottawa sample, although the following quote comes from a senior Toronto litigator:

Toronto-20: text units 186-190

"So my role has significantly changed and now I don't think a litigator can be a litigator without also being a....person who has advocacy skills relevant to conducting the process of mediation....(H)ow do you do an opening statement? How do you identify issues? How do you know to prepare yourself into what issues you want to give up? What issues do you want to hold on to? How do you best present your client's case? *All of those things are done quite differently at the mediation* (my italics) because the adversarial process to a large extent has been dropped.... (N)ow instead of coming in as an aggressive advocate saying I'm going to take you to court, you've got to come somewhat conciliatory because you are there to settle"

Many of the particular skills and tools identified in this statement, and also in the comments of other counsel, relate directly to the need for a closer analysis of the other side's interests (above). Other skills talked about by counsel include adopting a conciliatory manner and tone; an ability to build

¹⁵⁹ Toronto-9 : text unit 303.

¹⁶⁰ See for example Toronto-7: text units 186-187.

rapport with the other side; matching the mediator to the case; displaying a confidence and openness; thinking outside the “box” of conventional, legal solutions in developing creative problem-solving skills;¹⁶¹ and related to this, an increased knowledge and awareness of business context.

A number of lawyers who were positive about mediation were at pains to emphasize that this was “...still advocacy.” “Its just another arrow in the quiver of advocacy”.¹⁶² Another reflected that lawyers may only be just beginning to become aware of what made for a skillful mediation advocate. “I don't think people really know what makes a good lawyer for the client in a mediation. We're starting to understand what makes a good mediator. But, I'm still at a loss as to what role I really play.... Maybe that will develop over the next five or ten years.”¹⁶³ This underscores the point that many lawyers now believe there to be discrete and different skills involved in mediation advocacy, and that this is not simply a matter of reproducing traditional positional bargaining skills.

D. Changes in attitudes towards the use of mediation

The data collected at both sites reveals a widespread belief that the level of acceptance of mediation has increased, and the level of skepticism has decreased, over the past several years. Some lawyers put this change down to the mandatory mediation program and being “forced’ to use mediation. Interestingly, acknowledgment that there has been a general shift in attitudes towards mediation is reflected fairly strongly in the Toronto sample, even though there is greater evidence of both the instrumental use of mediation and continuing resistance to mediation among this group than in Ottawa. Many Ottawa counsel spontaneously expressed their opinion that the Toronto Bar had not accepted the use of mediation at the same level as the Ottawa Bar. One Ottawa counsel¹⁶⁴ commented that “... certainly in Toronto there isn't the acceptance (of the underlying philosophy of the

¹⁶¹ For example, Ottawa-16: text unit 125.

¹⁶² Ottawa-15: text units 245 and 255.

¹⁶³ Toronto-18: text units 266-271.

¹⁶⁴ Ottawa-5: text unit 485.

Rule) and there's still the ambush mentality.” Almost all the individuals in the Ottawa sample talked about significant changes in attitudes towards mediation, both personal and throughout the local legal community. When Ottawa counsel reflected on the changes they had seen in the five years since mandatory mediation was first introduced into the Ottawa-Carleton region, they usually described the initial resistance and cynicism as one might an amusing historical anecdote and almost always at arms-length (suggesting that they did not go along with such cynicism at the time, it was their colleagues who were the sceptics not they). For example,

Ottawa-12: text units 82-84

“There was a lot of rumbling at the beginning, likely as you have probably heard. The reason, as I've been told...is look, we're big people and we can settle the darn thing, what do we need a third party for and why do our clients have to be there?”

In order to explain what they saw as a quite different contemporary climate, respondents identified change along a number of related continua. This included moving from skepticism about the usefulness of mediation towards acceptance of its value even where it does not result in settlement; from working within a wholly legal paradigm to being more open to settlement possibilities that are “outside the box” and which counsel may not anticipate; from approaching mediation in the same way as traditional negotiations to recognising that it requires discrete advocacy skills; and from discomfort with client involvement to a level of comfort and appreciation of its contribution. This latter change - and its relationship with other assumptions about settlement negotiations - was described by one Ottawa counsel in the following frank and colourful terms:

Ottawa-7: text units 56 - 62

“It completely caught me off guard at first. The first few mediations, I hadn't had any mediation training. My only training was the general attitude in the profession that this is a lot of horse crap and I had settlements hit me between the eyes and I couldn't believe my clients sold out on me the way they did. I was concerned that I had a serious client control problem.”

The same lawyer went on to describe his comfort now with involving clients very actively in the mediation process. Other counsel also described their transition from sceptic to “believer”. Here is one such story.

Toronto-20: text units 590-608

“(W)hen mediation first came in 1990 I couldn’t believe it. What a load of rubbish. What do I need a mediator in there to do when I can sit down and talk to the lawyer?...You couldn’t have persuaded me of that in 1991, 1992, 1993 I thought it was ridiculous. I couldn’t see any benefit to it. I couldn’t see that it would resolve anything. It wasn’t that I was concerned that my files were going to get closed down. It was more of a concern that I was just wasting my time and money. So I wasn’t interested in doing any of that stuff and then I got forced into doing these things and I got pregnant, my son was born in 1991 and everybody was starting to do these mediations and I thought, “I don’t know what I’m doing”, so while I was pregnant I thought I will take this time to go and do a mediators course. So I went and did a five day course and learned how to be a mediator and thought, wow you know this has it’s own little advocacy skill set and it’s kind of fun, it’s different, it’s not quite like doing a case but, if it’s going to be coming here I might as well make the best use about it. Figure out what I can do. And now I’m a believer and I accept that mediation is a good thing.I think you’ll find that I’m a person who has now converted and I admit to being a believer in mediation”.

The generally greater levels of experience with mediation among the Ottawa group might suggest that acceptance along the continua described above increases with experience.¹⁶⁵ One Toronto counsel volunteered this as an explanation for his own shift in attitudes.

Toronto-11: text units 453-455

“I think it’s fair to say that my experience with mediation has improved every time and I suspect it will continue to improve for a while.”

VII. Reconciling Mediation within the Culture of Commercial Litigation

A. At a personal level : the “ideal types” and their experiences of role dissonance

Counsel who participate regularly in mediation would appear to confront a number of challenges to their traditional adversarial role. Simply on a technical level, the process is different to that of most traditional settlement negotiations because it includes a non-judicial third party in a non-authoritative role, takes place face-to-face rather than by correspondence, and directly involves their

clients in some capacity.¹⁶⁶ Furthermore - at least in the case of mediations under Rule 24.1 - mediation occurs significantly earlier than discussions over settlement generally commence. At a conceptual level, it is not difficult to imagine that the consensus-building orientation of mediation, the development of an appropriately settlement-friendly style of advocacy, and the business-driven outcomes sought by many commercial clients might also present some role tension for the traditional litigator, and possibly presage significant changes in both professional identity and personal meanings. One example that implicates both practice and principle is disclosure; whereas problem-solving mediation and negotiation require some exchange of information to be effective, there is a strong bias against revealing one's cards or disclosing any sign of weakness of adversarial ethics. As well as internal role conflict ("what is my role here, to fight for the last cent or to facilitate settlement?") there is also the potential for role conflict produced by external factors and expectations ("I prefer going to trial, early settlement does not make sense for my business").¹⁶⁷

The clarity of the traditional litigator's role - variously described as "zealous advocate",¹⁶⁸ "a son of a bitch",¹⁶⁹ "a manager of war",¹⁷⁰ and a "pitbull"¹⁷¹ has eroded as litigation costs have risen exponentially and commercial clients have begun to expect different approaches to creative problem-solving. Such expectations are in many ways at odds with formal legal training, as several respondents remarked. For example,

Ottawa - 1: text units 52-53

¹⁶⁵ See also the discussion below at 7(III).

¹⁶⁶ For the well-documented characteristics of traditional lawyer-to-lawyer negotiations, see for example Clarke, S., Ellen, E. & McCormick, K. "Court-Ordered Civil Case Mediation in North Carolina : Court Efficiency and Litigant Satisfaction" Institute of Government, University of North Carolina 1995.

¹⁶⁷ These types of external conflicts have already been observed in data on the economic impact of mandatory mediation (above at 6(I)) and regrets on the absence of both trials and "old-style" lawyer-to-lawyer negotiations at discoveries (above at 5(I)).

¹⁶⁸ See for example Freedman, M. Lawyers' Ethics in an Adversary System Bobbs-Merrill, 1975 and the ABA Model Rules of Professional Conduct, 1983.

¹⁶⁹ Ottawa-6: text unit 113.

¹⁷⁰ Toronto-2: text unit 47.

¹⁷¹ Ottawa 1: text unit 53. The same lawyer continued Aits kind of the last person left standing wins." (Text unit 62).

I mean we're trained as pit bulls, I'm not kidding you, I mean, we're trained as pit bulls and pit bulls just don't naturally sit down and have a chat with a fellow pit bull, the instinct is to fight and you just get it from the first phone call. I'm bigger and tougher and strong and better than you are. The whole attitude is one of confrontation and to go from that, you're thinking well, do I bark back or how do just switch this into a "let's talk about voluntary mediation?"

Ottawa - 2: text unit 298-299

"First and foremost our training is in rights-based advocacy, that's first and foremost and that creates the tension because you're saying settlement, they say why? You sort of feel like why do I have the real training, maybe I don't need that, I should just have the training in problem solving. We do have that training and it's there and you still have to use it and so the compromise is always cut against your training to a certain extent"

Nonetheless, not all counsel identify the same type or intensity of role conflict. Some lawyers in fact experience little or no tension between the goals of mediation and those of litigation. Generally, lawyers who adopt a pragmatic, instrumental or dismissive approach to mediation are disinclined to see what happens in mediation, or their role within the process, as substantially different from traditional adversarial norms. Their approach is characterised by an effort - not necessarily explicit or acknowledged - to accommodate and absorb a mediation model within the norms of more conventional litigation strategy. The Dismissers, in particular, sees mediation as a new "fad" which presents little different to the traditional model of negotiation towards settlement and therefore no special challenges to the role of counsel. Because they do not regard mediation as adding anything useful or different to lawyer-to-lawyer negotiation, those adopting a Dismissive approach do not generally see anything either conflictual or complex about engaging in the process. In fact, mediation is seen by Dismissers and Oppositionists as quite unnecessary and unworthy of their attention. This view is captured in the following statements:

Toronto-6: text units 233-237

Interviewer: "What do you see as the essence of your role in a case that is mandated into mediation?"

Interviewee: Basically complying with the rules. Minimal compliance because I don't think it's going to help me settle any better and it's just more money spent.... I just find it's a headache for counsel who have busy practices

and it doesn't make it a case that's going to settle any easier than any other case I've had."

Toronto-9 : text units 317-318

Interviewer: "In what ways does representing a client destined for mandatory mediation require you to do anything different or change that role at all?"

Interviewee: It doesn't at all, it just, you just fit the mediation in. Usually it's a useless, time consuming step because I'd have settled the case if it was ready to go at the time of the mandatory mediation was called for."

Other Dismissers effectively neutralise the use of mediation by understanding it as a process whose efficacy is subject to their primary role as negotiators, In this way any potential conflict between the lawyers's traditional negotiation role and mediation is eliminated. For example,

Toronto-6: Text units 136-137

"We decided the lawyers could settle this easier. So every two months, one time I took them to Canoe upstairs for drinks, they take me and we try and settle, we're getting close, we're now extremely close but we're not there yet and the mediation day, everyone acknowledged, was a waste of time."

Others see themselves as integrating mediation and more conventional "litigotiation"¹⁷² in a pragmatic fashion. For example, the Pragmatist does not experience any particular sense of role conflict because both his clients interests, and therefore his own interests, are in settlement.

Those adopting a Pragmatic approach to mediation have probably already integrated some business norms and practices into their negotiating strategy, and are accustomed to settling most cases. Having set his benchmark by his clients' stated needs, the Pragmatist is flexible in his perspective on the appropriate role he should play in any one case. If it best meets his clients' needs to negotiate or mediate, he will do that (and has always done that); if it calls for bringing a motion, he will do that. This attitude is illustrated in the following exchange:

Ottawa-8 : text units 280-283

¹⁷²

Galanter, M. A Worlds of Deals: Using Legal Process to Teach Negotiation" above note 5.

Interviewer: "Do you see any tension between the traditional win-lose situation, and mediation?"

Interviewee: No, because mediation doesn't mean you have to settle. If mediation was requiring you to settle that would be one thing. We just have to remember that *it's our clients that tell us what to do.*" (my italics)

Pragmatists themselves explain any sense of dissonance they might have to be the consequence of involving their clients directly in the bargaining process in mediation, rather than as a consequence of the intrinsic norms or dynamic of the process itself. One lawyer described this as follows:

Toronto-16 : text units 193-196

I do get surprised in mediation, but it's seldom surprise about the process.... The surprise is more in the sense of what they're prepared and willing to do to get towards a resolution. That's where I'm surprised and that surprise tends to be their changing their bargaining position or settlement strategy."

Many Pragmatists described similar situations which in some cases led to what they felt were ethical dilemmas around settlement. We were given numerous examples of cases where the lawyer felt that the client could have done better, but eventually bowed to his or her wishes. A good example is the following story:

Toronto-17: text units 106- 114

"Sometimes I've found it harder to take off the advocate hat and see clients coming in prepared to settle. I can think of one mediation with a number of different parties where once again, we were acting for a bank as a plaintiff in this case, and the banks claim was \$4,000,000. There were a number of parties including two insurers of the other side and the merits of the case I thought justified a pretty high settlement. Once again in this case a new account manager comes in and was about to retire and wanted to get a win on his docket before he retired. He just ended up settling for 20 or 30 cents on the dollar in order to avoid going to trial, and more importantly to wrap it all up before he retired. In that case I found myself in caucus saying to the client "this is obviously your decision, this is a business decision and I will respect your decision but, I think the case is worth a lot more than 20 or 30 cents on the dollar". I have found it difficult at times to take off the advocate hat and to be sensitive to the clients business objectives"

The Instrumentalist - who is far more skeptical than the Pragmatist about the benefits of mediation - is more likely to be aware of some tension or contradiction between the settlement norms of

mediation and the goals of litigation. He will volunteer that he is often “play-acting” in the mediation process, in order to seduce both the third party and the other side into believing that he is genuine about settlement - when in reality he is using the mediation process in an instrumental way to advance adversarial goals. While the Instrumentalist is thereby implicitly rejecting (consciously or otherwise) the idea that there may be inherent (and perhaps unpredictable) benefits to be derived from settlement discussions, his efforts to intentionally “subvert” the process also imply a recognition of the divergence of values and roles between mediation and litigation (otherwise there would be nothing to subvert).

The Instrumentalist regards “switching hats” (or behaviours, or strategies) as something that lawyers often have to do, and moves with ease and little apparent discomfort between an adversarial role and a more conciliatory role. We were given many examples of this by our respondents.

Toronto-7: text unit 185-187

“At mediation you’re going to see Miss Helpful...I’m going to be the most helpful, cheerful, flight attendant type person you’ve ever seen - but if that mediation fails, then we’ll just go for the jugular.”

Ottawa-4: text units 100-102

“You have to have a different mind set. It’s almost like I drop down into that mind set for the mediation - and then come out of that mind set when I’m back into the rest of the judicial system”.

Ottawa-15: text units 82-83

“So I tend to be fairly non-aggressive. If I get in a courtroom I’m quite different. I think people all of a sudden see a different person, but that’s just *the nature of the business*.” (my italics)

While most of these lawyers did not feel discomfited about making this switch others did admit to some more conflicted feelings about the appropriateness of playing what one counsel described as a “two-faced’ role.¹⁷³ For example,

Toronto-7: text units 194-197

Interviewer: “And are you comfortable with that role switch?”

¹⁷³

Toronto-4 : text unit 75.

Interviewee: (I)t feels kind of slimy doing it, just from an ethical point of view. It feels slimy, it's a complete act and usually the clients on the other side are so naive as to buy into the act and from an ethical point of view that doesn't feel that great, but it's what we do."

Those counsel who appear to experience most tension between their role in mediation and as traditional litigators tend to be those with the strongest views on mediation, both positive and negative, and the most to say generally on the question of professional identity. Those who express Oppositionist sentiments¹⁷⁴ tend to firm and forthright views about the importance of strong advocacy values, which they see as potentially undermined by mediation.

Toronto-2: Text units 281-283

"The right philosophy is that we're going to have disputes, and conducting serious disputes is going to cost a lot of money and the trick is to get me before a judge as fast as possible, and have a decision. Mediation is not the solution. The whole mind set is different."

Toronto-6 : Text units 375-378

"So you'll find mediation is going to be the way to go, but we have a watered down legal system. Our system was built on the adversarial process and that will die.... I'm not sure that's going to be the best system in the end of day. The best system should be getting the best results through some sense of adversarial process with experienced lawyers, so at the end of the day clients can feel that they got the right result, as opposed to a manufactured result that no-one's crazy about."

The role of the "manager of war" in an adversary model is so clear and fixed for those expressing Oppositionist sentiments that one lawyer responded thus when asked how he would react to the suggestion of settlement discussions.

Toronto-2 : text units 50-53

Interviewer: "What if the client starts for whatever reason to get cold feet and says to you, I want you to go to them and ask them if they'll talk settlement, how might you respond to that?"

Interviewee: Very badly!

Interviewer: What would you say to the client?

¹⁷⁴ For example, Toronto-2, 6, 11 & 14.

Interviewee: I would say to the client, if you're interested in settlement, you go and talk to the other side about it, I'm very bad at it, my job is to manage a war, not to manage a peace."

At the other end of the continuum of attitudes towards mediation, the True Believers experience a strong feeling of tension between their adversarial and their settlement roles, often finding themselves reflecting on what this means for their own legal practice and for the practice of law in general. In particular, several counsel commented on the ways in which mediation offered a quite different analysis of conflict - its causes and consequences - than traditional litigation. For example,

Ottawa-14 : text units 296-298

"...(A)s lawyers or as litigation lawyers or advocacy lawyers, maybe we're all getting cynical and all we think of is in terms of people wanting either money, or the equivalent of money or related to money, saving money, whatever. You go to a mediation, and it's all about an apology or an acceptance of why somebody did something the way they did it, that happens and it's astounding."

Several of those who identified themselves as True Believers remarked on the inadequacy of their law school education in preparing them to take on this type of role.¹⁷⁵ Some reflected that the sense of role tension they experienced might be diminished among the younger generation of lawyers for whom settlement processes were familiar and almost normative.¹⁷⁶ A number of lawyers who were supportive of the use of mediation also pointed out the tension between settlement and the economics of legal practice. One remarked, "I'm an advocate, but I'm not blindly adversarial. I'm constantly putting myself out of business and it's a difficult thing to do...".¹⁷⁷ Others, while readily acknowledging the differences that mediation makes to their practice strategies, continue to work at integrating these norms into traditional values and vocabulary about advocacy and representation. For example,

¹⁷⁵ For example Ottawa-15: text unit 93, Ottawa-16: text unit 134.

¹⁷⁶ One lawyer commented that the older generation "weren't trained to negotiate. They were trained to fight." (Ottawa-14: text unit 172) For other examples, see Ottawa-11: text units 470-480, Toronto-14: text unit 243, Toronto-19: text units 339-340.

¹⁷⁷ Toronto-16: text units 463-364.

Toronto-5: text units 202-203

"...I see a completely different form of adversary process. You call it a mediation that we're working together to come up with a deal, but we're still adversaries- I'm still trying to get the best possible deal I can".

Toronto-14: text 249

"It certainly it requires a different mind set but one of the things you have to learn is that you can do a mediation without compromising your adversarial position - that's one of the things you try and do."

B. At a systemic level: the mutual impact of mandatory mediation and traditional commercial litigation

A key theoretical question for this study has been what is the mutual impact of mandatory mediation and the traditional adjudicative process? There has been much speculation about the potential of mediation to change or diminish the adversarial cultural of litigation, with a strong case being made that court-connected mediation will inevitably become co-opted or assimilated into the dominant model.¹⁷⁸

Whatever form it actually takes - and this study has demonstrated the diversity of experiences of mediation - there are some important differences between the assumptions of mediation and those of adjudication. A core assumption of mediation is that the particular facts of a conflict are often symptoms of an underlying dispute which is primarily over interests or resources rather than values - therefore a negotiated compromise is possible. The core assumption of the adjudicative model is that conflicts are always normative, requiring a determinative moral/legal outcome by a third party. The extent to which these two approaches to conflict resolution remain distinctive depends on how far the

¹⁷⁸

See for example Menkel-Meadow, C. "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"" 19 Florida State University Law Review (1991) 1; Gordon, E. "Attorney's Negotiation Strategies in Mediation: Business as Usual" 17 Mediation Quarterly (2000) 377; Gerencser, A. "Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must Be Changed" 50 Florida Law Review (1998) 843; and Welsh, N. "Making Deals in Court-Connected Mediation: What's Justice

former remains a genuine exercise in consensus-building - which may or may not involve explicit or exclusive reliance on legal standards - and the latter retains its focus on authoritative argument and decision-making. While the differing assumptions of these two approaches to conflict resolution need not be understood as incompatible or as either/or, any marriage or merger between them will inevitably change the character of each. Depending on how we understand their mutual impact, the character of both mediation and traditional adjudication may be changing (“convergence”), or one may be changing at the expense of the other (“assimilation”). A third possibility is that there will be no mutual impact and the simplistic summary of fundamental differences offered above will remain accurate (“divergence”). Fourthly, one might hypothesize that the mutual impact of the two models may be such that over time, a new paradigm of dispute resolution is created which replaces both mediation and adjudication. An important consideration here is that these two models of dispute resolution are not interacting at arms-length. Rather, mediation is being inserted into a process that is already headed towards adjudication. In the cases described by the lawyers in this study, mediation (whether private or court-connected) and adjudication are intertwined and are being used simultaneously by the parties to resolve their dispute.¹⁷⁹

These four hypotheses about the mutual impact of mediation and traditional litigation can be examined in the light of the data provided by this study. The most common outcome where an established culture meets a marginal or less powerful one is the assimilation of the latter by the dominant tradition. The hypothesis here is that adjudication will simply swallow, subvert or assimilate the different goals of the mediation process - which might include simply holding up the “touchy-feely” approach of mediation to ridicule¹⁸⁰ - and turn it into a traditional exercise in positional bargaining.

Got to Do With It?” forthcoming.

¹⁷⁹ The answer to the question of mutual impact may also depend on whether one defines mediation as mandatory mediation, or private commercial mediation. This study has focused on the use and impact of mandatory mediation via Rule 24.1 in Ontario, but many of the respondents spoke about their parallel experiences in private commercial mediation also. It is not possible to draw separate conclusions from this data on any difference between the impact of private commercial mediation, as distinct from mandatory mediation.

¹⁸⁰ See for example Toronto-12 : text unit 455.

Apparent evidence of assimilation includes the apparent hijacking of court-connected mediation by a small group of highly evaluative retired judges (memorably described by James Alfini as the “hashers, bashers and trashers”¹⁸¹) whose often pressured approach focuses on the legal merits of the dispute. Certainly the respondents in this study expressed a clear preference for this type of mediator.¹⁸² Another assimilative use of mediation noted by this study was the instrumental use of mandatory mediation as an early, cheap discovery process, thereby reducing the possibility of it achieving the more transformative goals - for example relationship building, reality-checking and even some personal catharsis - described by some respondents.¹⁸³ A slightly different, but perhaps similarly motivated, response to mediation is to neutralise its impact by not taking it very seriously or preparing in a way that makes the process likely to be effective (a Dismissive attitude). Both approaches suggest the assimilation of mediation norms by the dominant adversarial norms, and little if any impact of mediation on those norms either conceptually, or in practice. Even among those who take mediation more seriously, there are some signs in Ottawa of a return to the norm of only exploring settlement after discovery - what one Ottawa lawyer described as “that old put-it-off- until-it-really-needs-to-be-done” approach¹⁸⁴ - which could also be seen as an example of assimilation.

Nancy Welsh has suggested that there is significant evidence of the assimilation of mediation into a model of adversarial litigation practice. She writes that “(C)ourt-connected mediation of non-family civil cases is developing an uncanny resemblance to the judicially-hosted settlement conference”, hallmarks of which are lack of direct client involvement and a focus on the legal arguments and their relative merits.¹⁸⁵ Without direct and systematic observation of mediations, it is

¹⁸¹ Alfini, J., “Trashing, Bashing & Hashing it Out: Is This The End of ‘Good Mediation’?”(1991) 19 Florida State University Law Review.

¹⁸² The same strong preference was observed by Professor McAddo in her study of lawyers in Minnesota. See note 18 above at 37-39.

¹⁸³ See Section 4(II) above.

¹⁸⁴ Ottawa-14: text unit 67. See the discussion at Section 4(I) above.

¹⁸⁵ Welsh, N. “The Thinning Vision of Self-Determination in Court-Connected Mediation : The Inevitable Price of Institutionalisation?” 6 Harvard Negotiation Law Review 101 at 125. Welsh argues that this is the price that has been paid for the legitimacy bought with the institutionalisation of mediation within the court system.

difficult to know how accurate a description this might be of commercial mediations in Ontario. While the respondents in this study expressed a strong preference for evaluative mediators, it is less clear that counsel see the function of these mediators as simply running a judicial-style settlement conference. Rather, many comments suggested that lawyers wanted the mediator to have a legal evaluation in their back pocket if all other efforts at settlement failed.¹⁸⁶ Flexibility of approach (hardly a hallmark of judicial settlement conferences) was also seen as important. Moreover, there is considerable evidence in this study that at least some counsel recognise the importance of clients participating directly in mediation,¹⁸⁷ although it is fair to say that the lawyer still often sees himself as firmly in the driver's seat.¹⁸⁸ This in itself need not be seen as evidence of assimilation - the lawyer still has a role to play and process manager may be one of these.

Generally, however, the comments of litigators in this study suggest that something more diverse, complex and subtle than simple assimilation is occurring in Ontario. Another possibility when different cultures of conflict resolution encounter one another within the same space - as mediation and traditional litigation now do in the civil justice system - is that some natural convergence occurs.¹⁸⁹

"Convergence" here is intended to describe mutual influence that falls short of transformation or integration or the creation of a new, substitute paradigm,¹⁹⁰ where each culture of conflict resolution takes on some of the ideas and values and practices of the other. The convergence of different cultures might be compared to a chemical combination, where the essential properties of each process or culture are significantly changed as a result.¹⁹¹ There are a number of ways in which this study suggests some convergence between the practice of both mediation and litigation. For example,

¹⁸⁶ See the discussion above at Section 5(II) especially 50-51.

¹⁸⁷ See the discussion above at Section 6(II).

¹⁸⁸ For example, Ellen Gordon reports that in observed mediations, the minority of clients who did play active roles" were supporting rather than starring players". Gordon, E. *Attorney's Negotiation Strategies in Mediation: Business as Usual*" above note 178 at 383.

¹⁸⁹ I am grateful to my colleague Paul Emond for his discussion of the potential of convergence and divergence.

¹⁹⁰ Thomas Kuhn's concept of paradigm shift" means the actual replacement or substitution of the old with a new paradigm - that is not what is contemplated here. See above note 39.

¹⁹¹ I am grateful to Ellen Travis for this metaphor.

mediation practices have adapted to the court-connected context by formalising rules on exchange of documents¹⁹² and the increasing use of evaluative mediators. Mediation practice in the context of civil litigation is inevitably affected by a parallel process of fact-finding and theory-building towards adjudication, and one would expect the “shadow of the law”¹⁹³ to be more significant as a result in the ensuing negotiations. Many of our respondents suggest that litigation practice has also been affected, for example, by challenging the entrenched assumption that settlement negotiations should not be contemplated until after discoveries,¹⁹⁴ or that clients should not participate directly in negotiations.¹⁹⁵ A number of counsel noted outcomes of mediation that were critical to resolution which they would not have otherwise contemplated, such as apologies and acknowledgments.¹⁹⁶ A number also described developing new advocacy skills for the mediation which they saw as making new and distinctive demands on their expertise.¹⁹⁷

Of course, the extent and authenticity of convergence is always questionable. For example, one might view the development of the modern welfare state as the consequence of the influence of principles of Marxism and collectivism on industrial capitalism; or a minimally costly measure to defuse opposition and stabilise the control of the corporate classes.¹⁹⁸ In the same way, the moderate (in Toronto) and widespread (in Ottawa) acceptance of mediation as a legitimate dispute resolution process might be seen as a sign of the influence of principles of consensus-building on the culture of litigation; or simply a fashionable “front” for what is essentially the same rights-based model, manipulated to advantage by the Instrumentalists or the Dismissers or at best, embraced by business reasons by the Pragmatists. Certainly convergence often gives rise to some “strange affinities”. Here

¹⁹² Rule 24.1.10.

¹⁹³ Mnookin, R. & Kornhauser C. Bargaining in the Shadow of the Law : the Case of Divorce” 88 *Yale Law Journal* (1979) 950.

¹⁹⁴ See the discussion above at Section 6 (I).

¹⁹⁵ See the discussion above at Section 6 (II).

¹⁹⁶ See the discussion above at Section 4 (II) & (III).

¹⁹⁷ See the discussion above at Section 6 (III).

¹⁹⁸ See further, Macfarlane, J. When Cultures Collide” in Bell C. and Kahane, D. (eds) Intercultural Dispute Resolution in Aboriginal Contexts: Canadian and International Perspectives, University of British Columbia

there appears a coincidence of interests between private market capitalism and informal, confidential, mediation processes for commercial disputes.¹⁹⁹ One respondent went further to reformulate the relationship of law and business issues in the context of mediation as follows:

Ottawa-19 : text units 217 & 344

“Quite often ...this is more of a business decision than a legal decision...(A)t mediation it’s a business decision really, taking into account the legal parameters”

A possible explanation for the positive attitude adopted by many business lawyers towards mediation - especially those with greatest experience of mediation - is the apparent compatibility of private business solutions developed in mediation with business corporate needs. What many would see as a vehicle for social and personal transformation (mediation and consensus-building) may in fact double handily as a means to produce private, unregulated, efficient and highly pragmatic business solutions for corporations. This raises questions about the inherent value of convergence, whatever form it takes, which are outside the scope of this paper. For example, is private commercial mediation at odds with the public rights culture of adjudication? Should commercial interests have the means to avoid their legal responsibilities? Is a lawyer-dominated model of mediation necessarily a good or a bad thing?

A third possibility is that forcing the co-existence of mediation and adjudication within court-connected mediation actually creates divergence, rather than convergence. Different approaches and understandings of conflict are reinforced and further entrenched with little or no enhanced mutual understanding. Some evidence of divergence can be seen in this study in the different responses within the profession to the growth of mediation, most dramatically in the gap between the True Believers on one hand, and the Oppositionists on the other. The rhetoric of “faith” in mediation serves

Press, forthcoming 2001.

¹⁹⁹

It is interesting to note that the relationship of business thinking - business values, conventions and practices - to commercial litigation might be seen as a possible parallel for the integration of mediation and adjudication models in dispute resolution. Many respondents had already thoroughly integrated business thinking into their litigation practice, so that their approach to a commercial file went beyond a legal analysis to consider practical business interests and solutions, and regarded the business expertise and experience of

to heighten the impression of divergence (between the “believers” and the “non-believers”). The potential for two separate legal practice “tracks”, one oriented to settlement and the other to fighting, can also be seen in the emergence of specialist settlement-only counsel,²⁰⁰ the establishment of “ADR boutiques” and ADR Departments” inside larger firms, and the development of collaborative lawyering networks, where lawyers are retained by their clients exclusively to negotiate, and are for barred from litigating.²⁰¹

Finally, the consequence of prolonged exposure to another - different, challenging - approach to conflict resolution may eventually be fundamental changes in the internal norms of each approach that go beyond mutual influence to the creation of new paradigms for conflict resolution. An authentic integration of values and practices would offer a new paradigm of litigation practice. For example, is it becoming normative for settlement discussions to be credible and worthwhile earlier in the litigation process and not seen as an admission of weakness?

Toronto-14: text units 87-87

“I think what mediation has done is made it easier to try and negotiate a settlement or discuss settlement without doing so from a point of view or giving the perception that you’re doing so because you’re worried about your case, or it comes from a point of weakness because you can just say everybody does it, so you want to do it.”

While there is some evidence of some systemic changes in practice, the emergence of a new, substitute paradigm is clearly not supported by the data. What one respondent called “the new lawyering role”²⁰² is far from normative for civil litigators. However, there are some signs that existing paradigms are under pressure, in particular in the descriptions of a sense of role conflict and dissonance among some litigators.²⁰³ The introduction of early mediation processes into commercial

the client as integral to problem-solving.

²⁰⁰ Coyne, W. The Case for Settlement Counsel” 14 Ohio State Journal on Dispute Resolution (1999) 367.

²⁰¹ See for example Skolar, T. Collaborative Law – “Method for the Madness?” 23 Memphis State University Law Review (1993) 667.

²⁰² Ottawa-2: text unit 145.

²⁰³ See the discussion above at Section 7 (I).

litigation, where advocates who have been trained to be highly competitive and adversarial, seems likely to impact the core identity of the players, both personal and professional.

In summary, while perhaps the most compelling evidence gathered by our interviews with commercial litigators points to some assimilation - and hence erosion - of the informalism of mediation by traditional legal adversarial values, there are also signs of both convergence and divergence. The following quote captures the idea that all three consequences might be occurring simultaneously, with none yet the clear outcome of the co-existence of mediation and adjudication.

Toronto-12: text units 455-460

“There's a tendency of some mediators to say, “Oh gee, can't we settle this, isn't there a way that we can all just kiss and make up and go home?” (*assimilation/ridicule*).....that type of mediation - maybe it works in some circumstances - but that is the antithesis of the old "take no prisoners" style of litigation (*divergence*). I like to think that myself and most mainstream litigators are somewhere in between now” (*convergence or mutual influence*)

C. Some possible variables

A small number of key variables may help to explain the diversity in personal responses to mediation amongst our respondents. These same environmental and circumstantial factors may also shed some light on the inconclusive and apparently contradictory evidence that the result of the forced marriage of mediation and adjudication is sometimes assimilation, sometimes convergence, and sometimes divergence.

The first of these variables is the pilot site itself - Ottawa or Toronto - and the resultant local legal culture. There is a much stronger and more consistent recognition among Ottawa litigators of the impact on their practice of case management in general, and mandatory mediation in particular, than among their Toronto colleagues. Ottawa lawyers tended to offer many more concrete observations and ideas than their Toronto colleagues about the ways in which their practice has adjusted or

changed to reflect the demands of mediation. Their analysis of change and its impact on practice seemed generally to be more reflective and introspective, and the ideas they suggested more complex and sophisticated. Almost all the Ottawa lawyers we spoke with had plainly already thought about the questions we put to them, some had discussed these issues with colleagues, and this showed in the depth of many of their answers. In Toronto, many counsel seemed to be considering the questions we put to them for the first time.

Ottawa lawyers were more generally positive about mediation than their compatriots in Toronto, and often quite critical of the adversarial spirit that Toronto counsel - as they asserted - sometimes demonstrated around mediation. Almost every one of the twenty respondents in the Ottawa sample were "True Believers" at some level, even if this was often mixed in with a heavy dose of Pragmatism. In Toronto, "True Believers" were much less in evidence (7 or 8 of the sample expressed these sentiments, but not unambiguously) and those who were genuinely committed to the use of mediation generally retained an instrumental approach to representation tactics in mediation which more closely resembled traditional advocacy norms. In other words, being a "True Believer" in Toronto may carry somewhat different implications than being a "True Believer" in Ottawa, with the more ambiguous and sometimes cynical approach of the Torontonians being indicative of some wider cultural differences between the two cities.

One obvious explanation for these notable differences between lawyers at the two pilot sites is the different levels of application of mandatory mediation between Ottawa and Toronto. Mandatory mediation and case management has been used for all civil cases filed in Ottawa-Carleton since 1997,²⁰⁴ whereas in Toronto the present case management level is just 25% (this is planned to rise to 100% on July 1 2001).²⁰⁵ This means that in Ottawa there has been no alternative to proceeding under (what is now) Rule 24.1 for the past four years, whereas in Toronto it is possible to escape

²⁰⁴ 100% mandatory mediation began in Ottawa in 1997 with the introduction of Practice Direction O.R. (Ref) by Mr Justice Chadwick. It was replaced with Rule 24.1 in 1999.

mandatory mediation altogether or simply to refile.²⁰⁶ The impact of having no choice but to use mediation may be that Ottawa litigators have developed an investment in making mediation work which is not present for their colleagues in the Toronto Bar.²⁰⁷ At the same time, the aspect of coercion under Rule 24.1 is reduced in Ottawa by the apparent flexibility and willingness of the Ottawa Master to allow adjournments of mediation until after discoveries. The same dispensation appears to be far less accessible in Toronto, and this contributes to a general sense of resentment about the mandatory mediation program.²⁰⁸

The differences between the two groups may also reflect different stages of the legitimization of mediation in the two cities. A critical element of changing attitudes towards the use of mediation by litigators is the credibility imparted to the process by the support of professional leaders. Practically every one of the lawyers in the Ottawa sample commented - unprompted - on the leadership role played by Mr Justice James Chadwick and Master Robert Beaudoin in building support for mandatory mediation in Ottawa. In Toronto there are some professional leaders committed to mediation, but these are fewer and less powerful than their compatriots in Ottawa. This is reflected in peer group norms. It is still not especially fashionable for top-flight commercial litigators to be highly supportive of mediation, and certainly not of the mandatory mediation program. In contrast, the widespread acceptance of mediation, including Rule 24.1, in Ottawa is such that lawyers wish to be seen to be supportive of such a positively regarded development. For example,

Ottawa-5: text units 452 & 471

“Good lawyers, in this town, understand what mediation's about.... I think that's what is accepted in the system, so lawyers have made the change”.

²⁰⁵ For further information see www.attorneygeneral.jus.gov.on.ca.

²⁰⁶ See the discussion at Section 4(l) above.

²⁰⁷ I am grateful to Ellen Travis for this point.

²⁰⁸ See the discussion at Section 6(l) above.

It was noticeable that the questions about mediation which were on the minds of Toronto counsel were also markedly different than their Ottawa colleagues. Toronto counsel pondered aloud about the usefulness of mediation, its potential to run up additional costs, whether mediation could be shown to be settling more cases faster, and so on. These are typical of the types of questions that users pose about an innovation change as a new process or procedure takes root; their emphasis is on efficacy and improving on past performance. These issues did not arise in discussions with Ottawa counsel, who appear to assume the worth of mediation in providing a more accessible and less expensive process for clients. In a so-called pre-legitimacy stage, sceptics tend to ask “does this improve on the existing process/system, and if so how?”.²⁰⁹ At a later stage of legitimacy, attention shifts to making the new process or system work better. It is now assumed that it brings benefits and the focus becomes instead how to maximise these.²¹⁰ The Ottawa Bar may now be at a stage of acceptance that mediation is assumed to be “a good thing”, rather than requiring mediation to “prove itself”. Instead, most counsel are focused on how to use mediation effectively to serve their clients’ needs and how to improve their own levels of skill and comfort within the mediation process; investment in new knowledge and skills is rationally calculated to increase profits.

What then is the role of mediation experience in the use of and attitudes towards mediation? John Lande’s work suggests that what he describes as “faith” in mediation²¹¹ increases with exposure to the process.²¹² A study of Indiana lawyers also reached the conclusion that favourable attitudes towards civil mediation are significantly correlated with mediation experience as a representative.²¹³ The present study has found some evidence to suggest that attitudes towards mediation become more

²⁰⁹ See Tolbert, P. & Zucker, L. “Institutional Sources of Changes in the Formal Structure of Organisations: The Diffusion of Civil Service Reform 1880-1935” 28 *Admin. Sci. Q.* (1983) 22, 35-36.

²¹⁰ See Tolbert, P. & Zucker, L. “Institutional Sources of Changes in the Formal Structure of Organisations : The Diffusion of Civil Service Reform 1880-1935” *supra*.

²¹¹ Lande, J. “Getting the Faith: Why Business Lawyers and Executives Believe in Mediation” above note 29 at 171-176.

²¹² *Supra* at 199.

²¹³ Medley, M. & Schellenberg, J., “Attitudes of Attorneys Toward Mediation” above note 11 at 195-196.

positive with greater experience and familiarity with the process.²¹⁴ Here the Ottawa sample was generally much more experienced than the Toronto group. All but four of the lawyers in the Ottawa sample had had experience of 30 or more mediations, whereas in Toronto only five lawyers in the sample had had 30 or more experiences of either mandatory or private commercial mediation. Therefore the more positive and reinforcing attitudes towards mediation found throughout the Ottawa sample - and in particular the large number of True Believers - would seem to suggest that greater experience of mediation results in more favourable attitudes towards its use. At the same time this conclusion begs the question “what type of mediation experience?”. This study has demonstrated the wide diversity of experiences of mediation, reflecting different styles of mediation and mediator style, the needs and goals of the participants, the advocacy approach adopted by counsel, the relationship between the parties, issues in dispute, and so on. Furthermore there are both good and bad experiences of mediation - each respondent had at least one “horror story” to tell us. It is notable that three of the five most experienced counsel (more than 30 mediations) in the Toronto sample were also fairly or very negative about mediation.²¹⁵ However those Toronto counsel who expressed views along the lines of the “True Believer” are also generally the more experienced group (with 20-30 mediations). Those with least experience also tended to be most negative or at minimum, most instrumental, in their use of mediation.

The Indiana study correlated favourable attitudes towards mediation with a younger generation of lawyers.²¹⁶ Adopting the same logic, perhaps, almost every one of our respondents advanced the view that they anticipated that more of the older lawyers would be resistant and hostile towards mediation, with the younger group generally more open and willing to embrace it. Certainly some of the younger lawyers in both parts of the sample made the point that having been introduced to ADR at law school, and/or having only practised in a climate in which mediation was promoted, they had fewer

²¹⁴ See the discussion at Section 7(IV) above.

²¹⁵ Toronto-2, Toronto-3, Toronto-14.

²¹⁶ Medley, M. & Schellenberg, J. “Attitudes of Attorneys Toward Mediation” above note 11.

biases against its use and assumed its place in civil litigation, rather than having to be convinced of its worth. One lawyer (year of Call 1995) - who was very positive about mediation - was asked whether trial lawyers were still held up as role-models in her (very large) firm. She replied:

Toronto-4: text unit 211

“We have so few trial lawyers that I haven't really found that - in fact the people are the trial lawyers I think are the ones who are struggling to kind of fit with this mentality, more than the rest of us are struggling to be good trial lawyers.”

However, the assumption of many of our respondents that the older members of the Bar would be more likely to be resistant to mediation did not apply to the older lawyers in either Toronto or Ottawa. In Toronto, seven of the sample of 20 had practised for more than 20 years. Of these, four were strong or moderately strong supporters of mediation. The most senior of all (called to the Bar in 1968) was one of the strongest advocates for mediation. Five members of the Ottawa sample had practised for more than 20 years and all were positive about mediation. Again, the most senior of all (called to the Bar in 1965) was one of the very strongest advocates for mediation. On the other hand, just three of the Toronto sample had practised for less than 10 years, and two of these were among the most negative and cynical of this group. As a result, there is nothing in this study which suggests a clear or even slight correlation between length of time in practice and attitude towards mediation.

Nor did this study find any correlation between gender and attitudes towards mediation. The ten women (five in Toronto and five in Ottawa) who were part of the sample group held views and attitudes which spread across the spectrum from True Believer to Pragmatist to Instrumentalist. The only consistent observation that could be made about the female respondents is that none of them expressed real negativity, either as Dismissers or Oppositionists - but since these views were held by relatively few throughout the whole sample, perhaps this simply reflects the small size of the female group.

Local legal culture combined with mediation experience appear, therefore, to be the most significant factors in predicting personal attitudes towards mediation. The same variables might be

used to explain the conflicting evidence surrounding the mutual impact of mediation and adjudication (for example, the convergence between mediation practice and litigation practice is both more apparent and more recognised in Ottawa than in Toronto, and signs of divergence are most noticeable where resistance to mediation is greatest). The data also offers enticing hints, rather than substantial evidence, of a few other possible variables. Some lawyers suggested that their approach was significantly affected by the corporate philosophy of their major client base- "(T)here are all kinds of different corporate philosophies, some of which are more litigious and some of which are less litigious".²¹⁷ Others pointed to the attitude adopted by their sector of the Bar²¹⁸ - really another aspect of local legal culture - or the suitability of particular types of disputes for resolution at mediation.²¹⁹ Finally, a couple of comments suggest that some litigators find it more difficult than others to comfortably embrace the emotional dimensions of conflict that are sometimes brought out in mediation. For example, one lawyer told us frankly,

Toronto-13: text units 191-192

"I'm not really good dealing with emotional clients, with personal problem-type issues and other lawyers are better at that kind of thing. I'm more of a dollars and cents, focus on the business solution to the problem."

Suggestive of the significance of personality variables, this would clearly require further study.

VIII. Conclusions

In conclusion, the data collected via the 40 interviews which comprise this study demonstrates a wide diversity of ideas about how mediation should be used in civil litigation, and the meaning and

²¹⁷ Toronto-19: text unit 30. For example, several counsel mentioned the resistance of the CMPA to any form of mediated compromise; see for example Ottawa-5 : text unit 460, Ottawa-6 : text unit 17.

²¹⁸ For example, the insurance Bar who have been mediating under the Insurance Act since 1990 (Toronto-20), and the employment Bar whose matters have been referred in greater numbers to mandatory mediation under the earlier pilot program (Toronto-19).

²¹⁹ For example employment matters where the only issue is quantum: see Toronto-19: text units 65, 296 & 352. For a comment on the different considerations brought to mediation by commercial litigation versus personal

impact of incorporating the mediation process within the adjudicative system. The five “ideal types” constructed from this data synthesise the most prevalent themes that emerge in answer to these questions. But while the ideal types identify some convergence of approach or attitudes, there is diversity here also. For example, among the Oppositionists, there are different reasons for resisting mediation (for example, it undermines the principled basis of adjudicative decision-making, it is too “touchy-feely”, it adds extra costs).²²⁰ Similarly among the True Believers, there are many different views over what “good” mediation is, and what makes for a “good” mediator (for example, a process manager, a proactive negotiator, a creative problem-solver, a reality-checker, an authoritative figure).²²¹ This means that continuing arguments over whether in fact mandatory mediation means the “co-option” or assimilation of the “real” values of mediation are inevitable.

Those counsel who have the strongest views about mediation - those who take the position of a Oppositionist or a True Believer - are also those who are most likely to see mediation as a radical alternative to traditional litigation.²²² The same group is also most likely to experience role tension between their role in mediation and in traditional negotiation. For a small number of lawyers the consequence of integrating mediation into their practice strategies appears to be a fundamental questioning of their professional norms and identity, accompanied by a sense of dissonance between their adversarial training and the challenges of consensus-building in mediation. Among those lawyers who experience role dissonance, there will be increasing pressure to rationalise and perhaps rethink their roles as dispute resolution experts. There may also be increasing divergence between those who consider the introduction of mediation into the civil justice system to be a highly significant development - whether they see that as positive or negative - and those who regard this innovation as inconsequential, a mere “fad”, or who are simply disinterested in using or thinking about mediation unless they are forced to (primarily the Dismissers and the Instrumentalists). These types of divisions

injury litigation, see Ottawa-14: text units 25-28.

²²⁰ See the discussion at Section 5 (I) above.

²²¹ See the discussion at Section 5 (II) above.

between lawyers and legal academics are already becoming apparent within local bars, Bar Associations and law schools.

One of the reasons that some counsel and academics may not take civil mediation very seriously is that there is little theory development to support the practice or learning of effective mediation advocacy. Our data reveals no clear emergent paradigms of practice which offer a consistent and coherent conceptual framework for the use of mediation in civil litigation. With only a few exceptions at either end of the spectrum of opinion, there is a pervasive sense of tentativeness, ambiguity and improvisation in what litigators say about mediation. This is illustrated in the multiple ideal types reflected within any one interview, and also in the apparent absence of conceptual and strategic links made by lawyers between - for example - the objectives they see for mediation as a single session and as part of an overall strategy in litigation. The data does suggest that lawyers who indicate that they have seen their clients derive important psychological and emotional benefits from mediation are more likely to speak to the importance of having clients participate actively and directly in the mediation, but this connection (and others) are rarely made explicitly by lawyers themselves. This suggests that there is no clear or uniform paradigm shift taking place here, but instead a collection of diverse and discrete responses to the phenomenon of mediation. Lawyers might explain this eclecticism as their response to the unique context and circumstances of each case; indeed, many counsel spoke of their need to appraise the appropriateness and implementation of mediation (for example, choice of a particular mediator) on a case-by-case basis. However, I would argue that the pervasive uncertainty - and in Toronto, an apparent lack of dialogue among practitioners over these issues - also reflects the deeper absence of conceptual frameworks which lawyers might use to make these judgments and to develop their strategies for mediation.

The data does offers some evidence of the systemic impact of mediation - especially in file management practices, settlement strategies and client relationships - mostly in Ottawa and among

²²² Galanter, M. "Worlds of Deals: Using Legal Process to Teach Negotiation" above note 5.

those lawyers most experienced with mediation. This means that notwithstanding the apparent lack of explicit models or frameworks for how to function effectively in this environment, the practice of litigation is changing as a result of mediation. Lawyers are changing the ways in which they operate both functionally (for example with more front-loading on new files) and conceptually (for example how they strategise towards settlement outcomes). We can expect this gap between practice and theory to be reduced as mediation becomes more widely accepted as a serious component of litigation practice, worthy of debate and exchange via informal dialogue, and theory development via continuing legal education programs. Moreover, the relationship between increased exposure to mediation and increased confidence in its usefulness that has been described above would suggest that this is a likely consequence of the overall growth in the use of mediation, both in private commercial and court-connected programs. It will be interesting to see how the Dismissers and the Instrumentalists (above) respond to this development.

There is strong support for drawing the conclusion that the norms of mediation usage are more settled, and the Bar more genuinely accepting of the use of mediation, in Ottawa than in Toronto. This underscores the importance of local legal culture as a factor in understanding changes in legal practice. The differences between the mediation culture in Ottawa and Toronto is especially apparent in relation to instrumental uses of the mediation process, which seem to be much more prevalent in Toronto than in Ottawa. Conventions on documentary exchange and the use of comprehensive mediation briefs also appear more established in Ottawa than in Toronto. Ottawa counsel were also more likely to talk about a positive, active role that they see their clients taking in mediation, and to suggest a deeper sense of comfort with this. Again, this supports the conclusion that mediation is having an effect on how *some* litigators practise law, and points to mutual influence rather than co-option. However, there is also evidence - notably limited to Toronto - of mediation being absorbed into traditional litigation as a purely mechanical step which is capable of being neutralised either by transforming it into informal discovery or by only giving it "20 minutes" of time. This is an obvious reflection of the pervasiveness of the dominant model of advocacy and its adversarial norms.

This paper began by describing the relationship between the norms of legal practice and the social and institutional cultures of the disputing world. There is considerable evidence in this study to support the assertion that corporate and institutional clients, in particular, are developing expectations for early settlement that require litigators to significantly readjust their settlement norms and practices. One possibility is that we shall see the Bar begin to evolve into settlement specialists and trial advocates. Another is that trials will become an increasingly rare occurrence in commercial litigation and that the norms and practices of the commercial litigator will be reoriented towards the pursuit of early, effective and business-friendly negotiated solutions to conflict. Some of the lawyers who participated in this study would argue that this is already happening.

Toronto-20: text units 181-187

“My role now appears to be as a settler. Or maybe something more than that. Maybe somebody who has to pick the wheat from the chaff and determine, is this file one that should settle, or is there some overwhelming legal principle that is so important that irrespective of all our other views you need a judge to make a ruling on it? Those are the cases now that seem to go forward. *Not the cases that used to go forward.* (my italics) So my role has significantly changed and now I don't think a litigator can be a litigator without also being a mediator. I don't mean a mediator in the sense of the person who is actually the mediator but, a person who has advocacy skills relevant to conducting the process of mediation.”

APPENDIX A

Interview questions

Introduction (by interviewer)

In this project we are interested in your experiences of managing cases that have been mandated into mediation under Rule 24.1. We are am interested in all aspects of that experience, including the work you put into these cases, how you prepare these files for mediation, how you work with clients, your strategies for getting best results out of mediation, and so on. We are primarily interested in the impact of the mandatory mediation program, that is, mediations under Rule 24.1 - however, we expect that the people we talk to will have had other experiences of mediation outside Rule 24.1 ie private commercial mediation. Where possible, I shall ask you to distinguish these experiences from your experiences with mediations under Rule 24.1, but I am also interested in any differences you see between mediations under the Rule and other private commercial mediations.²²³

The interview will be audio-taped and then transcribed. We guarantee confidentiality - what you say will not be attributed to you in any final reporting of the results. It is possible that a quote from you may be used - but it will not be attributed to you but simply to a "Toronto/Ottawa lawyer". These results will be provided to the Law Commission of Canada in the spring of 2001, and in addition the results of the study may be used in future academic publications eg periodical article.

I would like to begin by asking you about your approach to preparing cases for standard track litigation, followed by some questions about how you manage cases that have been referred to a mandatory mediation session under Rule 24.1.

²²³

If some respondents have had parallel experiences of private commercial mediation, it is difficult to see how these experiences will not seep into their answers to many of these questions. We shall try to identify which experiences - mandatory mediation or private mediation - provoke which comments and reflections.

1. I want to begin with a picture of how you would manage a litigation file from its early stages until the point at which you are ready to open serious settlement negotiations with the other side. Could you take me through the work you would put into a litigation file from the time it arrives on your desk, up to the point at which you might consider yourself ready to discuss settlement options with the other side? (Also: “we anticipate that you may need to make some critical distinctions here eg plaintiff/ defendant, case type”. Look for process steps that would be followed, such as: review statement of claim/defence; any legal research; client contact, etc. Try to touch on timing, when overall appraisal of appropriate strategy on a file is done including what a file may be “worth” to the lawyer/ to the client, when contact is made with the other side and how, when and how often would the lawyer meet with and talk to the client, and what work and how much work is done on the file before discoveries)

2. What type of input into the management of a litigation file might you “typically” expect from clients? (this may have already come up under Q1) (Try to touch on: meetings with the client (how many, how often, and for what purpose); what type of input is looked for and at what point; would clients be involved in settlement negotiations and in what role). Generally, how would you describe your working relationship with your clients (a partnership? An expert/client relationship? Some other?)

3. Can we now switch our focus to cases which have been selected for mandatory mediation.

First, could you walk me through the steps you would take in managing this case, from the time it arrives on your desk, up to the point of the mediation session?

4. What type of input would you expect from the client - how would he or she be involved in preparing for mediation? (Try to touch on: level of client input; type of consultation; timing of client input; expectations around the roles to be played in the mediation session by lawyer/ client respectively)

5. What if any other differences do you see between the ways in which you manage a mediation case and a standard-track litigation case (which may or may not use the services of a mediator at some point?) (Try to touch on : the type of work that is put into the file, when this work is done, who is involved in the work, the role of the client etc)

6. Can you describe how you see yourself/ your role as a lawyer? (What are the elements of “responsible representation”? Can you give some examples of how this role gets played out in practice in an “ideal” situation? What situations arise when that “ideal” role is more difficult to play? Why was that the case?)
7. What do you see as the essence of your role in a case that is mandated into mediation?
8. In what ways does representing a client in a case destined for mediation require you to do anything different, or anything that changes the essence of that role? (For example does it affect any of your client service values? (refer back to Q2 above); are you comfortable with these differences; do you welcome them? Do you see them as appropriate in mediation cases? Do you also see them as appropriate for cases that are not mandated into mediation?)
9. How would you generally evaluate a “good” outcome in commercial litigation? (Could you give me some examples? Is there a difference between a good outcome and a “just” outcome”? Is there a difference between a “good outcome” for your client and a just outcome generally? Is there a difference between a “good” outcome at trial and a “good” outcome achieved through settlement? What is it? How do you see “good” outcomes in mediation? Are these any different - are there any different considerations - than “good” outcomes achieved through settlement negotiations? (above))
10. Are there any differences (both practical and conceptual) between this and what you consider to be a “good outcome” in mediation?(working from actual examples if possible. Also, what type of mediator are you looking for when you select a mediator in order to achieve a “good outcome”?)
11. Can you identify any (further) differences that your experience of mandatory mediation have made generally to the way you manage files, whether or not they are bound for mediation? (Try to touch on whether the respondent is any more willing/ likely to consider mediation in matters not mandated; any impact on your willingness to attempt early lawyer to lawyer settlement negotiations; any impact on readiness to proceed with discovery before serious negotiations attempted?)

If there is a positive response: Why do you think that you have made these changes/ adjustments? (Because the firm expects it, because the client expects it, because I think it is a good idea because...)

12. Do you think that mediation offers anything really different than traditional lawyer-to-lawyer negotiations? Does mediation allow you to do anything that you could not do in lawyer-to-lawyer negotiations? (Try to touch on the timing of discussions; the significance of an early look at the other side's case; the timing of an offer or proposal for settlement in either case; whether the classic ritual of exaggerated offer and underestimated counter-offer still occurs in mediation as it does in negotiation; whether mediation results in traditional split-the-difference type solutions or are there interests-based discussions and solutions; the role of the client; do you see problem-solving and positional approaches being combined at all in mediation? and ask for examples. Note some possible overlap here with Q2).

13. In what ways, if at all, has the management of disputes within your law firm or department changed over the last few years, and would you attribute any of these changes to the MMP - or the growth of mediation generally? (for example, client education, time spent in preparation with clients, time spent on files earlier in the litigation process, use of discoveries? Could ask: how do your colleagues view mandatory mediation? Do the lawyers in this firm talk about mandatory mediation? What do they say about it? Do they talk about strategies for mediation? What do you think has been the overall impact of the MMP on the way that commercial litigation is conducted within this firm? Has there been more in-house training? Specialisations?) Do you see any changes in the profession as a whole as a result of the MMP?

14. What are the counter-pressures to change? Do you see any obvious tensions between the MMP and the adversarial culture? (eg old habits die hard, the tendency to use positional bargaining strategies in negotiation rather than a problem-solving approach? The use of non-lawyers as mediators? The tension between the dominant culture of concealment and non-disclosure in negotiation and the pressure to show ones cards in mediation? Is the tendency to rational, single issue, numeric cost-benefit analysis in traditional negotiation challenged by the type of cost/benefit analysis suggested by mediation (multiple issues, expanding the pie etc)? In each case, what are the consequences of the tension/ clash of values and assumptions?)

What other questions do you think I should ask you/ is there anything else you would like to add?