Paradigms and Paradoxes:

Mediation Advocacy and its Effect on Mediation, Mediators and Clients

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Index

Part I Introduction

With the introduction of Rule of Civil Procedure 24.1, mandatory mediation is now part of the legal landscape in two major court centres in Ontario. It is difficult to overestimate the effect this program will have on gathering lawyers in to the mediation context. While many lawyers previously have engaged in mediation, or are mediators themselves, many more now will be brought into close quarters with the process and its possibilities.(1)

This paper is an exploration of the effects on mediation, mediators, and clients when the participation of lawyers is institutionalized by the mandatory nature of the process. It seeks to establish how the presence of lawyers and their actions may create untenable paradoxes for participants in mediation, specifically in the area of mediator neutrality and lawyer role, and how these can be overcome by subtle yet important shifts in understanding and practice by all parties involved.

The scope of our exploration is limited to the most common and general forms of mediation, those forms that will typically be encountered by litigants in Toronto and Ottawa who are channelled through the mandatory program. We focus on a style that is generally facilitative, with room for the acknowledgement that some mediators are chosen specifically for their evaluative style. We recognize that the definition of mediation has evolved to include many sub-specialized forms of joint problems solving/dispute resolution. For example, mediators may be hired explicitly for their specialized knowledge, as for example, in construction disputes; for their evaluative expertise and capacity, such as mediators who are able to perform hybrid mediation/arbitration processes; or for the type of early neutral evaluation they can provide, such as that offered by retired judges who perform directed mediations similar to pre-trial conferences. These types of mediations, where there is a very specific skill offered by the mediator, exist at one end of a broad spectrum of mediation styles.(2)

Because of this, we believe these forms have their own issues surrounding neutrality and lawyer participation, issues that may not be readily included in a consideration of neutrality issues relating to less specialized forms.(3)

The advent of the court connected mandatory program means that mediation is now a step in the litigation process for certain litigants - mediation will now be a naturally occurring part of their litigation experience, rather than a choice they will consciously make. At first glance, the mediation and litigation contexts seem to be at opposite ends of a spectrum of dispute resolution. Beyond their common goal of settling disputes, the processes are based on very different philosophies of ownership of disputes and different process values (adversarial advocacy versus joint problem solving). Increased participation of knowledgeable lawyers and increased business for independent mediators may mean that mediation begins to take on a different character, or that mediation techniques become modulated in some way. (4)

In part II, we examine the traditional role of lawyers in litigation in light of the requirements of the mediation context. We note that the two paradigms are relatively incompatible and discuss ways that lawyers may modify their conception of their role to be more effective participants in the mediation process. In part III, we discuss traditional concepts of mediator neutrality and examine how these concepts withstand the importation of adversarial practices into the mediation context. Part IV discusses how clients may be affected in mediation by the choice of role their lawyer makes. In conclusion, we summarize the subtle yet important paradigm shifts that can be made to ensure that lawyers'

participation in mediation makes a positive rather than negative contribution to the process as a whole, and in particular to creating satisfying outcomes for clients.

Part II The Lawyer's Paradox

A. The Champion v. Joint Problem Solver

The role a lawyer is required to fulfil in the litigation process is different from the role a lawyer plays in the mediation process. In litigation, a lawyer is the client's advocate, or "champion." In contrast, all parties to a mediation, including the lawyer, are to take on the role of a "joint problem solver". Each role requires different skills, which may not be transferable across contexts . Hence, when our "champion" enters the mediation realm, the paradigms of a champion do not fit nicely into the mediation context. In fact, the skills that make a champion may act to subvert the unique possibilities of mediation. In this section, we suggest that the adoption of a model of deliberation[(5)]

may work to resolve the inconsistencies between the roles of champion and joint problem solver. The adoption of this model may result in the development of a different role for lawyers as more productive mediation advocates.

1. The Litigation Context

Leonard Riskin describes a lawyer's assumption about his role as a "philosophical map". Two intrinsic components of this map include the belief that "(1) disputants are adversaries -i.e., if one wins, the other must lose -and (2) that disputes may be resolved through application, by a third party, of some general rule of law."[(6)]

These assumptions lead inevitably to the role of "champion". The focuses is on winning on behalf of the client, and in the zero-sum litigation context, this necessarily means that the other party must lose. This role of lawyer "honours the principles of partisanship;"[(7)]

the lawyer becomes a "hired gun", a zealous advocate for the client. However, the lawyer's advocacy is towards solutions which lay within the legal framework, with it's emphasis on the *rights* of the client. Therefore, possibilities for resolution which exist outside of this "rights" framework tend to be neither acknowledged nor fulfilled.

The lawyer is dominant in this relationship with the client. The client brings to the lawyer a problem to be resolved. The lawyer redefines this problem to fit it within the legal framework. When in the legal context the lawyer has control of the dispute as he, not the client, understands the necessary language and procedure. The resolution of the client's problem occurs through persuasion of the decision-maker who is a neutral third party.[(8)]

2. The Mediation Context

In contrast, Riskin describes the assumptions held by a party to a mediation; they are "(1) that all parties can benefit through a creative solution to which each agrees; and (2) that the situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it."[(9)]

The focus is on understanding the underlying interests of parties to the mediation. Such understanding should lead the creation of outcomes which are beneficial to *all* parties, that is, non zero-sum outcomes.

Acknowledgement and understanding of the other party's needs and interests are essential parts of the process. The stance that a party adopts in mediation is that of a "joint problem solver", where the focus is on developing responses to the underlying needs and interests of all participants.

As noted above, there are various models of mediation from which a party can chose. They range from the neutral evaluation of an expert who may impose a settlement structure, to those which view mediation as an opportunity for a party's healing or a "transformation" both of the individual and society. Typically, the mediator's role varies depending on whether he or she is taking a facilitative or evaluative approach. Mediation which aims at goals beyond the mere settlement of a dispute, and where the mediator takes a more facilitative approach, can be "empowering" to the participants. "Empowerment" in mediation results when the client maintains control of the dispute. Specifically, she has an opportunity to tell her own story, in her own way, and is actively involved in shaping the outcome. Mediation also presents the possibility of meeting the diverse needs of clients, looking beyond simple monetary solutions to consider the emotional and psychological needs of participants. In mediation, a lawyer may be required to relinquish control to both the mediator and client in order to achieve these results.

Clearly, mediation is fundamentally different from litigation, and the skills required in each process may not be fully transferable to the other. Lawyer participation in mediation focusing on positional bargaining can "often look like muscled settlement conferences, and negotiation in mediation looks like aggressive trial advocacy." (10)

This is a reflection of the fact that "[m]any lawyers simply lack a basic understanding of the mediation process, the premises and values which drive it and the creative outcomes which are possible." (11)

It is also reflective of the problem of paradigm shifting; lawyers who are successful through the use of adversarial and aggressive strategies may be unwilling to adopt a less confrontational approach, or feel uncomfortable relinquishing control in the process of the mediation to clients or the mediator. (12)

They may also have difficulty in conceiving of favourable outcomes as anything more than a narrowly defined "win."

Much of the literature discussing "mediation advocacy" demonstrates aspects of this problem. The difficulty lies in that, even in mediation, lawyers continue to act on assumptions that are formed in the litigation context. For example, persuasion is fundamental to the lawyer's role in the litigation context. Persuasion is less important to the ability to *both* listen and communicate in the mediation context. However, the difficulty in re-conceptualizing this function is clearly apparent in the literature discussing "mediation advocacy".

It is commonly understood that mediators have a great deal of power in the mediation, and the abuse of this power could lead to outcomes which are unfair to the parties. Therefore, a mediator's neutrality is of central importance in the mediation. However, in the mind of the champion the mediator is still thought of as an object of persuasion. For the champion, if bias does exist, it is not quite so problematic if it is in favour of *his* client. Cooley demonstrates this tension when describing how a client should interact with the mediator:

Your client's eye contact with the mediator will help make his message more persuasive to the mediator. Persuading the mediator is important even though mediators are duty-bound to remain neutral and impartial regarding the parties and the subject matter of the dispute, they are human beings whose perceptions and action can have a great impact on the quality of the ultimate settlement. (13)

This theme is repeated by Weinstein who also says "no opportunity should be missed to gain the support of the mediator, but the person who must ultimately be persuaded by the advocate's theme is the decision maker." (14)

Although there is clear acknowledgement that the mediator is not the decision-maker, there is much to gain by attempting to gain the mediator's support for a client's position. However, there is also much to lose. Chapman believes "advocacy in the courtroom sense may well be damaging and may serve to polarize attitudes rather than facilitate agreement." (15)

Such polarization is problematic since the goal of the mediation is for parties to move *towards* each other and settlement of their dispute.

Cooley's focus on persuasion may also act to limit the client's participation in the mediation. He says

Depending on the particular client, the nature of the case, and the personalities and style of the opposing parties or counsel, you may decide that your client will have an active verbal role, a limited verbal role, or no verbal role whatsoever....If your client is credible, likeable, and persuasive, you may decide to employ his full and active verbal participation...You may give an easily confused, unsure, and less-than-credible client...a very small role or perhaps no role. (16)

Again, Cooley is writing in terms of strategic choice on the part of the lawyer to achieve the best outcome in mediation. Such a view negates the client's role in the process, and the possible transformative and healing possibilities to the client of telling his or her own story. The mediation process also allows the client greater control of the process itself, and where the lawyer is to take a secondary role. The difficulty is subtle. A lawyer acting as a champion and seeking a narrow "win" for the client may act in ways inconsistent with the mediation process, and may in fact subvert the unique possibilities of mediation.

As well, the lawyer may be engaging in mediation for reasons other than an attempt to find creative, mutually satisfactory options to resolve the dispute. For example, Cooley suggests mediation offers an opportunity to "[s]ee how the opposing party would impress a jury as a witness;" (17)

the aim is getting a better understanding of the other's party's case before starting litigation. A mediation is also viewed as an opportunity for further discovery, Cooley asks "if discovery is an essential party of the litigation process, why shouldn't the discovery that occurs informally in the mediation process foster rather than impede the litigator's purposes?" (18)

Both of these examples demonstrate the focus on eventual litigation, and seeking some form of advantage for the client through mediation. The aim is purely to engage in mediation for the purpose of achieving the benefits to litigation that may derive from mediation.

Much of the literature on the "how to's" of mediation advocacy speaks to lawyers. This is despite the goal to allow *clients* greater control in the direction of the dispute. Specifically, Cooley in the above examples is speaking to the lawyer. The reason is that the lawyer, and not the client is still seen as the primary decision maker in the resolution of the dispute. What is problematic about the literature on mediation advocacy is that it encourages lawyers to carry the role of the champion into mediation. We have demonstrated that many of the assumptions regarding the role of the champion, particularly trying to persuade the mediator, viewing the mediation process as an opportunity to seek advantage in litigation, and maintaining the dominance of the lawyer, *subvert*s the promise of mediation. This

subversion occurs because the mediation becomes to look more like the litigation process and less like an alternative to litigation.

B. The Deliberative Approach

As discussed, difficulties arising out of lawyer's participation in mediation are the result of lawyers acting as litigators, rather than conciliatory advocates in the mediation process. We suggest that in order to fully engage in mediation as joint problem solvers there has to be a shift in the lawyer's paradigm. We suggest that the a model of deliberation[(19)]

should be adopted so that lawyers and clients can fully realize the potential of mediation.

A certain quality of relationship between the lawyer and client is the root of the deliberative approach. This approach focuses on respect for human dignity and is based on ideas of civility.[(20)]

It is understood as a process of active dialogue between the lawyer and the client, where there is a reasoned discussion of alternate courses of action.[(21)]

The change that is required in this relationship begins well before lawyer and client decide to enter the mediation. It requires a reconceptualization of the lawyer as a "wise counsellor" rather than the current "hired gun" or "champion" model. Mary Ann Glendon's view of the "wise counsellor" is based on the idea that

lawyers can often serve their clients best by discouraging litigation, or by deliberating with them about a proposed course of action, rather than by unquestioningly carrying out the client's desires. They assumed that most clients value the opportunity to explore all the angles of a problem with a knowledgeable adviser, one who is apt to come up with new insights, ideas and perspectives.[(22)]

The deliberative approach requires mutual respect between lawyer and client, as well as a holistic view of the client's problem.

Nolan-Haley specifically discusses the pre-conditions for deliberation. The first aspect of this process is that "lawyers must understand their client's perspective - the facts as well as the clients' emotional state."[(23)]

Fully understanding the client's perspective requires taking into consideration more than legal norms and consequences. It should include factors relevant to the particular client, such as the economic, political, psychological, religious or social results of a client's decision.[(24)]

As well, there is an understanding that the totality of the client's goals and interests may not fit into a legal framework. The focus is on the client as a *human being* rather than simply as a legal entity with particular rights.

This logically leads into Nolan-Haley's second precondition where "lawyers must attempt to understand and not presume to know their client's initial goals."[(25)]

The focus is on communication, suspending judgement and actively seeking to understand a client's particular context. In this view, it is particularly important for the lawyer to engage in a discourse with the client to fully tease out all of the client's interests, and not necessarily stopping this process once an

initial legal framework has been developed.

Also important, the third pre-condition requires that the

...Clients must be informed that deliberative counselling has as its goal informed decision making, both in the attorney-client relationship and in the mediation process, and be advised of the roles that both attorney and client will play in it. Clients must also be educated about the mediation process and understand its essential differences from litigation.[(26)]

In making a choice regarding the course of action for her dispute, the client must be fully aware of the processes, and possibilities offered by both litigation and mediation, and other forms of dispute resolution which may be appropriate.

The fourth condition required by Nolan-Haley is that "clients must have a general knowledge about the relevant law governing their case, so that during deliberation, they may meaningfully evaluate alternative courses of actions."[(27)]

In the end, if all of these preconditions are fully met, the client choosing a course to meet his or her goals, such as entering into litigation or mediation,[(28)]

has made an informed choice regarding the best course of action for his or her dispute. This result, the "empowerment" of the client to direct the process of dispute resolution, can only occur in a relationship of mutual respect and trust between the lawyer and the client.

We suggest after engaging in this deliberative approach with the client, the lawyer is less of a champion and more of a problem-solver. It is likely that then lawyer understands the complexity of the client's concerns and is attempting to think creatively in order to help the client achieve his or her goals. As well, it is likely that the lawyer will view the client as possessing more than just rights defined in the legal context. Also, it is unlikely that the client's active or perhaps dominant participation in the mediation will conflict with the lawyer's perceived role. After all, the focus in the deliberative process is on the client's autonomy and dignity. Hopefully, understanding the complexity of the client's problem will make the lawyer responsive to the other party's needs and interests as well.

But, *how* does a lawyer adopt the deliberative approach, and understand the other skills required for effective mediation advocacy? The beginning of this process starts with legal education. This is where the initial lawyers' paradigm of "champion" develops. It is at this stage that where importance of being a "wise counsellor" should begin to be communicated to law students, as well as an understanding of the mediation process. These goals have specific implications for pedagogical planning around client counselling issues. Perhaps, as Janet Weinstein suggests, law schools should be trying to teach students a "combination of skill, empathy, commitment to others, and humility" which she believes necessary for increased wisdom.[(29)]

Listening should also be incorporated into legal education. As Weinstein comments, "legal training through its focus on intellectual activity and outgoing communication, provides law students with little training or development of skills in receiving incoming communication."[(30)]

Listening is an important component of the deliberative process. Also, in the mediation context, listening is essential in understanding what is at the core of a dispute between parties. Only in understanding this "core" is possible to focus and address underlying interests, rather than the positions

of parties.[(31)]

As well, it is through greater understanding of the mediation process and its possibilities that a lawyer will begin to understand that the mediator is not an party to be persuaded; and that attempts to persuade may actually undermine the mediation process, and the interests of the client.

C. The "Good" Mediation Advocate

Lawyers have an important role to play in the mediation process. As Glendon points out, many skills possessed by lawyers are beneficial to the process overall. For example, she notes that lawyers are trained at identifying issues in dispute between parties. This skill is essential for understanding what the "common good" might be in a dispute. Traditionally, lawyers are skilful in drafting agreements and understanding the legal framework which acts as a backdrop to the dispute as well as future relations between parties.[(32)]

Lande believes that such skills may in fact "stabilize" the mediation process.[(33)]

These skills are eminently transferable, and in fact, beneficial to the mediation process.

Thorough preparation is important for lawyer engaging in the mediation process. A lawyer engaging in a deliberative process with a client will have engaged in an extensive dialogue with the client, and therefore holistically understands the clients needs and interests. The lawyer and the client decide the type of mediation which would be most beneficial to the client. If the client chooses to engage in mediation, the client does so understanding the process and the roles that various people will play in resolving the dispute. In the mediation, the lawyer and client are able to interact with the mediator and other lawyers and parties in a problem-solving mode to create options in order to settle the dispute. However, it is the client who is the primary communicator in the mediation, not the lawyer.

In entering the mediation, the lawyer is empathetic, is ready to listen, is humble and is not afraid of an inner journey. The lawyer is open to, and willing to generate creative solutions to resolve the disputes between the parties. The lawyer is aware of the possibilities of a "transformative" or "healing" type of mediation which may be beneficial to the client. The aim of the lawyer is not to "win" or to shine, but to support the client as a wise counsellor.

Part III: The Mediator's Paradox

In this section we explore the tension that emerges when lawyers use mediation advocacy, the importation of litigation practices into the mediation context, to try to affect mediator neutrality. We review what constitutes mediation advocacy, how it is learned, how it is marketed, and what its goals are. We assert that mediation advocacy holds, as one of its basic assumptions, that mediators have some power over achieving settlement, and because of this, it is important to persuade the mediator and to affect the mediator's neutrality in your favour. We acknowledge the paradox, first identified by Cobb and Rifkin,[(34)]

in which the mediator who locates neutrality within him or herself may face a moment when the two components of neutrality, impartiality and equidistance, produce a paralyzing circumstance. We examine definitions of mediator neutrality and question its locus and its source. We note that mediators who locate neutrality within themselves instead of in the process may be particularly vulnerable to certain mediation advocacy tactics. Finally, we suggest that the resolution to the paradox, and the

antidote to mediation advocacy techniques, may lie in what Rifkin and Cobb call "discursive neutrality." This form of neutrality, when combined with a lawyer who adopts the role of "wise counsellor," increases the possibility of meaningful and enduring agreements for clients.

Mediators' stock in trade is language. Mediators use language to direct the conversation of others. They take special care in how they process language (of all types, including body language, facial expressions, intonation, inflection, as well as words themselves) and meaning, and pride themselves on their empathetic listening skills. They use "rephrasing" - putting others' words into their own mouths - as a standard technique for developing trust and rapport. They use their own words, they hope, to engender mutual understanding and clarify issues so that parties may more easily move to common ground where settlement of the dispute is possible.

But talk, and especially persuasive talk, is important to lawyers, too. As courtroom advocates, lawyers seek to persuade a trier of fact that his or her client is more credible, more within accepted legal principles, that the client's story is more compelling or more explicitly provable, that they are indeed more truthful, than their opposite number. Lawyers have a vested interest in their persuasive abilities. It is the way lawyers "win," but it is also how lawyers are taught to approach the "truth" of the matter. Alternative truths are presented at trial and the strength of the conviction of the advocate as to the supremacy of his or her truth over that of the other side, is what makes them effective and persuasive. The party whose advocate is most persuasive is the party who gets their "truth" (or version of events) rewarded by the outcome of the trial.[(35)]

Advocacy is something that lawyers work hard at to do well. In the courtroom, a cynical observer might say that it is not the better case that wins, but the better advocate. The ability to put a positive "spin" on unfavourable facts while applying a similarly negative spin to all your opponent's favorable evidence is the aim of such advocacy. So if the aim in the courtroom is to persuade by good advocacy technique, it is hardly surprising that as lawyers move in to the mediation context, they will bring this technique with them. From courtroom advocacy springs "mediation advocacy." One successful lawyer from a large Toronto firm calls it "a new way of lawyering."[(36)]

After all, even within the mediation, lawyers do represent their client and it is in each lawyer's interest for his or her own client to prevail.

Persuasion has its place in mediation. As one experienced mediator puts it, the goal in mediation is for each party to persuade the other party toward their perspective on the facts.[(37)]

This is certainly consonant with the lawyers' urge to persuade, which would lead us to the conclusion that lawyers in mediation are helpful and necessary. But here we should enquire as to whom the lawyer is trying to persuade. In the courtroom, it is the trier of fact that is the object of the lawyer's persuasive technique, because the trier of fact holds the power over the disposition of the dispute. Now consider the locus of power in mediation, if there is one. When lawyers overlay the courtroom paradigm on the mediation paradigm, it becomes clearer that mediation advocacy has at its core the assumption that in mediation, it is the mediator who should be the object of persuasion.

Consider, too, the practice of "judge shopping" in the litigation context. Since this practice is not uncommon, we could assume that lawyers recognize the fact that some judges have certain biases, or are predisposed to decide certain types of cases in a particular way. Indeed, judges are human, and as such they carry their own ideologies and biases into the courtroom with them. Both lawyer and client benefit from this recognition; knowledge of a judge's biases or expectations might be used to your client's advantage, since the judge is the power locus in the courtroom. Why would lawyers not believe the same

to be true of mediators? Both mediators and judges are supposedly neutral. But since judges' neutrality is apparently vulnerable by virtue of their innate biases to certain external characteristics of the cases they hear, then it is not unreasonable for lawyers to expect that mediators might be as well.

Indeed, a central characteristic of mediators is their neutrality. Typically mediation is defined as negotiation facilitated by a "neutral" third party. But why is neutrality so important to the construct of mediation? Some scholars argue that it is the imposition of a "neutral", a concept legitimized in the history of the justice system, that allowed mediation and other forms of alternative dispute resolution to emerge as alternatives.[38]

It is neutrality that legitimizes the work that mediators do as facilitators. It is central to the credibility of the process both for those who participate and for those who would choose it.

A. Mediation Advocacy

1. Defining, Learning and Selling Mediation Advocacy

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- Canadian Bar Association of Ontario

Advertisement for Continuing Legal Education

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Lawyers know that knowledge is power. When faced with the prospect of participating in a mandatory mediation, many practitioners look for information regarding the process as well as guidance for how to most effectively engage in mediation with their client. As a result, education programs, such as the one that produced the above "catch line," are becoming available. Here, lawyers can learn how to select a training program and participate productively;[40]

how to choose a mediator appropriate for their dispute (based on a number of factors, including mediator style);[41]

how to get more training in the area of mediation; and how to get the most "bang for the buck" from their presentations within the mediation session; in short, how to become a more effective "mediation advocate". The goal of these educational opportunities is to help the lawyer to become "more at ease with mediation and better able to make it work for their clients."[42]

Many textbook-style practice aids are now also available which instruct practitioners on the

process of mediation and their role in it.[43]

There appears to be a tacit awareness that the role of the lawyer as mediation advocate is subtly but substantively different from lawyer's role as litigator. Lawyers are invited to brush up on old skills ("listening, questioning, reframing, clarifying interests"[44]

) and acquire new skills (appraising and reappraising a BATNA, for example) appropriate to the joint-problem solving context of mediation.

These sorts of programs signal an important stage in the legal culture's movement toward general acceptance of mediation as a mainstream process, whether mandated or not. The more lawyers know about mediation, and the more they are comfortable with it, (45)

the greater the possibility they will choose it as part of the normal package of options offered to a client, even in the absence of a court-annexed program. Some of the guidance that lawyers receive from instructors shows great sensitivity to and support of client interests beyond the interest in settlement. For example, some instructors emphasize that mediation is effective not only when there is settlement, but in fact at any time that greater understanding and communication is fostered between the parties. (46)

What is less encouraging, however, is the extent to which the "advocacy" aspect of mediation advocacy is sometimes emphasized. One might wonder about the extent to which a lawyer's actions in mediation are informed by the lawyer's understanding (or lack of understanding) of the mediation process. Consider for example the assertion by John Lande that "[l]awyers will learn how to practice advocacy in mediation, reading the mediators' moves and then coordinating or parrying as appropriate." (47)

This is borne out in the section in John Cooley's book, *Mediation Advocacy*, headed "How To Use The Mediator And The Caucusing Process For Best Results." (48)

The author appears to base this section on two assumptions. Cooley's first assumption is, again, knowledge is power. The mediator has knowledge of the other side's case which he or she could reveal but chooses not to explicitly. The lawyer therefore must look for "clues" to what the mediator knows about the other side. Here, the author seems to imply that there is an element of secrecy in confidentiality which can be compromised through astute observation of the mediator's strategies, tactics, body language and intonation: "[t]hrough body language, the mediator might unconsciously provide clues to the other side's true interests or concerns." (49)

In other words there are secrets to be kept, but a clever mediation advocate can find them out. (50)

Cooley's second assumption in this section is that the mediator is an appropriate target for, indeed even susceptible to, persuasion and manipulation. The author asserts that a mediator can be used in certain ways and that his or her personal alignment can be co-opted by a "reasonable" argument. But note the paradoxical instructions to the mediation advocate:

"From the beginning of the very first caucus, let the mediator know that the mediator and you are on the same team... Be collaborative." (51)

versus

"Do not disclose your bottom line to the mediator up front... . (52)

Hold back some information favorable to you or unfavourable to the opposing side until the final caucuses." (53)

Hardly a "collaborative" attitude.

While others writing on mediation advocacy more explicitly acknowledge the importance of the parties as decision-makers, there is still some focus on the possibility that the mediator occupies this role as well, even when mediators are seen as more facilitative than evaluative. One article asserts that "[w]hile addressing the decision-maker, plaintiff's counsel will nonetheless be engaged in representing the plaintiff's case to the mediator." (54)

The authors go on to state that "...the mediation session demands preparation, skilful use of communication techniques and employment of whatever measures are appropriate to convey a persuasive message to the mediator and the decision maker." (55)

Clearly, the indication to the mediation advocate is that regardless of the mediator's style, he or she will have some part to play in directing the decision-making that goes on in the mediation context. (56)

Any attempt to affect the neutrality of the mediator probably presupposes a belief on the lawyer's part that the mediator is "powerful" and is an implied if not overt decision-maker. Similarly, the attempt to persuade must be predicated on the assumption that it is possible to incite a bias in the mediator (of course, in the context of early neutral evaluation, as in the adjudicative context, this makes perfect sense). Thus, if lawyers believe that the mediator does have a certain amount of decision-making power, and the mediator is susceptible to persuasion, mediation advocacy strategies are sensible and appropriate.

2. The Seduction of Settlement

Court-annexed mediation provides its own motivation, in that the process is mandatory for certain disputants. But even when given other good reasons for participating in mediation, (57)

lawyers may still focus on what is for them the single most salient aspect of the process, settlement. For lawyers, settlement is typically the measure of success of any negotiating strategy and interaction. Some lawyers even believe that "[f]rom the mediator's point of view, success is measured largely by whether or not the dispute settles." (58)

Especially within the court-annexed process, the goal is also early settlement of disputes (59)

outside of the court system. (60)

The court mandated mediation for efficiency purposes -- clearance of backlogs, quick(er) settlement of most cases, and shorter time to trial for cases that don't mediate or don't settle. The goal was clearly not to provide therapeutic, empowering or transformative processes for clients. But is the mandatory mediation process, as conceived, serving clients interests? (61)

Depending on the level of importance attached to settlement, the "alternative" dispute resolution technique is no longer alternative in focus, only alternative in venue. Even the methodology, depending on the mediator, can begin to resemble a court proceeding.

It is not unusual then that lawyers should be approaching this process as if advocacy skills were appropriate and as if the measure of success were settlement, especially one more favorable to their client than to the other party. (62)

The concern, as noted above, arises when lawyers' advocacy techniques concentrate on trying to bias the mediator in favour of the lawyer's client and away from the other side. Lawyers, in perfecting their mediation advocacy skills, may be getting the message that you must not only persuade the other side, but you must also persuade the mediator.[(63)]

Lawyers are encouraged to make their clients look like "the good guys" and to get the mediator "on side." What do these admonitions say about the lawyers' conception of mediator neutrality? It seems lawyers believe that neutrality is vulnerable to persuasion.

Consider this in light of the mediator selection process that lawyers undertake. Some lawyers exhibit a clear preference for a certain type of mediator:

Particularly if I believe my client has the better legal position in the dispute, I am of the firm conviction that a mediator with knowledge and experience in the legal subject matter area of the dispute will benefit my client. He or she will be better able to understand and then communicate that legal advantage to the other party to the mediation so that my client's advantage is properly considered in the deliberative process. However, even when I perceive no legal position advantage, I still believe a mediator experienced in the subject matter area is likely to be a more effective, more efficient mediator.[(64)]

The selection of a mediator specifically for his or her legal knowledge supports the continuation of the context of legal rights, in turn leading to positional bargaining and further attempts to co-opt the mediator. Mediation indeed becomes "bargaining in the shadow of the law" - the court context is never very far from mind and the main motivator toward settlement is not the positive impetus to resolve the dispute creatively but rather the negative impetus, "we'll win in court so you're better off to settle now."[(65)]

From another perspective, the mediator's expertise represents a bias toward a certain broad set of outcomes for a certain type of problem.[(66)]

Experience brings expectations, and shapes future perceptions - these are biases which are transparent to the mediator because they are unconscious, or because they seem, on a legal basis, "objectively right" to the mediator. This bias is internal to the mediator, a personal attribute, and thus is susceptible to being called on, in the process of persuasion, by either party to the mediation. When the context of legal rights is imported, the mediator may be biased toward a certain outcome which favours one party, thus losing impartiality, or align themselves in a relationship which favours one party over the other, thus losing equidistance, and do this as a result of their expertise. By choosing a mediator with some expertise in an area, not only are lawyers choosing, consciously or not, non-neutral biased mediators, but they are also, perhaps sub-consciously, choosing a mediator whose bias they believe they can influence in favour of their own client's position. There would be no flourishing market in mediation advocacy courses if lawyers did not believe that the mediator was susceptible to persuasion and the engenderment of bias.

Choosing a mediator specifically for his or her legal knowledge may perpetuate the rights-based approach to dispute resolution. At a more subtle level, choosing a mediator with expertise is akin to choosing the mediator whose bias most favours your client. The lawyer's impulse toward non-neutral mediators is further complicated by a third assumption influencing the lawyer's desire to have an effect on mediator neutrality: choosing a mediator with whom the lawyer has a regular on-going professional relationship, and perhaps eventually a personal relationship, is good for your client. This is not to cast a sinister or pejorative light on such a choice. Particularly in a centre with a small, closely-knit bar, it may be inevitable that lawyers participating in court-annexed mediations begin to interact repeatedly with certain mediators. The relationship may or may not be the primary motivating factor in the lawyer's

choice of mediators; perhaps it is just previous positive interactions, or familiarity that motivates such a choice. But it will almost certainly have a secondary effect on the lawyer's perception of mediator neutrality.

Lande notes that "[r]egular participation of lawyers in mediation is likely to result in ongoing relationships between mediators and lawyers that may overshadow their respective relationships with the principals and dramatically affect the mediation process." (67)

As lawyers visit certain mediators with "repeat business," lawyers may become personally acquainted with a specific mediator. Past successes, similar personal philosophies about dispute resolution, and good interpersonal rapport outside the mediation context may all conspire to lead the lawyer to believe there exists the possibility of an "edge" over the competition who is not so familiar with the mediator. Further, the independent mediator who is dependent on referrals from lawyers for business may feel an especially acute pressure to maintain the relationship with the lawyer on, at minimum, a friendly professional basis, and may not be displeased when the relationship becomes more collegial. To the extent that there is an unspoken, if erroneous, assessment of success based on the number of settlements achieved in the past, the mediator him or herself may feel a certain pressure toward "settlement."

B. Mediator Neutrality

"[I]mpartiality" means being and being seen as unbiased towards parties to a dispute, toward their interests and toward the options they present for settlement.

- Canadian Bar Association

Model Code of Conduct for Mediators, November 1997

How then does a mediator define and preserve his or her neutrality in the face of adversarial techniques, assumptions, and personal relationships established with lawyers? The most obvious answer would appear to be: in the same way that a judge defines neutrality, as an internal personal attribute, inviolable by outside influences. Mediators are not naive. In fact, they are practiced at being astute observers of meta-communicational attempts to convey meaning. By virtue of their experience as mediators, or by virtue of their own status as lawyers, they are likely to recognize persuasive tactics aimed at compromising their neutrality, and "will develop strategies to finesse, reframe, or resist lawyers' advocacy at times." (68)

But as noted, biases are usually transparent to the holder. And some persuasive techniques aimed at engaging these biases may go unnoticed or unchecked. If a mediator is unaware of his or her biases, the mediator may also be unaware of the danger these biases present to neutrality.

1. Neutrality Defined - The Cobb and Rifkin model

Cobb and Rifkin after a review of the literature identify two major components of neutrality as impartiality and equidistance. These components are commonly and frequently cited in textbook descriptions of mediation and mediator neutrality. (69)

Each of these components has certain characteristics.

According to Cobb and Rifkin, impartiality is best described as an "absence of feelings, values or

agendas." (70)

The opposite of impartiality is bias, which is the presence of these feelings, values and agendas which can shape our actions and expectations. In interviews with mediators, Cobb and Rifkin note how central the concept of impartiality is in mediators' efforts to describe their neutrality and its importance. (71)

Textbooks and training programs designed to educate mediators also stress the importance of remaining unbiased, and stress the importance of being able to "[put[aside one's own opinions, reactions, and even some principles." (72)

Underlying these instructions is the tacit assumption that impartiality is a psychological process, a process that occurs inside the mind and personality of the mediator.

Equidistance is the second component that Cobb and Rifkin identify as constituting neutrality. Where impartiality may be appreciated as the attitudinal measure of neutrality, equidistance is the practical functional measure. Equidistance enquires into the amount of time the mediator spends aligning him or herself with any given interest, represented or unrepresented, in mediation. It may be thought of as the process by which symmetry is created by using alternating bias: the mediator caucuses first with one party, then with the other; the mediator invites one party to speak and then the other; the mediator asks questions of one party and then the other. All the mediator's attention and professional effort is divided equally among the parties in order to balance power and give equal time to all interests affected by the mediation outcome.

2. The Mediator's Paradox

How mediators view their own neutrality may affect the extent to which they are able to control their own vulnerability to mediation advocacy. Cobb and Rifkin highlight several logical inconsistencies, or paradoxes, that arise when mediators locate their neutrality as an internal attribute. First, if impartiality is an internal process, then it can be endangered by

both conscious and unconscious processes. The concern is that without awareness mediators may act on biases so as to coerce disputants to adopt one or another position...[M]ediators must guard against psychological processes that may favour either disputant. Because some of these psychological processes are unconscious, mediators, in effect, must monitor unconscious processes...How can anyone monitor that which is outside her awareness? (73)

Thus, an internal locus of the impartiality aspect of neutrality puts the "practice of neutrality beyond the mediator's control." (74)

The paradox is, as mentioned above, how can anyone hope to actively monitor a transparent internal psychological process? If impartiality, as an internal attribute, is understood as one component of neutrality, then mediators must be on guard against an invisible threat to their neutrality.

Second, equidistance as a component of neutrality is equally paradoxical in practice. Cobb and Rifkin note that the mediator's ethical code promulgated in the United States by the Society for Professional Dispute Resolution (SPIDR) (75)

explicitly requires mediators to highlight and consider the interests of unrepresented parties in the process with the parties to the mediation. Especially in situations where there are important interests at

stake that may not be represented at the mediation session, it becomes important to the endurability of the agreement to at least bring those interests forward for the consideration of the parties present. The mediator, by highlighting these interests, becomes associated with the interests, effectively "representing" the interests to the parties. Yet, by definition, this is partial, not impartial behavior.[(76)]

However, if the mediator does not engage in this representation, "then they unwittingly contribute to maintaining power imbalances in the session. In other words, if mediators are equidistant, they cannot be impartial, and if they are impartial, they cannot be equidistant."[(77)]

A further paradox arising from equidistance is illustrated by the example described above: a mediator in caucus works diligently to develop a rapport with the party so that the party will trust the mediator. The mediator encourages honest communication and expression of interests by appearing empathetic, interested, and sincerely concerned -- in short, by appearing, at least for a moment, partial. The party may receive these messages and be both confused ("The mediator is supposed to be neutral...") yet heartened ("The mediator thinks I'm right..."). The ultimate difficulty arises for the mediator once this trust and rapport have been established and the party in caucus feels comfortable enough to trade on it: "Don't you think I'm right? Wouldn't you do the same thing if you were in my position? What do you think I should do?" This is the moment at which the mediator must risk breaking the hard-earned trust by re-distancing him or herself from the party, re-establishing impartiality. It is an uncomfortable moment, one where the mediator's credibility is at stake, and is often difficult to resolve delicately or gracefully while still maintaining rapport.

Do lawyers and mediation advocacy play a part in the maintenance of this paradox? Yes, to the extent that lawyers participate in the construction of the definition of neutrality as an internal process, and to the extent that they engender expectation in their clients that neutrality in the mediator will be evident through certain attributes or characteristics of the mediator. Imagine the same moment described above from the lawyer's perspective. Intellectually, the lawyer may fully understand, appreciate and support the requirement of mediator neutrality. But psycho-emotionally, in the confidentiality of the caucus, the communicative cues the lawyer receives, those of empathy and sincere interest, may tempt the lawyer away from any intellectual motivation to maintaining neutrality. In one way, the lawyer may feel satisfied and successful that he or she has persuaded the mediator to the rightness of the client's position. After all, the mediator wouldn't be empathetic if he or she didn't at some level believe that the client was in the right. In another way, once the mediator attempts to re-establish impartiality, the lawyer may take this as a cue that more persuasion is required, and revisit the dispute from a more entrenched positional perspective.

Neutrality, while still including the elements of impartiality and equidistance, may have different characteristics in different settings. For example, the neutral actions of a mediator in a community dispute resolution centre may be quite different from those of a court Master assigned to case manage certain actions through the use of pre-trial conferencing. Both mediators are "neutral," both are facilitating communication and discussion between parties. But the case master (or, for example, someone mediating along the Riskin narrow/evaluative model) has a greater mandate to impose his or her own evaluation of the merits of the disputants' positions and legal rights and also to strongly suggest solutions to the parties. Typically, community mediators do none of this. They are usually strongly committed to the theory that the only tenable and endurable solution is one that the parties have fashioned for themselves. The mediator may facilitate the discussion, but will not impose, and perhaps will not even suggest, solutions. Now, consider the preference of lawyers for the characteristics of one of these processes over the other. The literature suggests that many lawyers are much more comfortable in the first setting, where a mediator with some substantive knowledge of the law and is willing to suggest to the parties a preferred outcome.[(78)]

If neutrality is defined differently or has different characteristics over different settings, is there a correlation between the characteristics of neutrality in the setting lawyers most prefer and the extent to which lawyers perceive those characteristics to be vulnerable to mediation advocacy strategies? Lawyers are in the habit of trying to persuade. The people whom they most often try to persuade in court are judges. In the lawyer's mind, then, it may appear that mediators who operate more in the context of judges may be more susceptible to persuasion. Thus neutrality, if defined as an internal process, is undermined.

C. When Worlds Collide

Mediation advocacy is designed and used to create bias when neutrality is defined as an internal attribute. Mediation advocacy typically seeks to have an effect on the mediator (as well, as we have seen, on the other party). Thus, if a mediator understands his or her neutrality to be an internal process, it becomes vulnerable to any bias that can be raised in the mediator through the application of mediation advocacy techniques. But, it is also possible that experienced mediators may perceive no effect on their neutrality by mediation advocacy techniques. Experienced mediators may develop strategies which they believe are effective at deflecting any attempt to sway their innate neutrality. These strategies may be insufficient, however, when we note that bias may not only occur internally to the mediator, but may also occur externally, in the interactive process occurring between all parties. Here, mediation advocacy may have a much more negative effect than is commonly perceived, and the mediator may unwittingly be amplifying this effect.[(79)]

D. Re-envisioning Neutrality - Creating Discursive Neutrality

Neutrality becomes a practice in discourse, specifically, the management of persons' positions in stories, the intervention in the associated interactional patterns between stories, and the construction of alternative stories.[(80)]

Mediators are managers of interaction in the mediation process. Mediators control the flow of communications in the same way a traffic control officer regulates the flow of automobiles through an intersection. The discourse that occurs between parties to a mediation is a result of the enabling or disabling activities of the mediator. Even when the mediator "gets out of the way" of the parties, she or he is still making a "control" choice, and may be prepared to intervene if the discourse moves too far in an unproductive direction. The danger in managing discourse is that certain management or participation practices may result in the emergence and instantiation of what Cobb and Rifkin call a "dominant discourse" -- those communicative practices that "privilege one story over another, that legitimize one speaker over another, that reduce any speaker's access to the storytelling process."[(81)]

Even when the mediator feels no vulnerability to a compromise of their neutrality, having located neutrality outside of themselves and in the process, the act of creating stories with speech can quickly and firmly entrench one version of an event and subsume any other version offered. This domination may occur at a very obvious level, or at a very subtle level, and results in a power imbalance by the creation of a "terms of reference" preferential to one version of the story over another.

The suppression and control of dominant discourses is a neutrality process that occurs exterior to the mediator; it is an attribute of the process, as opposed to an attribute of the person. Thus it allows the mediator to have more control over neutrality than when neutrality is located as an interior psychological process. Mediators, whether consciously or not, participate in the construction of stories in the mediation process. As Cobb and Rifkin assert, language in mediation, rather than reflecting reality, actually creates reality.[(82)]

By being more self-aware of the stories they help to construct, mediators can actively create a neutrality located in the process. Mediators need to learn in their skills training how to construct neutral discourses, and how to balance and control discourses that tend to become dominant.(83)

Learning to identify the advent of a dominant discourse is as easy as recognizing the creation of "terms of reference." There is no magic to being able to interject and change a descriptive term, for example, when that descriptor obviously favours one party over another. The mediator should also be aware of the role he or she can have in the construction of alternate dominant discourses. There is room in the mediation context for many stories to be heard and to evolve, and there is considerable support for the proposition that the greater the number of interests that are heard and folded into an agreement, the more enduring and more satisfying to the parties the agreement will be.

Can lawyers and mediators attain a more sophisticated understanding of "neutrality" in mediation that benefits all parties? Movement toward this would first require that mediators are given enough knowledge in skills training to help identify their own hidden biases and ideologies. First, mediators must be enabled to recognize the places where their "neutrality" becomes vulnerable, if they consider it something that is personal attribute, and thus mutable, rather than a process in which they engage. Mediators must be able to appreciate how neutrality is constructed, and how it is vulnerable if described as an event which occurs inside the mediator as opposed to being contained in the external discursive practice. Second, mediators must learn to recognize the part they play in the creation of the mediation discourse, and move toward a discourse of storytelling: "story telling embodies and explains the fundamental nature of mediation and that what a successful mediator does is facilitate the production of a coherent narrative....[T]he problems associated with identifying and dealing with disputants' sides are eliminated if mediators instead focus on the conjoint process of storytelling." (84)

The key may lie in the acknowledgement that neutrality, approaching a party without bias, has a reflexive companion, which is receiving all information equally openly and curiously, and creating equal time and space for that "story" to exists with other "stories" in the mediation and in any resulting agreement to settle. Open, curious, accepting and empathetic *listening* is the companion of neutral *talking*. With adequate self-awareness on the part of the mediator even the most clever of mediation advocacy strategies will have no effect on the propensity of the mediator to favour one disputant's position or demands over the other's.

Similarly, we suggest that lawyers best serve their clients' cause in mediation when they seek, not to persuade the mediator and incite a bias in the mediator toward their client, but rather to recognize dominant narratives when they arise and become expert at constructing alternative dominant narratives. Cobb and Rifkin have shown that even where parties are fairly evenly matched for power, the existence of a dominant narrative allowed to go unchecked can co-opt and subsume any other narrative that potentially exists.(85)

If this happens within the first half an hour of mediation, a lawyer may spend the rest of the mediation fighting against the established character positions and attributes generated by the dominant narrative. Typically, the construct of "justice" requires that settlement be reached in an atmosphere free from bias. Even the most experienced litigator would support this concept as fundamental. And so justice is best achieved in mediation when the same is true -- lawyers not seeking to bias the mediator, but working diligently to ensure that alternative dominant narratives are used in the construction of the settlement agreement. Here, the lawyer has a particularly important role to play. Once the lawyer realizes that it is in the interest of all the parties that a dominant discourse not be formed to subsume all other versions, the lawyer may be called on for his or her particular skill in recording and accounting for all of the rich detail available to be incorporated into minutes of settlement when there isn't just one story represented

in that agreement.

Part IV: The Client's Paradox

Like mediator and lawyers, clients may also become trapped by a paradox when their expectations regarding the litigation process are superimposed on the mediation context. As discussed, the current litigation paradigm requires that clients exhibit a certain amount of loyalty to the lawyer as champion. In this model, the client has a limited participatory role. The client initially sets out the goal to be achieved by the champion, or more generally brings a problem without a clear view of the solution to the lawyer's attention. Once the lawyer "takes on" the client, the lawyer becomes the primary decision-maker in the client's dispute, since it is the lawyer who understands the language and rules of the legal framework. The client is the amateur, and therefore a bystander on the sidelines of the legal playing field. It is the lawyer, the expert, who participates in the play. In response, the client feels a sense of loyalty to the champion. After all, the lawyer is acting on the client's behalf.

In contrast, mediation offers the client control over the process and the outcome of his or her dispute. This process also offers greater opportunities for the client to tell her story in her own language; to engage in creative solutions to the dispute which can be non zero-sum; as well as to accept a healing or transformative experience. In mediation, it is assumed that no one knows the dispute better than the client and therefore the client is the "expert." However, the client's understanding of the possibilities of the dispute is not complete. In particular, the client does not have an understanding of the legal framework which may influence resolution of the dispute.[(86)]

Engaging in the mediation process with a lawyer creates a dilemma for the client, a duality of potentially incompatible roles. On one hand, the client wants to remain faithful to the champion, acknowledge the lawyer's expertise, and exhibit appreciation for it. On the other hand, the client may know that mediation is a forum where, unlike the courtroom, he or she has a much greater autonomy to control the process. How is the client to choose between loyalty to the lawyer and the possibility of asserting her own power in the mediation process? Both are there to serve her interests, yet they seem incompatible. Lande points out that the inclusion of lawyers in the mediation process may in fact subvert these possibilities for the client. Specifically, the lawyer may decrease the client's decision-making power and thereby reduce client's role in the process.[(87)]

The adoption of a deliberative process[(88)]

is likely to have implications for the client's paradox. In this model, the client is a principal actor in her dispute through dialogue with her lawyer. Through deliberation with her "wise counsellor" the client has greater responsibility for the decisions. The lawyer as "wise counsellor" has an important educative function in relation to her client. In particular, through her lawyer, the client gains an understanding of how her dispute may fit into a legal framework. As well, the lawyer practised in a deliberative approach may help the client see the entire range of possibilities for resolution of the dispute. However, until such a model becomes adopted, the mediator can act to ensure that the client does not have to make an explicit choice.[(89)]

Lande suggests adopting the objective of "high quality consent" in the mediation. This refers "to a condition in which a principal has exercised his or her responsibility for making decisions in a dispute by considering the situation sufficiently and without excessive pressure."[(90)]

In achieving "high quality consent", the client is aided in taking the power away from the "champion" in

mediation and in developing a new relationship between lawyer and client. Through considering the factors involved in ensuring high quality consent, the client and the lawyer move towards a relationship which is more similar to the client as boxer and the lawyer as the coach, rather than the paradigmatic "champion" and "damsel in distress" roles which dominate the litigation paradigm.

Lande suggests seven factors which should be considered by the mediator and throughout the mediation process to evaluate a client's consent. The first factor is the "explicit identification of the principals' goals and interests." (91)

This identification is developed by all parties to the mediation, ideally with the client taking the dominant role in the discourse regarding her rights and interests. This requires defining the dispute as broadly as possible, in order to allow the parties to identify and consider options which they may not have identified without such explicit consideration The second factor is the "explicit identification of plausible options for satisfying these interests." (92)

This factor supports the idea that generating multiple options allows for better possible solutions. The third factor to be considered is the "principals' explicit selection of options for evaluation." (93)

This explicit choice (and perhaps discussion) aims at reducing undue influence on the principal's decision. The next step is the "careful consideration of these options," where the principals weigh these options and the consequences, determining the information they need in order to make this choice. The fifth factor is the "mediator's restraint in pressuring principals to accept particular substantive options," for example, in the mediator pushing the parties towards settlement. The sixth factor is the "limitation on the use of time pressure." In particular, this factor aims at side-stepping the creation of time constraints as a ploy to require the principal to make a decision. (94)

Finally, the seventh factor looks to ensure that the principal is agreeable to the options for settlement chosen, it requires "confirmation of principals' consent to selected options." Again, it demonstrates an emphasis on the responsibility and power of the principal for making decisions in the mediation context. In Lande's view, *all* of these factors do not have to met, but they provide a framework in which to evaluate a party's consent to mediation process and the outcome.

Such factors may play a significant role in the mediation process if the client does not have an "enlightened" deliberative lawyer. In Lande's view, it is particularly important for the mediator to consider the quality of the client's consent when lawyers are included in the process. In particular, lawyers are often the source of the time pressure (due to the demands of practice) which may decrease the quality of a participant's decision-making in the mediation context. Also, the client engaging in the mediation process with a lawyer as champion may not find his views fully reflected in those expressed by his lawyer. To ensure that the client is not being overshadowed, the mediator should check for the client's consent to ensure that any agreement is reflective of the client's actual wishes.

Again, the solution to the client's paradox, particularly where non-deliberate approach is taken by his own her lawyer, is focusing on empowering the client in the mediation. The mediation process offers unique benefits to participants, and Lande's suggestions aim at ensuring that these benefits are achieved.

Part V: Conclusion

Mediation was once seen as a breakthrough. It offered a form of dispute resolution radically different from the litigation paradigm, allowing people to shape their own solutions to problems free from what

were perceived to be the narrow strictures of the traditional legal system. Today, because of the high cost of litigation (among other reasons), this "alternative" is being adopted as part of the mainstream legal system through mandatory mediation programs. There is an assumption at work is that mediation will fit seamlessly into the current litigation system. We have attempted to demonstrate that this assumption is highly problematic by focusing on the "paradoxes" created when the mediation and litigation cultures converge.

A recent article in the Law Times, quoting an experienced Toronto lawyer and mediator, notes that "[t]he success or failure of the Ontario [mandatory mediation] experiment...will depend on the mindset of participants, particularly counsel who may attend mediations 'reluctantly and without proper attitudes and training'." (95)

The role of lawyers in our society does not coincide with the role of joint problems solver required in the mediation process. We have shown that paradigmatic persuasion of the third party neutral essential in the litigation process is at the core of similar attempts to bias a mediator on behalf of a champion's client. This is part of the current conception of the role of lawyers, to "win" on behalf of their clients, where a "win" is defined as a corollary loss for the other party. In this view, clients act primarily as bystander in the solution of their problem.

We believe that there is a danger that mediation may become so institutionalized by the courts, by virtue of the mandatory mediation experiment, that eventually it becomes only another step in the litigation process as a whole. This danger is exacerbated by lawyers and mediators clinging to old roles and old concepts of neutrality, and leaves the client not only in a difficult position vis a vis the lawyer and mediator, but also potentially with no viable alternative to the litigation process. It is important that mediation not become simply one more hurdle to jump in the litigation process. We have suggested that in order to fulfil the unique possibilities of mediation, and to resolve the paradoxes that occur when mediation and litigation are superimposed on eachother, three paradigm shifts are needed.

First, lawyers must learn to reconceptualize their role, moving away from the paradigm of "champion" and becoming instead a "wise counsellor," engaging in a deliberative process with the client. Lawyers must recognize that the habits and practices which make them able advocates in the courtroom may serve to inhibit positive outcomes for their clients in the context of mediation.

Secondly, mediators must learn to view neutrality not as an internal attribute of themselves, but rather as an external attribute of the mediation process, something that is embedded in the discourse of the mediation rather than a belief internal to the mediator. Mediators can approach this by noting that the "end goal of mediation can be redescribed as the construction of agreements that empowers both the disputants and the mediators: that is, allowing agreements to be constructed in the absence of the conflicting demands of neutrality. The means for doing this is the active facilitation of stories." (96)

Finally, both lawyers and mediators must enable the client to participate in the process with high quality consent. The client must not be constrained by the role the lawyer/client relationship typically imposes on the client. The client must be free to, and indeed encouraged to, participate in both the process of the mediation, and any resolution of the dispute.

As Lande suggests, the incorporation of mediation into the litigation process - and lawyers into the mediation process - will fundamentally alter the nature of both. It is possible that as court annexed mediation progresses past its origins as a pilot project, mandatory and voluntary mediation may evolve to be different species. It is our hope that whatever evolution occurs, the possibilities of facilitative interest-base mediation are not forgotten, and that mandatory mediation does not become just another

routine step in the process experienced by lawyers and clients on their way to court.

1. [0] According to the rule, the mandatory nature of the program is limited to case managed actions. The Lawyer's Weekly estimated that this would "represent approximately 25 per cent of cases in Toronto and 100 per cent of cases in Ottawa." See 18 Lawyer's Weekly No.4 (May 29, 1998) at 11 (2).

2. [0] John Lande suggests that one of the goals of mediators, as mediation evolves, should be to "embrace a great diversity of practices under the 'mediation' label....There is some merit to most mediation philosophies, and we should resist the temptation...to elevate our own approach as 'real' mediation and denigrate others as false substitutes that should not share the mediation franchise....It is unlikely that any camp will prevail completely, and if perchance one does, mediators, and more importantly, principals, will lose the precious values of diversity and choice." See J. Lande, "How Will Lawyering and Mediation Practices Transform Each Other?" (1997) 24 Florida State U. L.R. 839 at 895.

3. [0] We suspect that in such specialized contexts, "bias" or "neutrality" may be differently defined or have different effects. It may even be that biases are desirable in these contexts - ie a mediator is hired specifically because he or she is predisposed to certain types of outcomes for the parties involved or is prepared to explicitly evaluate on legal or statutory rights as well as on interests.

4. [0] Lande predicts a "co-evolution"of mediation and litigation, resulting in what he terms the "liti-mediation culture." See Lande, *supra* note 2 at 879 (footnote 189).

5. [0] Jacqueline M. Nolan-Haley "Lawyers, Clients, and Mediation" (1998) 73 Notre Dame L.R. (no.5) 1369 at 1372.

6. [0] Leonard L. Riskin "Mediation and Lawyers" (1982) 43 Ohio State L.J. 29 at 44.

7. [0] Nolan-Haley, *supra* note 5.

8. [0] Although a particular judge's biases are often well-known to the local bar, and lawyers make careful use of this knowledge. See *infra* section III A 1.

9. [0] Riskin, *supra* note 6.

10. [0] Nolan-Haley, *supra* note 5 at 1373.

11. [0] *Ibid.*

12. [0] Cinnie Noble, L. Leslie Dizgun, and D. Paul Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery Publications Ltd., 1998) at 93.

13. [0] John W. Cooley, *Mediation Advocacy* (National Institute for Trial Advocacy, 1996) at 91.

14. [0] Jeffery L. Weinstein and Tailim Song, "Winning Without Trial: Advocacy in Mediation" (1996) *Trial* (vol. 32, June) 28 at 31.

15. [0] Roger Chapman, "The Role of Lawyers in Mediation" (1996) New Zealand L.J. (May) 186 at 189.

16. [0] Cooley, *supra* note 13.

17. [0] *Ibid.* at 25.

18. [0] *Ibid.* at 35-36. Cooley notes that the use of mediation as early discovery is certainly not a reason to avoid the process, but he suggests it may be a reason to engage in the process; if the mediation fails to create a settlement, at least you have an understanding of the other party's case.

19. [0] See generally Nolan-Haley, *supra* note 5.

20. [0] *Ibid.* at 1383.

21. [0] *Ibid*. at 1382.

22. [0] Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (New York: Farrar, Straus and Giroux, 1994) at 36.

23. [0] Nolan-Haley, *supra* note 5 at 1383.

24. [0] *Ibid.* at 1384.

25. [0] *Ibid.* at 1383.

26. [0] *Ibid*. at 1384.

27. [0] *Ibid.* at 1385.

28. [0] Or, perhaps choosing not to enter into any process at all, legal or non-legal.

29. [0] Janet Weinstein, "Teaching Mediation in Law School: Training Lawyers to be Wise" (1990) 35 New York Law School L.R. 199 at 217.

30. [0] *Ibid.* at 206.

31. [0] See Chapman, *supra* note 15 at 188.

32. [0] Glendon, *supra* note 22 at 102-108.

33. [0] Lande, *supra* note 2 at 893.

34. [0] See generally Sara Cobb and Janet Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991) 16 Law and Social Inquiry (winter) 34 [hereinafter "Practice and Paradox].

35. [0] See generally Anthony Kronman, "Legal Scholarship and Moral Education" (1991) 90 Yale L.J. (no 5) 955. Kronman asserts that the advocate in general is indifferent to truth, and that for the advocate,

the "value of an argument in a lawsuit or a legislative committee depends entirely on its ability to persuade, on whether it leads to victory or defeat...the defining goal of legal advocacy is, in Socrates' words, the production of conviction rather than knowledge." *Ibid*. at 963.

36. [0] Donald E. Short (lawyer and partner, Fasken Campbell Godfrey), "Potent Paper Plus: An Examination of Documentary and Other Aids to a Successful Mediation" (paper presented to the Canadian Bar Association of Ontario's Continuing Legal Education Conference, "Power Packed Mediation" - 29 January 1999) (on file with the authors).

37. [0] Calum U.C. McLeod B.A., LL.B, C.Med., Case Management Master, Ontario Court (General Division) Toronto, Lecture (Queen's University Faculty of Law Advanced Mediation Course, 9-10 January, 1999) [unpublished].

38. [0] Sara Cobb and Janet Rifkin, "Neutrality as a Discursive Practice" (1991) 11 Studies in Law Politics and Society (vol. II) 69 at 87 Footnote 1 [hereinafter "Neutrality"]. Mandatory mediation probably derives some of its credibility from the fact that it is a court-connected process.

39. [0] CBAO CLE materials (on file with authors).

40. [0] Professor Julie McFarlane, "21 Questions To Ask Before Choosing A Mediation Advocacy Training Program" (paper presented to the Canadian Bar Association of Ontario's Continuing Legal Education Conference, "Power Packed Mediation" - 29 January 1999) (on file with the authors).

41. [0] It is interesting to note how important this aspect of mediation -- mediator selection -- seems to be for lawyers. Model guidelines for the selection of roster mediators for court annexed programs have been drafted by renowned author and well-respected mediator Christine Hart (see "Draft Model Guidelines for Court Connected Mediation Programs" Chapter One, Guidelines for the Selection of Mediators [paper prepared for the Canadian Bar Association Systems of Justice Implementation Committee's Working Group on Dispute Resolution Standards, 3 September 1998]). But it appears that these guidelines are also useful in educating lawyers in regards to what makes a "good" mediator.

42. [0] Advertisement in CBAO CLE materials, *supra* note 39. Note that the term advocate in the phrase "mediation advocate" does not import the idea of "adversarial" as in hostile or inappropriately aggressive. We don't envision the drawbacks of mediation advocacy to be associated with these sorts of overt behaviours. However, even very calm and reserved litigation professionals still carry with them certain assumptions about the litigation paradigm which, when brought to bear on the mediation process, can produce less than ideal results. These assumptions are what motivate our discussion.

43. [0]See, *e.g*., Cooley, *supra* note 13 and Noble *et al*., *supra* note 12.

44. [0] McFarlane, *supra* note 40.

45. [0] But we could ask if mediation advocacy, as a hybrid technique (ie, part mediation and part litigation) may be symptomatic of lawyers' discomfort with mediation and its potential unpredictability, which stems from the presence of "the human factor." See Robert M. Nelson, *The Psychology of Mediation* (internal publication, Gowling, Strathy & Henderson, Ottawa - on file with the authors).

46. [0]See, eg, Selma Colvin, "Mediator Issues in the Mediator Selection Process" (paper presented to the

Canadian Bar Association of Ontario's Continuing Legal Education Conference, "Power Packed Mediation" - 29 January 1999) (on file with the authors).

47. [0] Lande, *supra* note 2 at 891.

48. [0] Cooley, *supra* note 13 at 116.

49. [0] *Ibid.*

50. [0] This is a stance that seems more consonant with the image of lawyer as courtroom-battle-goer (or "champion") than it does with lawyer as joint problem solver.

51. [0] Cooley, *supra* note 13 at 116.

52. [0] *Ibid.* at 117.

53. [0] *Ibid.* at 121.

54. [0] Weinstein and Song, *supra* note 14 at 32.

55. [0] *Ibid*. at 33.

56. [0] This characterization is especially appropriate in the model of mediation called early neutral evaluation, where the mediator is selected specifically for a certain substantive knowledge and is expected to actively evaluate the strengths and weaknesses of each side's case and to impose on the process "appropriate" options for settlement. It seems that many lawyers are most comfortable with this kind of mediator and mediation context. Consider, though, that this style of mediation exists at one extreme on a continuum of styles which appear more or less like an adjudicative process. Consider too that at its inception, mediation in many cases sought to be an *alternative* to the adjudicative process, something different than the sort of evaluation and resolution that goes on at court.

57. [0] See Richard Weiler, "Getting to Mediation: The Lawyer's Mediation Planning Toolkit" (CBAO CLE conference materials Jan 29. 1999 - on file with authors) for examples of self-evaluative devices that lawyers can use to asses whether a given case is appropriate for mediation.

58. [0] Danny G. Shaw, "Tip from the Litigator: Enhance the likelihood of a Successful Mediation for your Client" (1997) 45 LA. Bar J. 140 at 140. It is interesting to note that experienced and reputable mediators typically do *not* measure their success by the number of cases they settle. They measure it rather by the extent to which the process has encouraged the parties to better appreciate each other's perspectives and interests. See also Rita Lowery Gitchell, "Preparing Your Case For Mediation" (online at: www.nla.org/library/spring97/pgl3.html [last accessed, 16 February 1999]), where the author notes "When mediation does not end in resolution, both sides, and their lawyers, nonetheless are left with a clearer picture of what the issues will be at trial, how firm the other party is in his/her position, and an educated prediction of the costs and consequences that lie ahead should the case not resolve prior to trial."

59. [0] Lawyers typically argue that they have been settling cases for years, without the help of mediators,

so why (aside from the mandatory nature of the court-annexed program) should they require them now? The appropriate response to this assertion lies in the qualifier "early" - in other words the benefit of mediation that is overlooked here is that it can provide settlement early in the litigation process, before the adversarial system has a chance to gain momentum and become costly in terms of time and money. See generally Stephanie Charlesworth, "Still Waiting in the Wings: Mediation and the Legal Profession" (1991 Jan.-Feb.) Law Institute J. 59.

60. [0] See, for example, comments made by Master Robert Beaudoin of the Ottawa mandatory mediation project. (paper presented to the Canadian Bar Association of Ontario's Continuing Legal Education Conference, "Power Packed Mediation" - 29 January 1999) (on file with the authors): "In a court connected scheme, settlement is naturally a priority." But he goes on to dispel that "myth" that it is the *only* priority:

"We can't ignore other measures of success:

• client satisfaction; in a small survey conducted by one of our mediators,...client satisfaction was very high, regardless of whether or not their case had settled.

• [c]lient participation; this is their dispute, resolution is enhanced when they are exposed to a greater understanding of the process.

• impact on legal culture: lawyers are broadening their traditional skill base, in [that] they are becoming experts in a variety of dispute resolution techniques."

We question, however, whether this broadening of lawyers' skills base has the effect of making them better participants in mediation.

61. [0] We suppose that lawyers resist the "purer" forms of interest based mediation, those that approach transformational ("granola"-type mediation, as one practitioner puts it), probably because most lawyers are not trained, as social workers or psychologists might be, to deal with the psycho-emotional aspects of conflict resolution for their clients. Hamilton, Ontario mediator and lawyer Richard Shields notes: "The negotiation of a settlement defines success in problem-solving mediation. A successful outcome in transformative mediation occurs when the parties experience growth in two dimensions: the capacity for strength and the capacity for relating to others." (paper presented to the Canadian Bar Association of Ontario's Continuing Legal Education Conference, "Power Packed Mediation" - 29 January 1999) (on file with the authors).

However, the two goals, problem-solving and personal growth, are not mutually exclusive. The question here is whether the court-mandated variety of mediation, with all that the participation of lawyers carries with it, is even open to the possibility of a transformative process (potentially very beneficial to clients) occurring. See also, Paul Jacobs, "How Mediation can get Rid of that Unresolvable File" 18 Lawyers Weekly No. 4 (May 29 1998) at 13(1), where the author notes that the value of interest based mediation may lie in its ability to relieve lawyers of "those one or two files in the drawer that naggingly return to your calendar tickler every once in a while."

62. [0] Consider the popular aphorism that the best settlement in a mediation is one that is equally unattractive to everybody.

63. [0] Note Professor McFarlane's first rule of mediation advocacy: "Don't tick the mediator off!"

64. [0] Shaw, *supra* note 58.

65. [0] Robert M. Nelson, *supra* note 45, notes that the dynamism of emotion in interest based mediations, and the fact that such emotion is neither predictable nor controllable, may be a factor in the types of mediations lawyers prefer, and thus the types of mediators they choose. This dynamism can quickly overtake any lawyerly preparations done in anticipation of the process. The lawyer is not in control of the process. Combine this loss of control with the lawyer's innate fear of unpredictability and spontaneous emotion, and the middle of the mediation context can quickly become a fairly uncomfortable place for a lawyer. Conversely, early neutral evaluation-type mediations give lawyers lots of control - but do they serve the needs of clients?

66. [0] We could perhaps call this a "legalistic" bias, to the extent that a bias may be defined as a pre-conceived trained-in preference for a specific set legal outcome, or the application of a particular legal principle. Mediation is supposed to be a forum where parties are not constrained by legal principles, which may stifle creativity. "Neutrality," as a process ideal, may be affected by this sort of bias.

67. [0] Lande, *supra* note 2 at 891.

68. [0] *Ibid.*

69. [0] "Practice and Paradox," *supra* note 34 at 41.

70. [0] *Ibid.* at 42.

71. [0] *Ibid.* at 40-42.

72. [0] Jennifer E. Beer and Ellen Stief, *The Mediator's Handbook* (New Society Publishers, 1997) at 23.

73. [0] "Practice and Paradox," *supra* note 34 at 43.

74. [0] *Ibid.*

75. [0] *Ethical Standards of Professional Responsibility* (Washington, D.C.: the Society, 1986) cited in "Practice and Paradox" at 44-45. The Canadian Bar Association of Ontario, ADR section, has developed a "Model Code" for mediators, to articulate standards of behavior and practice for mediators, although no such similarly explicit admonition to consider the interests of unrepresented parties is made.

76. [0] Note, though, that typically mediators will work at the outset to ensure that, first, all relevant interests are indeed represented in the mediation session; and second, that each party has the authority to enter in to an agreement on behalf of the interests the party represents. This can relieve the paradox to a great extent.

77. [0] *Ibid*. at 45.

78. [0] See *supra* note 65.

79. [0] Consider the place and effect of the dominant discourse in traditional civil actions. Traditionally, the plaintiff is the party who presents his or her case first, thereby establishing the frame of reference for the rest of the courtroom "discourse." But note that the benefit of the dominant discourse to the plaintiff is mitigated by an attendant burden of proof (evidentiary or persuasive) - there is no such requirement in mediation, no such opportunity for mitigation of the powerful momentum created when a dominant narrative in instantiated and validated by not only the parties but the mediator too.

80. [0] "Practice and Paradox " *supra* note 34 at 62.

81. [0] *Ibid.* at 51.

82. [0] *Ibid.* at 39.

83. [0] Mediators should, for example, be taught to consider the effect of who goes first in the mediation, how to recognize power imbalances in the narrative, and how to counter the verbal power plays of lawyers, who are expert in creating non-neutral discourse.

84. [0] Janet Rifkin, Jonathan Millen and Sara Cobb, "Toward a New Discourse for Mediation: A Critique of Neutrality" (1991) 9 Mediation Quarterly (no.2) 151 at 161 [hereinafter "Critique"].

85. [0] See generally "Critique," *ibid.*

86. [0] Even if client chooses to ignore legal rights, he or she should still be aware of them. Sometimes for example, standards of the legal system serve to protect the weaker party, even in a mediation.

87. [0] Lande specifically believes the inclusion of lawyers in the process can reduce the quality of the client's consent, which is comprised of decision-making power and responsibility. These two concepts as part of the idea of "consent" will be explored in the discussion that follows.

88. [0] See discussion *supra*, section II B.

89. [0] An experience mediator and mediation teacher, Richard Weiler of Ottawa, describes a particular technique useful in alleviating the client's paradox. Weiler suggests that the mediator make a decision to take a temporarily directive stance, explicitly redirecting decision-making authority from the lawyer to the client. As a result of the mediator's directive activity, the lawyer is momentarily relieved of the champion role, and will not look "weak" if he or she allows the client to make a decision. And the client is given permission in that moment to overtly exercise his or her autonomy, without appearing disloyal to the champion while doing so.

90. [0] Lande, *supra* note 2 at 868.

91. [0] *Ibid.* at 869.

92. [0] *Ibid*. at 868.

93. [0] *Ibid*.

94. [0] *Ibid.* at 877.

95. [0] Julius Melnitzer, "Need for Mandatory Mediation Drops with Caseload" *Law Times* March 1-7 1999.

96. [0] "Critique," *supra* note 84 at 162.