"MEDIATE FIRST" CONFERENCE IN HONG KONG

11 & 12 MAY 2012

Judiciary, HKSAR

HKIAC 香港國際仲裁中心 Hong Kong International Arbitration Centre

香 港 調 解 會 The Hong Kong Mediation Council (A Division of Hong Kong International Arbitration Centre)

Edited by Mediation Team, Department of Justice HKSAR

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Mr. Chan Bing Woon, SBS, MBE, JP[1]

Since the Chief Executive's Policy Address in 2007-2008, the Department of Justice has been at the forefront of the promotion and development of mediation in Hong Kong with the Working Group on Mediation (2008 -2010), the Mediation Task Force (2010 - 2012) and the Steering Committee on Mediation (late 2012 – current). I have the opportunity to contribute to these series of committees during these interesting periods and to be part of this global movement here in Hong Kong.

2012 was a milestone year for mediation in Hong Kong. In addition to the "Mediate First" Conference, the development of mediation in the areas of regulatory and accreditation in Hong Kong is remarkable. The enactment of Mediation Ordinance (Cap. 620) provides a legal framework to the conduct of mediation, in particular to the confidentiality and admissibility of mediation communication in evidence, supported by Hong Kong's sound legal system further strengthen Hong Kong as an international mediation hub. In August 2012, the Hong Kong Mediation Accreditation Association Limited (HKMAAL), an industry-led mediation accreditation body was set up to discharge disciplinary functions and to set standards for mediation in Hong Kong.

The "Mediate First" Conference was one of the initiatives of the Public Education and Publicity Sub-group of the Mediation Task Force that I chaired. The task falls on this Sub-group to map out a suitable regime for the promotion and publicity plans to encourage the more extensive use of mediation in Hong Kong. The change of culture and litigious mindset to an amicable resolution of disputes by way of mediation is not an easy task. I have no doubt that this book with the collection of conference papers written by international and local speakers will not only provide readers with worthy discussions but is also an important documentation highlighting the significant development as part of the history of mediation in Hong Kong.

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1 Mr. Chan Bing Woon is Adviser and Founder of Joint Mediation Helpline Office.

As the Chairperson of the Organizing Committee for the 2012 "Mediate First" Conference, I would like to thank the Organizing Committee members, Christopher To and Jody Sin for their invaluable contribution. On behalf of the Organizing Committee, I thank the authors for generously sharing their views and experiences to ensuring a healthy development of mediation in Hong Kong. Many thanks to Erica Chan for her unwearied diligence in ensuring the success of the Conference. A big thank you to the Mediation Team of the Department of Justice for their untiring efforts in reviewing and editing the conference papers, in particular to Venus Cheung for her enduring dedication throughout.

I look forward to more exciting development in the mediation industry and to further strengthen Hong Kong's position as an international mediation hub in the Asia Pacific Region.

Chan Bing Woon, SBS, MBE, JP
Chairperson of Organizing Committee of "Mediate First" Conference

"Mediate First" Conference in Hong Kong

11 & 12 May 2012

Day 1
International Development of Mediation

"Mediate First" Conference

The Honourable Mr Wong Yan-lung SC, JP [1]

I still have very vivid memory of the first Mediation Conference held in November 2007, which the Honourable Madam Justice Bergin also attended and where she kindly shared with us the Australian perspectives on mediation. Everyone was so eager to learn. The panel discussions during the conference were hardly enough to quench our thirst and a seminar was quickly put together at the Jury Assembly Room of the High Court enabling us to pick the brains of our overseas experts further.

In the past four and a half years, a lot has happened on the mediation front, thanks to the concerted efforts of many. Today I am pleased to report that mediation as a dispute resolution method has indeed taken root in Hong Kong.

A core value encapsulated in mediation is harmony. Here is Hong Kong we have been fortunate to experience that harmony among almost all key stakeholders who have been working closely together to develop mediation. I would therefore like to take this opportunity to thank all of you who have taken part in the Mediation Working Group, the Mediation Task Force, and the various sub-groups, for your time and fruitful labour in the past few years.

The Working Group and the Task Force

Just to recap what has happened since the last Mediation Conference: First, a cross-sector Mediation Working Group was set up in early 2008 concentrating on the various critical areas identified. The Working Group Report with 48 Recommendations was published in February 2010 for public consultation. After the three months' consultation, a total of 88 written submissions were received.

To follow up on the recommendations and the responses, a more compact Mediation Task Force was set up in December 2010. Specific goals were set and some are close to accomplishment. I will come to them in a moment.

The Civil Justice Reform and Legal Aid

But we must all acknowledge that the single most important impetus for the use of mediation is Practice Direction 31 on Mediation, introduced by the Judiciary as part of the Civil Justice Reform (CJR).

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1 The Honourable Mr Wong Yan-lung SC, JP was the Secretary for Justice, Department of Justice of HKSAR (2005-2012).

After Practice Direction 31 became effective on January 1, 2010, parties to litigation are required to comply with the procedure including the filing of Mediation Certificate, Mediation Notice and Mediation Response. This procedural requirement ensures the parties and their legal advisers would make genuine efforts to settle their disputes through mediation prior to litigation. One important motivation or driving force is that a party will have to face an adverse costs order if he fails to engage himself in mediation without any reasonable explanation.

The change of the landscape is significant and readily felt. Practitioners came to realize when it comes to mediation, Caesar has crossed the Rubicon. They, however reluctantly, would have to learn how to help as a mediator as opposed to fight as a gladiator. The number of legal practitioners seeking training and accreditation shot up. As of today, we have over 1,600 mediators who are accredited or have attained professional qualifications.

Another significant milestone in the development of mediation is the Director of Legal Aid's confirmation that expenses incurred by legally aided persons when undergoing mediation in the course of the legally aided proceedings are now regarded as costs incidental to the legal proceedings and thus covered by legal aid. In 2010, the Legal Aid Department approved funding for mediation in 555 assigned out cases. This is not the most up-to-date figure. But I have no doubt the figure would have been higher in 2011.

With mediation becoming an integral part of the dispute resolution regime in Hong Kong, it is imperative that parties to litigation can readily access the information as to what mediation is about, and how they can engage reputable mediation service providers. In this connection, apart from the Mediation Information Office set up by the Judiciary in 2010, the professional bodies themselves have also taken initiatives. In 2010, a non-profit-making organization, the Joint Mediation Helpline Office Ltd, was jointly founded by eight professional bodies, seeking to promote the effective use of mediation and provide mediator referral services.

Accreditation

The 1,600-plus mediators in Hong Kong are accredited by a number of different bodies, each adopting its own training and accreditation criteria. One key recommendation of the Mediation Working Group was to set up a single accreditation body. However, in view of the diversity of existing service providers and the obvious challenge to persuade them to surrender jurisdiction without legislative backing, the Working Group originally recommended the matter be reviewed in five years' time after mediation had become more entrenched in Hong Kong. However, the majority of the submissions received were overwhelmingly supportive of the establishment of a single body for accrediting mediators much sooner.

A Main reason is the fear, and sadly the experience of some, that mediation could be reduced to a tick-box before litigation, and parties went through the formality engaging mediators of dubious qualifications or ethics charging insulting fees.

The Mediation Task Force therefore grappled with the subject of accreditation with an added sense of urgency. However, as anticipated, the task of setting up a single accreditation body proved to be easier said than done. First, what should be the role of the single accreditation body? Should it accredit individual mediators, or the assessors, or the organization of mediators, or the courses? How does it enforce standards? How do we preserve flexibility and diversity while stipulating on standards?

Second, we also have to face very practical issues and vested interests. Mediation training and accreditation are admittedly lucrative businesses. The more established mediation service providers are understandably reluctant to lose their market niche and influence by merging with others into a common body.

However, with the hard work of the Accreditation Group of the Task Force and that of the major mediation bodies, I am pleased to report that broad consensus has eventually been reached among the major mediation bodies. We are now working on the detailed constitution of an industry-led single accreditation body, by the name of the Hong Kong Mediation Accreditation Association Limited (the Association). The Association will perform the role of the premier accreditation body for mediators in Hong Kong, discharging accreditation and disciplinary functions. The current thinking is that the four major mediation service providers, namely the Law Society, the Bar Association, the Hong Kong International Arbitration Centre and the Hong Kong Mediation Centre, will be the founding members of the Association, as well as the anchor members of its Council which would include elected and co-opted members. It is also proposed that a body which joins the Association will have to terminate its own existing accreditation system.

It is expected that the Memorandum and Articles of Association of the Association will be finalised and registered with the Companies Registry within this year. This will no doubt be a major milestone in the development of mediation in Hong Kong. Let me thank all stakeholders concerned for your understanding and willingness to put long-term public interest first.

The Mediation Bill

Another significant target almost reached is the enactment of a Mediation Ordinance to provide a regulatory framework for mediation. By the time we published the Working Group Report in 2010 a broad outline as to what should and what should not be legislated upon had been put together. The response received was also overwhelmingly supportive.

Since then, the Mediation Ordinance Group of the Task Force worked closely with my department producing numerous drafts of the Mediation Bill, conducting further consultation among stakeholders, surveying overseas legislations, researching into numerous legal issues, engaging our legislators and addressing concerns raised by different bodies.

Among other things, the Mediation Bill seeks to set out a clearer regime regarding important issues such as confidentiality and admissibility of mediation communications. Later this morning, we will have opportunities to discuss with overseas experts more about mediation legislation-related matters.

We are hoping to enact the Bill within this legislative year, if not within May. My sincere hope is that the passing of this important Bill, which is the product of such hard work, deliberations and consultations, and which is of such importance to Hong Kong, will not be jeopardized by any quorum or filibustering issues troubling our legislature at this moment.

As we engaged the public, other stakeholders and our legislators, it became apparent to us many still do not fully understand what mediation is all about and the scepticism is quite entrenched in certain sectors. It comfirms the importance of the third prong which we have been pursuing, and that is public education and publicity.

Public Education and Publicity

By now, many of you in Hong Kong must have come across out mediation Ad on TV or radio using the concept of "untying the knot" or "unlocking the dispute". In government terms, the ad is called API, standing for "Announcement in the Public Interest". Absolutely right as the availability and use of mediation to resolve disputes is a piece of good news of great public importance.

I am pleased to report that since the airing of the API, we have seen a marked increase in the inquiries on mediation services. The Public Education and Publicity Group of the Task Force is now working enthusiastically on another API. It will be useful to sustain and strengthen the message we have put across to the public.

Today's conference is entitled "Mediate First". In fact, back in May 2009, we already launched a very successful "Mediate First" Pledge campaign with more than 100 companies and trade organizations pledging to consider the use of mediation first before resorting to other means of dispute resolution.

In parallel, we also launched the Pilot Project on Community Venues for Mediation in 2009 to identify suitable venues for mediation available at nominal or no fees, to promote such venues to mediators and the public.

To change the community's mindset involves a lot more concerted and sustained efforts of all sectors. In this connection, we have been encouraged to see many are pitching in and voting in favour of mediation by concrete action. One particularly noteworthy venture is the setting up of the Financial Dispute Resolution Centre (FDRC) by the Government with the support of the financial institutions, following the success of the Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme, which scored an 89 per cent settlement rate. The FDRC, for which establishment is expected shortly in mid-2012, aims to provide an independent and affordable avenue for resolving monetary disputes between individual clients and financial institutions, and will seek to settle such disputes through mediation first.

Conclusion

There are still a number of issues identified in the Working Group Report which remain to be considered. For example, whether there should be compulsory referral to mediation as in some other jurisdictions. However, I believe we would be better placed to come up with the right solution after mediation has gained a much firmer foothold in our community.

I remember Professor Dame Hazel Genn raised a question with me back in 2007 when we met: Why is the Hong Kong Government playing such an active role in promoting mediation? Well, because we see the merits and potential of mediation, as they are almost universally recognized.

By way of illustration, the mediation reports filed in the District Court regarding the CJR-related cases in the period between January 1, 2011, to December 31, 2011, showed that settlement was reached in 47.9 per cent of the cases which have undergone mediation.

We need hard facts. As the saying goes, "Prejudice is a great time saver. You can form opinions without having to get to the facts." At this critical stage in the development of mediation in Hong Kong, we need figures and statistics, to show clients' satisfaction, to prove the saving of time and costs, so as to conduct meaningful evaluation, to convince the skeptics, and eventually to successfully change the community's mindset. At the same time, we also have to be vigilant to keep abreast of what is happening in jurisdictions who have walked much further than us on the mediation path.

Today, we shall have the opportunity to share experience and exchange views with many experts from overseas on some very crucial elements and directions in the development of mediation. I am sure we shall all cherish and enjoy this time. To our guests from overseas, may I extend a big "Thank you" to you all for coming and for partnering with us to build an even stronger foundation for mediation in Hong Kong. I hope you will find some time to enjoy our vibrant city and to savour our food and hospitality.

Mediation in Hong Kong: The Road Ahead

Mr. Rimsky Yuen SC, JP [1]

First of all, may I join the Chief Justice and the Secretary for Justice in welcoming you all to this conference. For those who have to travel from overseas, may I wish you an enjoyable stay here.

It gives me great honour to have this opportunity to speak to you at the beginning of this conference, a conference which I believe serves as a testimony to the awesome development of mediation in Hong Kong.

With the presence of so many distinguished experts and practitioners, may I make use of this opportunity to share with you some of my preliminary thoughts on how mediation may develop in Hong Kong, so as to invite discussions and views during and beyond this conference.

The Question: What Next?

As the Secretary for Justice just mentioned, we will hopefully have the Mediation Ordinance enacted very soon. As explained in the Report of the Working Group on Mediation published in February 2010, the aim is to provide a proper legal framework which can safeguard the fundamentals of mediation (such as the protection of confidentiality) and at the same time allows maximum flexibility for the conduct and future development of mediation.

The Mediation Bill includes clauses concerning key definition such as those for mediation and mediation communication, representation of clients in mediation, confidentiality, exceptions to confidentiality and admissibility of evidence.

The enactment of the Mediation Ordinance is certainly an important step in the right direction.

The question now arises is: what next? Or how mediation can be further and better developed in Hong Kong?

Perhaps this question may be viewed from two perspectives: internal and external. Internal in the sense of how the mediation process itself can be further improved. External in the sense of mediation's interaction with other means of dispute resolution.

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1 The Honourable Mr. Rimsky Yuen, SC, JP was appointed the Secretary for Justice, Department of Justice of HKSAR on 1 July 2012.

The Internal Perspective

The Accreditation Body

The quality and competence of mediators are of crucial importance if we are to maintain confidence in the mediation process. Proper training, appropriate accreditation standard and effective disciplinary procedure are the minimum that we have to achieve. As the Secretary for Justice mentioned earlier, the key stakeholders are in the process of setting up a single accreditation body who would oversee accreditation and discipline, whilst leaving training to be provided by other stakeholders.

One issue which merits consideration is that, on top of the local key players whose participation is of course fundamental, the direct or indirect engagement of international mediation bodies and overseas experts. Hong Kong is an international financial centre, and aspires to be Asia's world city. Participation by international mediation bodies and overseas mediation experts will bring in additional expertise and experience, as well as enhance the international image of Hong Kong, which in turn will fortify confidence from both local and overseas end-users. Ultimately, local as well as international recognition of the future accreditation body is the aim we should strive for.

Mediation Advocacy

Professional mediators aside, the importance of appropriate mediation advocacy cannot be overlooked. An atmosphere conducive to settlement built up by a skillful mediator can be easily destroyed if the parties' legal advisers do not perform their roles properly. However, mediation advocacy is an aspect which has so far received relatively less, if not insufficient, attention in Hong Kong.

Understandably, many of the litigation lawyers in Hong Kong (be they solicitors or barristers) are very much used to the adversarial approach adopted in litigation. Not only is adversarial approach the antithesis of mediation, it often becomes an obstacle that has to be surmounted before parties can see the light of a possible settlement. Further, some people somehow believe that their mediator training will automatically and sufficiently equip them to act as mediation advocates. I regret to say that is not necessarily the case.

To ensure the effective development of mediation in Hong Kong, the design and provision of mediation advocacy training courses suitable for Hong Kong (taking into account, amongst others, the bilingual dimension and the cultural element) is a task that should be undertaken soonest possible.

Research

Unlike litigation, there are no judgments for the interested parties to study. Besides, the confidential nature of mediation often creates practical difficulties in conducting research. This also explains why the data that stakeholders currently manage to

collect remain relatively limited, and that evaluation sometimes have to be based on anecdotal evidence. Such a state of affairs is not satisfactory.

Solid empirical data and evidence-based research are essential barometers that can provide useful guidance as to how mediation can be improved. Theoretical models of mediation cannot be tested unless they are put into practice, and practice of mediation cannot be polished without the support of proper research based on empirical data.

With a view to striking a balance between maintaining confidentiality on the one hand and facilitating proper research on the other, clause 8(2)(e) of the Mediation Bill, when enacted, will permit disclosure of mediation communication (as defined therein) provided such disclosure will not reveal, directly or indirectly, the identity of the parties involved. With clause 8(2)(e) and a set of guidelines to be published after consultation with stakeholders, it is hoped that more empirical or evidence-based research can be fruitfully conducted for the benefit of the mediation community.

In this regard, mediation bodies and practitioners have an important role to play. They should endeavour to facilitate the collection of data as much as possible, and to alleviate any unnecessary concerns their clients may have over the confidentiality issue by providing the proper explanation.

The External Perspective

Mediation is only one of the various means of dispute resolution. There are other means of dispute resolution which play different roles and suit different needs.

Viewed in this light, it is worthwhile to reflect on how mediation may position itself vis-a-vis the other means of dispute resolution and how mediation may suitably interact with them in the overall scheme of the administration of justice in Hong Kong. These are perhaps not questions that the mediation community can resolve on its own. They require cross-disciplines studies, as well as co-operation by stakeholders of all forms of disputes resolution.

Med-Arb

One of the areas that springs to mind is the relationship between mediation and arbitration.

The often called “med-arb” or “arb-med” process is allowed under section 33 of the current Arbitration Ordinance (Cap. 609) (which came into force on 1 June 2011), whereby an arbitrator may also act as a mediator provided he or she has the parties’ written consent.

Such a combined process is apparently not popular in Hong Kong due to concern over the confidentiality issue. Under section 33(3) of the Arbitration Ordinance, if

the mediation fails, the mediator-turned-arbitrator is obliged to disclose to all the parties the confidential information he has obtained as mediator that he considers to be material to the arbitration. Understandably, this requirement causes concern to lawyers trained under the common law system, although friends from civil law system may take a different view.

The recent decision by the Hong Kong Court of Appeal in Gao Haiyan v Keeneye Holdings Ltd. [2012] 1 HKLRD 627 (2/12/2011), though focused on the enforceability of a Mainland arbitration award delivered after a failed mediation conducted in an arb-med process, has generated discussion as to whether the confidentiality concern can be properly addressed. It also raises the question of the extent to which our legal framework should recognize different modes of conducting mediation in other jurisdictions (especially civil law jurisdictions).

In the CEDR Report entitled "Commission Settlement in International Arbitration" published in November 2009, the risks involved in med-arb process were discussed and safeguards suggested. In Hong Kong, the idea of confining the mediation in a med-arb process to evaluative, instead of facilitative, mediation has been raised by an experienced practitioner. Others have suggested that mediation in such a context should only include joint sessions but not private sessions. Whether these suggestions provide the right solution remains to be seen, but this is certainly an area that merits further study and discussion.

I say this because although med-arb is currently not popular in Hong Kong, the position is different in Mainland China, Japan and some other civil law jurisdictions. Since more and more disputes with Mainland elements are resolved in Hong Kong and given Hong Kong's aspiration to be an international dispute resolution centre, issues such as those concerning confidentiality in a med-arb process should be addressed sooner than later.

As mediation enjoys the avowed advantage of being a very flexible process, there is no reason why a solution cannot be found to overcome differences between the common law system and the civil law system.

Mediation and Litigation

Another aspect is the relationship between mediation and court litigation. The implementation of the Civil Justice Reform in 2009 has provided a very helpful momentum for developing mediation in Hong Kong. At present, the general consensus remains that mediation should be a wholly voluntary process, with appropriate costs sanction in the deserved cases. This approach has so far worked well, and I am sure the Judiciary will review the situation as and when the need arises.

Future Conflicts Management Model

Lastly, may I conclude by reiterating a point that I have sought to make in the past. The promotion of mediation is not the end but the beginning of the transformation of our dispute resolution culture. One key feature of traditional dispute resolution is that the process is normally only engaged after a dispute has arisen. This should not be the only way to handle conflicts or disputes. Rather, in many contexts, there are good reasons to implement an efficient concept of conflict management which involves well-designed mechanism that can prevent, identify, address and defuse conflicts at the earliest possible stage. How mediation, either as a process of its own or combined with other means of ADR, can be developed and modified to achieve this end will have to depend on the continuous support of all of you and the community as a whole.

The Objectives, Scope and Focus of Mediation Legislation in Australia

The Honourable Madam Justice P A Bergin [1]

Introduction[2]

Over the past decades, mediation has become a central feature of the Australian dispute resolution landscape. Just over thirty years ago, mediation could be found only in Community Justice Centres, or in specific contexts such as family or environmental and planning disputes. By contrast, Federal legislation in Australia now requires parties to pursue alternative methods of dispute resolution as a general rule, before commencing civil litigation.[3] Similar legislation has been enacted in New South Wales and Victoria.[4] The Victorian legislation was recently repealed[5] and the commencement of the New South Wales legislation has been delayed until 2013 to facilitate the monitoring of the operation of the Federal legislation.

There is no doubt that the significant cultural shift in favour of alternative dispute resolution (ADR) has contributed to a more efficient and robust civil justice system in Australia. An important issue for consideration is how legislative reforms can support the already beneficial ADR mechanisms that operate as additional processes to the Australian court systems. This issue needs to be considered in the context of the dynamic relationship between litigation and mediation.

This paper reviews recent trends in court-referred and court-annexed mediation, as well as mediation that takes place pursuant to a statutory requirement to take steps to resolve a dispute prior to commencing court proceedings. It also discusses empirical evidence concerning the "ripe time" for mediation, updating some initial conclusions that I presented on this issue in Hong Kong in 2007.[6] The analysis of these trends provides a useful framework within which the recent legislative reforms may be examined. Finally, the paper discusses various additional issues concerning mediation in Australia, including mediator accreditation and immunity.

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1 The Honourable Madam Justice P A Bergin is Chief Judge in Equity, Supreme Court of New South Wales.

2 I express my gratitude to Thomas Kaldor (Researcher to the Judges of the Equity Division of the Supreme Court of New South Wales) and Nick Roucek (Tipstaff, Supreme Court of New South Wales) for their assistance with the preparation of this paper and the collection and analysis of the sample data discussed in the paper.

3 *Civil Dispute Resolution Act* 2011 (Cth).

4 Part 2A of the *Civil Procedure Act* 2005 (NSW). *Civil Procedure Act* 2010 (Vic).

5 *Civil Procedure and Legal Profession Amendments Act* 2011 (Vic).

6 Bergin PA, "Mediation in Hong Kong: The way forward – Perspectives from Australia" (2008) 82 ALJ 196 at 207.

Basic tenets of mediation in Australia

In 1996, Leonard L Riskin, the CA Leedy Professor of Law and Director of the Centre for the Study of Dispute Resolution at the University of Missouri, Columbia School of Law, said that a "bewildering variety of activities fall within the broad, generally accepted definition of mediation – a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction".[7] Some years later, New South Wales adopted a legislative definition of "mediation" in the *Civil Procedure Act* 2005 (NSW) (CPA) as "a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute".[8] There are several basic tenets of mediation in Australia that are likely to be of more universal applicability.

Notwithstanding the centrality of the parties to the dispute, mediation is a structured process that is guided by an independent party. In this sense, mediation is distinguished from ad hoc negotiations conducted between parties. The success of mediation is in part dependent upon the abilities of the mediator. In Australia, private mediation is generally conducted by former judicial officers, lawyers and other professionals with particular expertise in the nature of the relevant dispute. In the main, court staff (Registrars or Commissioners) conduct the court-annexed mediations. However in some jurisdictions judges act as mediators (judicial mediation).[9]

A most important tenet of mediation in Australia is that it is confidential.[10] Legislation expressly prohibits parties from adducing evidence of a communication made, or a document prepared, in connection with an attempt to negotiate a settlement.[11] The willingness of parties to voluntarily settle their differences through mediation depends in large part on the confidentiality of the process. If parties fear that their disclosures to mediators or other parties during a mediation may be used against them or published outside the mediation session, it is likely that the use of the process will decline or the process will be weakened by parties manipulating their presentation to ensure that the mediator and/or the other parties are not provided with certain information that might otherwise be pivotal to a settlement being reached at the mediation.

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7 Riskin LL, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" (1996) 1 *Harvard Negotiation Law Review* 7 at 8.

8 Section 25.

9 For instance, in the judicial resolution conferences conducted in Victoria under the *Civil Procedure Act* 2010 (Vic). See also Practice Note 2 2012, "Judicial Mediator Guidelines Supreme Court of Victoria", 30 March 2012; Nickless R, "Victoria allows Judge mediators", *Australian Financial Review*, 13 April 2012.

10 CPA, s 31.

11 *Evidence Act* 1995 (NSW), s 131.

In the vast majority of cases in Australia mediation is voluntary.[12] Although there may be a mandatory requirement to attend mediation, the outcome is always voluntary. The parties alone determine whether they will settle their dispute and the terms upon which they will settle their dispute, albeit that they are assisted in this regard by the mediator.

Finally, mediation is a cost-effective and efficient mechanism for resolving disputes. Mediation is pursued in large part because of its potential to significantly reduce the practical and financial burden of a dispute. This principle has an important corollary that mediation should not be recommended if it is likely to prolong proceedings and lead to increased client costs. However, assessing whether this is likely to occur is not free from complexity.

Overview of recent legislative developments

Since 2000, courts in New South Wales have had the power to refer civil proceedings to mediation, with or without the consent of the parties.[13] A similar power now exists in all Australian jurisdictions.[14] This power has been effectively used to 'break the ice' between hostile parties who would not otherwise have considered mediation as an option. However, recent legislative developments go further by attempting to foster a culture of pre-litigation mediation for all civil disputes.

In the Federal jurisdiction, the *Civil Dispute Resolution Act* 2011 (Cth) (CDRA), commenced operation on 1 August 2011. The object of the legislation is "to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted".[15] Section 6 of the CDRA requires applicants instituting civil proceedings to file a "genuine steps statement" with their application.[16] This statement must outline either the steps that have been taken to resolve the dispute or the reasons why no such steps were taken.[17] The form of the genuine steps statement is prescribed by the new *Federal Court Rules* 2011 (Cth),[18] which also commenced on 1 August 2011. After the respondent to the proceedings is provided with a copy of the applicant's statement, the respondent must then file their own genuine steps

12 There are some disputes in which mediation is mandatory, referred to later.

13 The relevant provision is now contained in s 26 of the *Civil Procedure Act* 2005 (NSW).

14 For the federal jurisdiction, see s 53A of the *Federal Court of Australia Act* 1976. For Victoria, see s 48(2)(c) of the *Civil Procedure Act* 2010 (Vic) and O 50.07 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic). For Western Australia, see s 167(1)(q)(i) of the *Supreme Court Act* 1935 (WA) and 0 8 of the *Rules of the Supreme Court* 1971 (WA). For Queensland, see ss 102-103 of the *Supreme Court of Queensland Act* 1991 (Qld). For South Australia, see s 65(1) of the *Supreme Court Act* 1935 (SA). For Tasmania, see s 5(1) of the *Alternative Dispute Resolution Act* 2001 (Tas). For the Australian Capital Territory, see reg 1179 of the *Court Procedures Rules* 2006 (ACT) and s 195 of the *Civil Law (Wrongs) Act* 2002 (ACT). For the Northern Territory, see s 16 of the *Local Court Act* 1989 (NT) and r 32.07 of the *Local Court Rules* (NT).

15 CDRA, s 3.

16 CDRA, s 6(1).

17 CDRA, s 6(2).

18 *Federal Court Rules* 2011 (Cth), r 5.03.

statement, stating either that they agree with the applicant's statement or specifying the aspects with which they disagree and the reasons for the disagreement.[19] Furthermore, lawyers are under a duty to inform clients of their obligation to file a genuine steps statement and to assist them in complying with that obligation.[20]

A failure to file a genuine steps statement does not invalidate an application to commence proceedings, a response to that application or the proceedings themselves.[21] However, the Court may take into account whether a person filed a genuine steps statement when they were required to do so and whether that person did in fact take genuine steps to resolve the dispute in two important contexts: in awarding costs and, more generally, "in performing functions or exercising powers in relation to civil proceedings".[22] The Court may also have regard to a lawyer's failure to inform a client of a requirement to file a genuine steps statement and may also make an order that the lawyer bear costs personally.[23]

Section 4(1A) of the CDRA provides:

For the purposes of this Act, a person takes *genuine steps to resolve a dispute* if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.

Section 4 also provides a non-exhaustive list of examples of "genuine steps", including "considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process".[24] Although the legislation does not expressly require pre-trial mediation, it would inevitably be one of the most common mechanisms for demonstrating that genuine steps have been taken to resolve a civil dispute.

The regime in the CDRA applies to civil proceedings in the Federal Court of Australia and the Federal Magistrates Court. However, Part 4 of the CDRA excludes certain proceedings, to which the legislation does not apply, including:

- proceedings for an order imposing a pecuniary penalty for a contravention of a civil penalty provision;[25]

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19 CDRA, s 7.
20 CDRA, s 9.
21 CDRA, s 10(2).
22 CDRA, ss 11-12.
23 CDRA, s 12(2)-(3); *Superior IP International Pty Ltd v Ahern Fox Patent and Trade Mark Attorneys* [2012] FCA 282.
24 CDRA, s 4(1)(d).
25 CDRA, s 15(a).

- proceedings relating to a decision of various tribunals, such as the Australian Competition Tribunal or the Copyright Tribunal of Australia;[26]
- appellate proceedings;[27]
- proceedings arising from a power to compel a person to answer questions, produce documents or appear before a person or body under a Commonwealth law;[28]
- proceedings under various pieces of legislation that already prescribe specific regimes for the resolution of disputes external to litigation, such as the *Family Law Act* 1975 (Cth) and the *Native Title Act* 1993 (Cth);[29] and
- proceedings prescribed by the regulations.[30]

In late 2010, the NSW Parliament enacted similar legislation.[31] The new procedures, which became Part 2A of the CPA, were due to commence on 1 October 2011. Part 2A was intended to apply to all civil disputes other than the "excluded disputes" specified in s 18B of the CPA. Civil proceedings in the Supreme Court were excluded by Regulation 21 of the *Civil Procedure Regulation* 2005 (NSW).[32] On 23 August 2011, the New South Wales Attorney-General, The Honourable Greg Smith SC MP, announced that the introduction of Part 2A of the CPA would be delayed until early 2013 for the reasons referred to earlier.

Part 2A of the CPA prescribes certain "pre-litigation requirements", including that litigants take "reasonable steps" either to resolve their dispute or "clarify and narrow the issues in dispute" before commencing proceedings.[33] Similar to the "genuine steps statement" under the CDRA, the CPA requires parties to file a "dispute resolution statement", specifying the steps they have taken to fulfil these pre-litigation requirements, or explaining why no such steps have been taken.[34] The legislation also imposes an obligation on legal representatives to inform their clients of pre-litigation requirements and advise them about alternatives to the commencement of civil proceedings.[35]

As is the case under the CDRA, a failure to comply with pre-litigation requirements, or to file a dispute resolution statement, does not affect the validity of proceedings. However, once again, the Court may have regard to a party's failure to comply with

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26 CDRA, s 15(c).
27 CDRA, s 15(d).
28 CDRA, s 15(e).
29 CDRA, s 16.
30 CDRA, s 17.
31 The relevant provisions were contained in the *Courts and Crimes Legislation Further Amendment Act* 2010 (NSW).
32 Under s 18B(4) of CPA the Governor may make regulations declaring that certain specified proceedings are exluded from the operation of Part 2A.
33 CPA, s 18E.
34 CPA, s 18G.
35 CPA, s 18J(1).

pre-litigation requirements in making any costs orders against that party,[36] or against their legal representatives under s 99 of the CPA.[37]

In Victoria, similar pre-litigation requirements were introduced under the *Civil Procedure Act* 2010 (Vic), which commenced on 1 January 2011. However, on 30 March 2011 a newly elected government repealed the relevant provisions.[38]
In South Australia, plaintiffs are required by statute to notify defendants of a prospective claim at least 90 days before commencing proceedings.[39] As well as providing sufficient details of the claim, the written notice must also be accompanied by a settlement offer.[40] The defendants must then reply within 60 days of receiving the notice, and either accept the offer, make a counter-offer or state the grounds on which liability is denied.[41] If proceedings are commenced, the originating process must include a statement that this procedure has been complied with, or explaining why it has not.[42] In addition, the plaintiff's notification and any response must be filed in the Court in a suppressed file.[43] In awarding costs in relation to the action, the Court may take into account whether the parties have complied with their obligations, as well as the terms of any offer or counter-offer and the extent to which the offers were reasonable in the circumstances.[44]

There is no statutory requirement for pre-litigation mediation in any of the other States or Territories of Australia.

Particular contexts for pre-litigation mediation
In addition to the recent State and Federal developments requiring litigants to attempt to resolve their disputes before instituting court proceedings, legislation has for some time required parties to pursue mediation as a first option in certain contexts. These contexts share common characteristics. First, there is some policy imperative directing a preference for mediation and secondly, mediation has been shown to be an effective mechanism for resolving these particular disputes. Although the following examples are from New South Wales, legislative schemes imposing pre-litigation dispute resolution exist in other states, as well as in the federal jurisdiction.[45]

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36 CPA, ss 18M and 18N.
37 CPA, ss 18J and 18M.
38 *Civil Procedure and Legal Profession Amendments Act* 2011 (Vic).
39 *Supreme Court Rules* 2006 (SA), r 33.
40 *Supreme Court Rules* 2006 (SA), r 33(2).
41 *Supreme Court Rules* 2006 (SA), r 33(4).
42 *Supreme Court Rules* 2006 (SA), r 33(6)(a).
43 *Supreme Court Rules* 2006 (SA), r 33(6)(b).
44 *Supreme Court Rules* 2006 (SA), r 33(7).
45 *Farm Debt Mediation Act* 2011 (Vic), *Legal Profession Act* 2007 (Tas), *Retail Shop Leases Act* 1994 (Qld), *Family Law Act* 1975 (Cth).

Family provision disputes

One category of disputes that has been identified as suitable for mandatory pre-trial mediation in New South Wales is cases involving challenges to wills and applications by family members for greater provision out of the estates of deceased persons.[46] The *Succession Amendment (Family Provision) Act* 2008 (NSW) repealed the *Family Provision Act* 1982 (NSW) (FPA) with effect from 1 March 2009. The key provisions of the FPA were subsumed into Chapter 3 of the *Succession Act* 2006 (NSW).[47] Under the legislation, an eligible person may apply to the Court for a "family provision order".[48] Since 2008, any applications for a family provision order are referred to mediation before the matter goes to trial.[49]

Mediation is highly effective in this context. In 2010 and 2011, the Supreme Court of New South Wales referred a total of 933 family provision disputes to court-annexed mediation. Of these, 531 (56.9%) settled at mediation. In addition, the parties were still attempting to reach a negotiated settlement in 242 cases (25.9%), leaving only 160 cases (17.1%) in which the parties conclusively decided not to settle at the end of mediation (see Figure A).

Figure A: Outcomes of Court-annexed mediation of Family Provision disputes during 2010 and 2011

	Settled	Not Settled	Still Negotiating	Total
2010	267 (57.7%)	65 (14.0%)	131 (28.3%)	463
2011	264 (56.2%)	95 (20.2%)	111 (23.6%)	470
Total	531 (56.9%)	160 (17.1%)	242 (25.9%)	933

Farm debt disputes

The *Farm Debt Mediation Act* 1994 (NSW) (FDMA) establishes a mediation regime "for the efficient and equitable resolution" of disputes arising in connection with debts incurred for the purpose of conducting farming operations.[50] A creditor cannot take any action to enforce a debt without first notifying the farmer of its intention to do so, as well as the availability of mediation.[51] A creditor may apply for a certificate exempting it from this requirement. However, such a certificate will only be granted if there has been "satisfactory mediation", the farmer has declined to mediate or the creditor has attempted to mediate in good faith for a period of three months.[52]

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46 PA Bergin, "Judicial mediation: problems and solutions" (2011) 10 TJR 305 at 308.
47 *Succession Amendment (Family Provision) Act* 2008 (NSW).
48 *Succession Act* 2006 (NSW), s 57.
49 Unless the Court orders otherwise "for special reasons": *Succession Act* 2006 (NSW), s 98(2).
50 FDMA, s 3.
51 FDMA, s 8.
52 FDMA, s 11.

In *Waller v Hargreaves Secured Investments Limited*,[53] mediation had taken place in accordance with the FDMA following default by the borrower. At mediation, a further loan agreement was entered into. After further default, the parties entered into a third loan agreement. A certificate under the FDMA was subsequently issued to the lender after which it successfully brought proceedings against the borrower. The High Court held that the legislation barred the lender from obtaining a money judgment or possession of the borrower's property. Mediation had been conducted and a certificate had been granted in respect of the original loan agreement. Since that agreement had been discharged by the subsequent agreements, the lender was not exempted from its statutory obligations to propose and pursue mediation in relation to the later agreement before commencing court proceedings against the borrower. The legislation required the lender to again notify the borrower of the availability of mediation, despite mediation having already been conducted in relation to the initial agreement.

The legislative preference for mediation in this context is underpinned by a desire to temper the perceived structural imbalance between large lending institutions and small agri-business borrowers. Actions taken by financiers in relation to farm debts almost inevitably lead to severe consequences for farmers, including repossession of their property, which is generally both their family home and place of business. In addition, drought and other seasonal factors may result in temporary default of a farm loan. For these reasons, there is a clear policy imperative to encourage and assist parties to reach a negotiated resolution through mediation.

Retail tenancy disputes

Disagreements between landlords and tenants are disputes that the NSW legislature decided can be effectively resolved by early mediation. The *Retail Leases Act* 1994 (NSW) has been described as being underpinned by a legislative policy of mediation rather than litigation.[54] Parties involved in retail tenancy disputes are unable to commence proceedings unless they have first attempted mediation, or the Court is otherwise satisfied that mediation is unlikely to resolve the dispute.[55]

Tenancy disputes often involve a number of discrete issues and raise concerns for both parties. For instance, the initial dispute may arise from a default on rent payments. However, the tenant may dispute a rent increase following a recent review, or demand certain repairs be carried out at the landlord's expense. Equally, the landlord may be concerned about the way in which the tenant is using the property. Litigation

53 *Waller v Hargreaves Secured Investments Limited* [2012] HCA 4.
54 *GPT Management Ltd v Spa Heavan Pty Ltd* [2005] NSWSC 1043 at [15] (Palmer J).
55 *Retail Leases Act* 1994 (NSW), s 68.

may produce an unsatisfactory outcome for both parties if they wish to maintain their commercial relationship. However the flexibility of mediation enables parties to arrive at a mutually beneficial outcome.[56]

Empirical analysis: the ripe time for mediation

In 2003 Sir Laurence Street AC, KCMG, QC, made the following observation about the appropriate time for mediation:

It is impossible to generalise as to the time when a dispute is ripe for mediation. Some are ripe very soon after they erupt and before the parties become deeply entrenched in oppositional positions and incur expenditure on costs in consolidating those positions. Some are not ripe until the parties have fought them out to the point of judgment or award in a court or an arbitration. Between these two extremes is a continuum.[57]

One example that demonstrates the unpredictability of determining the ripe time for mediation is the case in which an independent contractor successfully brought a claim in negligence against Coca-Cola Amatil for injuries he sustained after being shot when delivering the company's products.[58] The trial judge awarded the plaintiff approximately $3 million in damages. However, the Court of Appeal overturned this decision in March 2006, concluding that the plaintiff's injuries were not caused by Coca-Cola's negligence.[59] Shortly after the Court of Appeal delivered judgment, the parties proceeded to a successful mediation.[60] Experience has suggested that a dispute is highly unlikely to settle following judgment at first instance and on appeal. However, in that case the parties may have wished to avoid the prospect of litigation in the High Court. In addition, the proceedings had already damaged Coca-Cola's reputation. The company was under immense pressure from both the public and the NSW government to "show some compassion" and "perhaps put aside their strict legal rights".[61] Notwithstanding these factors, it would have been difficult to predict that the ripe time to mediate this dispute was two and a half years after the case first went to hearing, and following the decision of an appellate court.

Despite this unpredictability, it is possible to identify certain characteristics of a dispute that may indicate whether mediation is more likely to be successful at a particular stage in the conflict or even whether mediation is likely to be successful

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56 Redfern M, "Mediation is Good Business Practice" (2012) 21 ADJR 53 at 56.

57 Sir Laurence Street, *Mediation: A Practical Outline* (5th ed, 2003), 8-9.

58 *Pareezer v Coca-Cola Amatil (NSW) Pty Ltd* (2004) Aust Tort Reports 81-772; [2004] NSWSC 825.

59 *Coca-Cola Amatil v Pareezer (NSW) Pty Ltd* (2008) Aust Tort Reports 81-834; [2006] NSWCA 45.

60 "Media Release: Coca-Cola Amatil and Craig Pareezer" (22 March 2006), available at http://ccamatil.com/InvestorRelations/md/2006/CCA%20and%20Craig%20Pareezer%20-%20220306.pdf.

61 Former Premier of NSW, Morris Iemma, quoted in "Shot Coke worker keeps payout", *Sydney Morning Herald* (online), 17 March 2006, available at http://www.smh.com.au/news/national/shot-coke-worker-keeps-payout/2006/03/17/1142098650896.html.

at all. Indeed, it is the ability to generalise about certain categories of disputes that enables the legislature to put in place the specific mediation regimes discussed above. Yet, even in those contexts, there is no guarantee that early mediation will effectively resolve all disputes in these categories.

Beyond the categorisation of disputes, the task of identifying a ripe time for mediation becomes even more problematic. In 2007, I attempted to shed some light on the issue by examining a limited sample of cases in the Equity Division of the Supreme Court of New South Wales.[62] More specifically, I considered 98 cases from the Commercial List and the Technology & Construction List (the Lists) that had been referred to mediation in the period 1 January 2006 to 1 June 2007.

The cases in the sample were divided into three categories, depending on the stage in the litigious process at which they had been referred to mediation:

- the *preliminary* stage – in which the parties are finalising their pleadings;
- the *intermediate* stage – during which discovery and other interlocutory steps occur;[63] and
- the *advanced* stage – when parties are preparing their evidence and the trial date has been set.

The data revealed that cases referred to mediation at a late stage in proceedings were more likely to settle. Of the 30 matters referred to mediation at an advanced stage, 18 (60%) settled. This compared to a settlement rate of 27% and 29% for matters referred to mediation at a preliminary stage and intermediate stage respectively. The overall settlement rate for the cases considered in the study was 38%.

New data has been collated from 99 cases referred to mediation from the Lists between 1 January 2008 and 31 December 2011. These cases were again categorised according to the three stages specified above. Significantly, the new data is consistent with the earlier finding that cases referred to mediation at an advanced stage are more likely to settle, although the difference between the settlement rates across the various stages was less marked in the new sample.

Occasionally, a matter was referred to mediation at multiple stages. There was a total of 104 referrals across the 99 cases. Where a matter was referred to mediation twice and a settlement was subsequently reached, the first referral was recorded as

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62 Bergin PA, "Mediation in Hong Kong: The way forward – Perspectives from Australia" (2008) 82 ALJ 196 at 207-210.

63 This stage will need to be adjusted in any future sample because parties in cases in the Equity Division of the Supreme Court of New South Wales are now required to serve their evidence before any discovery (disclosure) is permitted (unless there are exceptional circumstances): Practice Note SC Eq 11 Disclosure in the Equity Division 22 March 2012.

unsuccessful, while the later referral was recorded as successful. Where a matter was referred to mediation unsuccessfully on multiple occasions, all referrals were recorded as unsuccessful.

The overall settlement rate for the 99 cases was 46%, which was slightly higher compared to the earlier research (38%). Of the 46 matters that settled at mediation:

16 (35%) were referred at a preliminary stage;
14 (30%) were referred at an intermediate stage; and
16 (35%) were referred at an advanced stage.

Of the 104 referrals to mediation:

38 were referred at a preliminary stage and 16 (42%) settled;
31 were referred at an intermediate stage and 14 (45%) settled; and
35 were referred at an advanced stage and 16 (46%) settled.

In respect of those referrals to mediation that did not result in settlement (58):

22 (38%) had been referred at a preliminary stage;
17 (29%) had been referred at an intermediate stage; and
19 (33%) had been referred an advanced stage.

Of the cases that did not settle at mediation, the majority (53%) went to trial or were proceeding to trial at the time the data was collected, while 15% settled within six months of mediation and 32% settled more than six months after mediation.

The recent study also provided some further detail that was not available in the 2007 evidence. In nine cases the parties attempted to mediate the dispute before commencing proceedings. Each of these cases were subsequently referred to mediation during the course of proceedings, and the settlement rate among this group was generally in line with the overall settlement rate (four settled while five failed to settle).

Where the parties expressed concerns about the appropriateness of mediation at the commencement of litigation, subsequent mediation outcomes were much less successful. There were eight cases in which the parties were completely unwilling to mediate and five cases in which willingness was conditional (either upon the completion of a certain stage in the interlocutory process or the determination of a threshold question of law). Only one case in each group subsequently settled at mediation, which represents a significantly lower settlement rate compared to all cases.

As I said in 2007, "the drawing of inferences and conclusions from raw statistics is never satisfactory and in an area such as this, where mediations are conducted in private with confidentiality regimes, the conclusions and inferences are bedevilled by even more uncertainty".[64] However, although less pronounced, the new data is consistent with the observations I made in 2007.

Even if the data were unable to support a clear inference that the ripe time to refer a matter to mediation is at an advanced stage, it nonetheless suggests that mediation is at least *as effective* at a later stage in proceedings as it is at the earlier stages. An equally available conclusion is that the ideal time to mediate varies from case to case; in other words, there is no universal ripe time to mediate civil disputes. Both of these conclusions offer an alternative perspective to the current legislative shift in favour of pre-litigation mediation.

Evaluation of recent reforms

The most common criticism of mandatory pre-litigation requirements is that they conflict with the essentially voluntary nature of mediation. The force of this complaint is reduced by the fact that compulsory mediation has existed for many years, both in the Courts' powers to refer proceedings to mediation without the parties' consent and in the pre-action mediation mandated for certain types of dispute. Furthermore, experience demonstrates that a referral to mediation is often the initial stimulus that otherwise non-communicative parties need to move towards a voluntary and successful process of mediation.[65]

One difference between the CDRA on the one hand and the repealed Victorian provisions as well as the New South Wales legislation on the other, is the pre-litigation standard of conduct. The CDRA requires parties to take "genuine steps" to resolve their dispute, while the legislatures in the two States opted for the criteria of "reasonable steps".[66] The Chair of the National Alternative Dispute Resolution Advisory Council (NADRAC), an advisory body to the Federal Attorney-General, suggested that the New South Wales and Victorian legislation "missed the point" by adopting an objective test of reasonableness that "lawyerised a piece of non-lawyer legislation and caused a pre-litigation tool to be drawn away from the disputant and thrust into the fray of litigation".[67]

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64 Bergin PA, "Mediation in Hong Kong: The way forward – Perspectives from Australia" (2008) 82 ALJ 196 at 209.

65 Bergin PA, "Mediation in Hong Kong: The way forward – Perspectives from Australia" (2008) 82 ALJ 196 at 203-204.

66 CPA, s 18E(1); *Civil Procedure Act* 2010 (Vic), s 34(1) (repealed).

67 Gormly J, "The Children of the Revolution: A Change in Dispute Culture" (Speech delivered at Dispute Resolution Conference, *Dispute Resolution in the Next 40 Years: Repertoire or Revolution*, University of New South Wales, 2 December 2011).

Measuring a party's efforts to resolve a dispute by reference to an objective criteria may present as a flawed exercise. Yet, it may be equally problematic to determine whether a party has in fact taken "genuine" steps. This debate regarding the appropriate standard obscures a broader concern. Attempts to explicitly regulate attitudes to mediation may be misguided and perhaps even antithetical to the mediation process.

Legislation prescribing compulsory pre-litigation mediation involves a delicate balance between ensuring that parties attempt to settle their disputes before litigating and preserving the right of access to the Courts. The characteristics of certain disputes justify legislation deeming that good faith involves a requirement to mediate first in the context of those disputes. It is another thing entirely to conclude that good faith requires disputants to *Mediate First* in all cases.

The new legislation may encourage a party to 'play along' with attempts at resolution as a necessary pre-condition to litigation. This would only lead to additional expense and delay before the case finally goes to trial. An additional risk is that parties, by approaching mediation as a mere formality in the process of instituting proceedings, may reduce the potential for mediation to be effectively deployed at a later stage.

It is imperative to ensure that the operation of the legislation does not undermine confidentiality. Under the postponed New South Wales legislation, a Court may order that one party pays another's costs of compliance with pre-litigation requirements.[68] The Court may make such an order of its own motion or on the application of a party.[69] This introduces the possibility for litigants to present evidence and make submissions in relation to another party's failure to take reasonable steps. More generally, if pre-litigation requirements are to be enforced, it will be necessary for courts to scrutinise the steps taken by prospective litigants.

By scrutinising whether parties are taking reasonable or genuine steps to resolve their disputes, the new legislation may foster an environment in which parties are less likely to settle their differences through mediation. Confidentiality is an indispensable component of mediation; it is the essential pre-condition that initially brings parties to the table and the framework that enables parties to openly discuss their concerns in order to reach a mutually beneficial solution to their conflict. The strength of mediation is damaged irreparably if confidentiality is infringed.

Finally, empirical evidence from the Equity Division of the NSW Supreme Court indicates that mediation may often be more effectively deployed at a later stage in proceedings. In the sample presented, matters referred to mediation at an advanced

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68 CPA, s 18M(1)(a).
69 CPA, s 18M(2).

stage in proceedings settled at a higher rate than other cases. This does not mean that early mediation serves no purpose at all. Even if settlement is not reached, mediation may clarify and narrow the real issues in contest between the parties, thereby expediting the litigation process. Moreover, the fact that mediation is shown to be effective at a later phase in a dispute, does not necessarily mean that early mediation would not also have been successful.

Accreditation of mediators

Accreditation in Australia is not mandatory. However, since the beginning of 2008 a voluntary system known as the National Mediator Accreditation System (NMAS) has been in operation.[70] This system has become the primary source of mediator standards in Australia. Despite the concurrent operation of multiple accreditation systems, the NMAS seems to have acquired de facto status as an endorsed accreditation system, as most providers of court-ordered mediation are accredited under the NMAS.[71]

The history of the development of the standards dates back to 2000, with the release of a discussion paper on the issue,[72] and a series of forums held throughout the nation. This was followed by further papers and consultations, which culminated in a 2007 draft standards paper proposing the creation of the national system. The proposal ultimately became the current NMAS.[73] A defining feature of the development of the system in Australia is the central role played by mediation organisations and academics, with funding support provided by the Commonwealth Government.

The standards deal with various matters, including the creation of Recognised Mediation Accreditation Bodies (RMABs) to handle the process of accreditation, as well as the establishment of approval requirements and continuing accreditation requirements for mediators. A mediator seeking accreditation under the NMAS must:

- pass a "good character" test;
- have a relationship with an appropriate organisation that meets certain ethics requirements, has in place complaints and disciplinary processes and offers ongoing professional support; and

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70 The system is provided for by two main documents known collectively as the "Australian National Mediator Standards". The first is "Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System" (September 2007). The second is "Practice Standards For Mediators Operating under the National Mediator Accreditation System" (September 2007).

71 Thomson Reuters, *The Laws of Australia* (at 1 May 2009), 13 Dispute Resolution, '2 Mediation and Conciliation', [13.2.730].

72 National Alternative Dispute Resolution Advisory Committee, The *Development of Standards for ADR* (2000). NADRAC is an independent body in Australia, charged with providing policy advice to the Australian Attorney-General on the development of alternative dispute resolution mechanisms and with promoting the use and raising the profile of alternative dispute resolution.

73 Sourdin T, *National Mediator Accreditation System: Report on Project* (2007).

- provide evidence of competence by reference to a combination of experience, training and education.[74]

Where an applicant does not have sufficient experience in mediation, there is a requirement to complete a 38-hour workshop, including at least nine simulated mediation sessions.[75] Once accredited, a mediator is also required to conduct at least 25 hours of mediation and attend 20 hours of continuing professional development courses every two years.[76]

Immunity of mediators

Legal action against mediators may threaten the efficacy of mediation in two ways. This may require the Court to investigate the content of mediation sessions, which may undermine confidence in the process of mediation itself and discourage participants from engaging in a completely honest and open manner.[77] Exposure to legal liability may force mediators to adopt a more legalistic course of conduct in order to protect themselves, increasing formality and cost.[78]

In Australia, mediators enjoy broad protection from civil proceedings by reason of a rather piecemeal system of immunity, predominantly provided by legislation and supplemented by exclusions or limitations agreed to contractually on an ad hoc basis between the parties to mediation.

Immunities from civil proceedings in Australia are provided for by three main sources – common law, statutory provisions and contract. Under the Australian common law, no civil action lies at the suit of any person for any words, actions, omissions or other behaviours of a Judge in a judicial proceeding.[79] The provision of unqualified immunity of this sort is founded on public policy grounds, relating principally to the importance placed on judicial independence in the Australian legal system. The immunity extends to other participants in the judicial system, including quasi-judicial officers and bodies making determinations in cases before them, such as tribunals. In this context, one might expect this immunity to cover at least part of a mediator's activities. Although opinions differ on this point and

74 Australian National Mediator Standards, "Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System" (2007), 3(1).

75 Australian National Mediator Standards, "Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System" (2007), 5(3).

76 Australian National Mediator Standards, "Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System" (2007), 1(3).

77 National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters* (2006) at 63.

78 National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters* (2006) at 63.

79 *Cabassi v Vila* (1940) 64 CLR 130.

there is some suggestion that mediators are enveloped within common law judicial immunity, there is no Australian authority to this effect, and the better view is that no such immunity exists for mediators.[80] Statutory provisions are therefore the main source of mediator immunity in Australia.

While there is no single overarching statute at a state or federal level providing immunity to all mediators, a number of statutes cover the activities of mediators in specific circumstances. The result is a regime consisting of two different levels of immunity. Some mediators enjoy protection equal to that of a judicial officer, which is known as "unqualified mediator immunity". This affords mediators a complete immunity from civil proceedings without the need to first establish the impugned conduct was carried out in good faith. This kind of immunity applies to mediations connected to the highest courts in New South Wales, Victoria, Queensland, Western Australia and South Australia.[81] Such protection is also applied to the higher courts in the federal jurisdiction, including court-appointed mediators in the Federal Court,[82] Federal Magistrates Court[83] and the Administrative Appeals Tribunal.[84]

Other mediators must establish certain requirements before they have "qualified immunity". The most common qualifications are that a mediator must prove they acted in good faith or without fraud, or were carrying out the statutory purposes of the legislation providing the immunity.[85] Provisions of this kind apply to the highest courts in Tasmania[86] and the Australian Capital Territory,[87] as well as mediators in community justice centres in New South Wales, Queensland and Victoria,[88] and the Human Rights and Equal Opportunity Commission.[89]

Although the courts have not examined statutory immunity for mediators in Australia extensively, the Queensland Court of Appeal considered the issue in *Von Schultz v Attorney-General*.[90] That case concerned various allegations of misconduct made against a mediator, including an allegation of falsely signing a mediator's certificate to the affect that settlement had been reached in mediation between the parties. In dismissing the application for leave to appeal, the Court of Appeal applied

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80 Boule L, *Mediation: Principles, Process, Practice* (3rd ed, 2011) at 738; Carroll R, "Mediator Immunity in Australia" (2001) 23 *Sydney Law Review* 185 at 189-190.

81 CPA, s 33; *Supreme Court Act* 1986 (Vic), s 27A; *Supreme Court of Queensland Act* 1991 (Qld), s 113; *Supreme Court Act* 1935 (WA), s 70; *Supreme Court Act* 1935 (SA), s 65.

82 *Federal Court of Australia Act* 1976 (Cth), s 53C.

83 *Federal Magistrates Act* 1999 (Cth) s 34(5).

84 *Administrative Appeals Tribunal Act* 1975 (Cth), s 60(1A).

85 Boule L, *Mediation: Principles, Process, Practice* (3rd ed, 2011) at 740.

86 *Alternative Dispute Resolution Act* 2001 (Tas), s 12.

87 *Mediation Act* 1997 (ACT), s 12.

88 *Community Justice Centres Act* 1983 (NSW), s 27(1), *Dispute Resolution Centres Act* 1990 (Qld), s 35(1)(c), *Evidence (Miscellaneous Provisions) Act* 1958 (Vic), s 21N.

89 *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), s 48.

90 [2000] QCA 406.

s 113(1) of the *Supreme Court of Queensland Act* 1991 (Qld), granting the mediator immunity from suit equivalent to that enjoyed by a judge.

Parties may expressly agree that the liability of the mediator is limited or excluded. While the strength of contractual exclusion clauses in the context of mediation remains untested in practice, the immunity provisions contained in Australian mediation contracts are normally clear in scope and intent and provide a significant obstacle in the path of legal action against mediators.[91]

Litigation against mediators in Australia is extremely rare.[92] At least one reason for this is the regime of mediator immunity. There has been some debate about the current state of mediators' immunity in Australia, which has formed part of a wider debate as to role for immunities.[93] The view has been expressed that immunities need to be strongly justified as a matter of public policy, as they are a privilege bestowed on very few professions, and that the case for mediators' immunity has not yet been sufficiently made out.[94]

It has also been suggested that mediator immunity from civil action is superfluous, because a sufficient level of protection for mediators can be achieved using more moderate mechanisms, such as professional insurance and indemnity schemes.[95] Indeed, mediation services provided incidentally to a range of professional service activities in Australia (such as legal practice and accountancy) are generally covered by existing professional indemnity schemes and arrangements. Mediators accredited under the NMAS are now required to hold indemnity insurance.[96] With the increasing use of such schemes it remains to be seen whether the Australian mediation regime will continue to rely on and provide for broad statutory immunities.

Judicial mediation

That brings me to the important topic of judicial mediation upon which I touched when I was here in 2007. On that occasion I suggested that there was a real question whether the system of open justice is able to accommodate judges brokering deals in private.[97] That question has yet to be properly addressed in Australia.

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91 Boule L, *Mediation: Principles, Process, Practice* (3rd ed, 2011) at 744-45.

92 *Tapoohi v Lewenberg (No 2)* [2003] VSC 410.

93 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

94 Carroll R, "Mediator Immunity in Australia" (2001) 23 *Sydney Law Review* 185 at 221; National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters* (2006) at 20.

95 Carroll R, "Mediator Immunity in Australia" (2001) 23 *Sydney Law Review* 185 at 220.

96 Boule L, *Mediation: Principles, Process, Practice* (3rd ed, 2011) at 754; Australian National Mediator Standards, "Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System" (2007), 3(1)(c).

97 Bergin PA, "Mediation in Hong Kong, the way forward – perspectives from Australia 2008 82ALJ 196 at 199.

It is understandable that practitioners may find that "Judge-led" mediation is effective.[98] However, the more serious and important question is whether it is appropriate. It is clear from the provisions in place in those parts of Australia where judicial mediation is tolerated that the judge-mediator will not be permitted to do certain things unless there is approval given to the judge by the parties. It is also envisaged that judge-mediators will receive information directly from the party albeit that the legal practitioner for that party will be present. The judge is then prohibited from disclosing that information to any other person without the express authorisation from that party or the lawyer for that party. Accordingly, the judge-mediator will owe a duty of confidentiality to the party and/or the legal representative of the party.[99] Over the years, legal firms have established "information barriers" for the protection of clients' confidential information and to avoid conflicts of interest. At this stage no debate has occurred in Australia as to how the judges' duty to keep confidential the information is to be accommodated. The prospect of a need to establish an information barrier between judges of a court further highlights the real difficulties with the practice.

That judges should be directed to act in a particular manner by a party, be in a relationship with the party and/or legal practitioner and owe duties to those parties or legal practitioners who appear before them on a regular basis is antithetical to the perception of an impartial and independent judiciary. That judges should operate in secret and broker commercial (or other) deals during which they may express views to lawyers that cannot be repeated to anyone (including their colleagues) has the real potential to compromise the integrity and independence of the judiciary. History in this regard suggests only adversity. For instance, in Sweden, where judicial mediation was introduced, an Ombudsman had to be appointed to deal with the numerous complaints against judges in the conduct of mediations.

Although the practice has been described as "controversial"[100] it seems to me that a more appropriate epithet is that the practice is "untenable".

Conclusion

Long gone are the days when mediation could be accurately described as "alternative" dispute resolution. It is now an integral component of the civil justice system in Australia. The new legislation goes even further, requiring that civil litigants will always take reasonable or genuine steps to settle their dispute (including by mediation) before instituting proceedings. It will be critical to monitor whether this significant change supports the already positive impact of ADR on civil justice in Australia.

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98 Nickless R, "Victoria allows Judge mediators", *Australian Financial Review*, 13 April 2012.

99 This is an unqualified duty to preserve the confidentiality of the information provided to the judge: Charles Hollander QC & Salzedo S, *Conflicts of Interest* Thomson Sweet & Maxwell 2008 par 7-003.

100 Nickless R, "Victoria allows Judge mediators", *Australian Financial Review*, 13 April 2012.

Appendix

Figure 1: Settlement rate

Referral year	Matters referred to mediation	Matters settled at mediation	Matters not settled at mediation
2008	38	23	12
2009	21	7	14
2010	17	7	10
2011	26	9	17
Total	99	46	53

Figure 2: Settlement rate

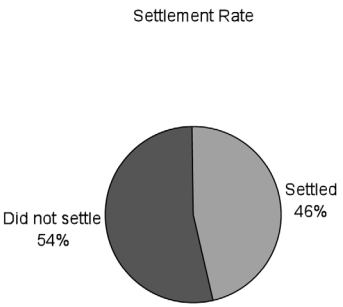


Figure 3: Stages at which cases settled at mediation

Referral year	Preliminary stage	Intermediate stage	Advanced stage
2008	9	5	9
2009	2	2	3
2010	2	3	2
2011	3	4	2
Total	16 (35%)	14 (30%)	16 (35%)

Figure 4: Stages at which cases settled at mediation

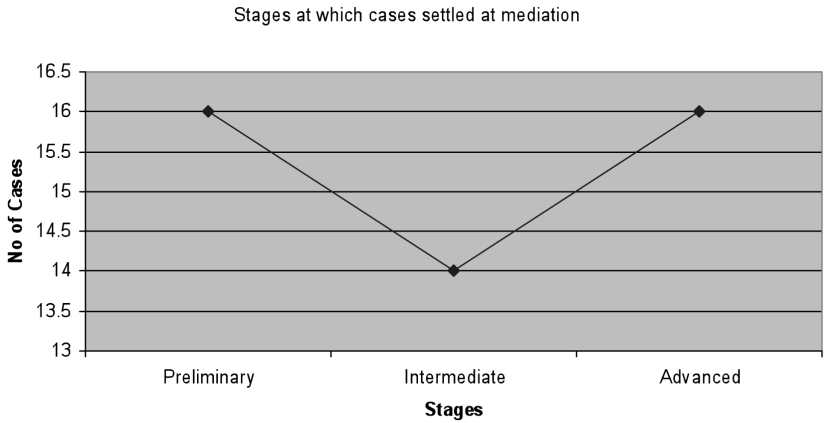


Figure 5: Success rate during stages

Stage	Number of referrals to mediation*	Number of settlements at mediation	Success Rate
Preliminary	38	16	42%
Intermediate	31	14	45%
Advanced	35	16	46%

*Note: Some matters were referred to mediation at multiple stages in the same proceedings

Figure 6: Success rate during stages

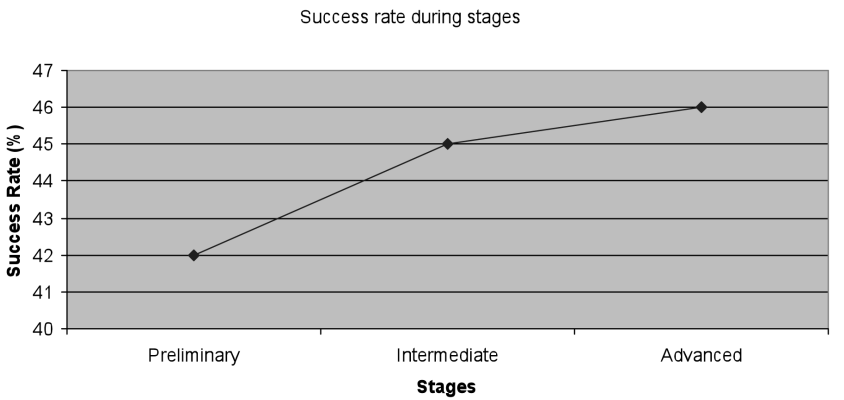


Figure 7: Unsuccessful referrals by stage

Referral year	Preliminary stage	Intermediate stage	Advanced stage
2008	7	6	1
2009	4	4	6
2010	5	4	2
2011	6	3	10
Total	22 (38%)	17 (29%)	19 (33%)

Figure 8: Unsuccessful referrals by stage

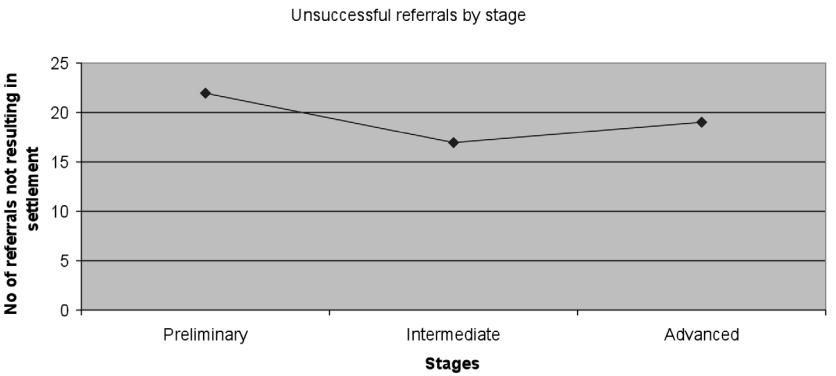
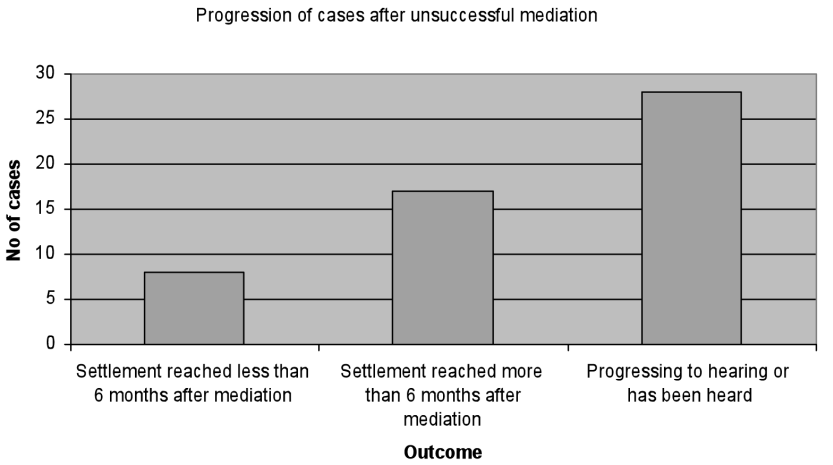


Figure 9: Progression of cases after unsuccessful mediation

Referral year	Settlement reached less than 6 months after mediation	Settlement reached more than 6 months after mediation	Progressing to hearing or has been heard
2008	1	7	4
2009	0	7	7
2010	4	2	4
2011	3	1	13
Total	8 (15%)	17 (32%)	28 (53%)

Figure 10: Progression of cases after unsuccessful mediation



Policy Issues in Mediation

Prof. Bryan CLARK [1]

This paper is a potted version of my contributions to the Hong Kong "Mediate First" Conference in 2012, hosted by the Hong Kong International Arbitration Centre. This was an extremely interesting and truly important event and I was very grateful to be given the opportunity to participate within it alongside a host of eminent and learned speakers. The paper is concerned with a range of related policy matters relevant to the practice of mediation in the realm of civil disputing and its embedding within formal civil justice including mandatory recourse to the process; confidentiality in mediation; ethical rules; accreditation and regulation; as well as training and assessment. The paper draws on my own research and experience of the field in Scotland and also references relevant international studies, legislative approaches and mediation practice.

Mandatory Mediation

Perhaps *the* most controversial issue in the linking of mediation to formal civil dispute resolution practices is the extent that participation in the process should be compulsory. The issue has dogged modern mediation's fate in many jurisdictions since re-emergence of the process in the post 'Pound Conference' era of 1970's USA. Before dipping into the arguments for and against the practice, from a definitional sense it is useful to pin down exactly what we are referring to. The term, 'mandatory mediation' can in fact pertain a number of different situations including mandating that all cases of a certain types are meditated prior to access to the court; allowing judges to refer particular cases to mediation on a mandatory basis; compelling mandatory recourse to a mediation information session; rendering mediation attempts a prerequisite for state legal aid funds, or *compulsion by the back door* – penalising litigants in terms of legal costs for 'unreasonable' refusals to mediate.

I should make it clear at the outset that mandating mediation is something I have always approached with a combination of discomfort and allure. On the one hand it seems intuitively wrong and contrary to the voluntary ethos of grass roots mediation. On the other hand, experience tells us that when mediation remains a voluntary option for disputants, the process tends to suffer from low take up. Selling the prospect of mediation to parties in the midst of a dispute may present a difficult challenge. Adding lawyers to the mix thus upping the adversarial stakes may render this task even more difficult. When

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squared against the evidence that mediation parties often settle their cases, pronounce themselves satisfied with their mediatory experiences, and that cost and time savings may result for both the litigants and importantly the state, mandating mediation may become an irresistible proposition for policy makers. Legal challenges to mandatory mediation as being unconstitutional or contrary to human rights provisions have largely failed.[2]

Nonetheless mandatory mediation may be challenged on a number of grounds, not least on the practical basis that it simply does not work. The premise here is that successful mediation is predicated upon the voluntary engagement of the parties to the dispute. Certainly there is some empirical evidence suggesting that settlement percentages fall and satisfaction rates falter in mediation under mandatory conditions.[3] This is not always the case, however. In fact there is a substantial body of evidence suggesting that mediation may flourish in compulsory environments and that even the most recalcitrant parties, dragged kicking and screaming into mediation, often settle their cases and are satisfied with their mediatory experiences.[4] Beyond dealing with the dispute at hand, research suggests that mandatory mediation can lead to wider cultural changes in attitudes towards the process and a greater ensuing voluntary embracement of mediation by parties and their lawyers.[5]

There can also be seen to be state justification for compelling litigants to attempt mediation before pushing the doors of the civil courts wide open. Across many jurisdictions the vast majority of civil cases filed settle without proceeding to a judicial outcome. Such settlement often occurs at a late stage in the proceedings, however, with cases clogging up the court's docket for months if not years. It seems thus legitimate to compel parties to attempt early mediation when the reality is that almost all cases settle extra-judicially in any case.

As a caveat to this, however, and particularly in terms of disputes in such matters as employment, consumer, housing and family matters, often involving party litigants with limited access to legal advice and representation, we should caution against the wholesale introduction of mediation at the expense of providing access to formal justice. Although my view is that in the vast majority of cases mediation may in fact provide the best vehicle for delivering optimum outcomes for the parties concerned, in certain cases, to ensure that legal rights can be given effect to, meaningful recourse to formal justice should remain available.

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2 See the discussion in B. Clark, *Lawyers and Mediation* (2012: Heidelberg, Springer) at para 5.2.3.1

3 See e.g. H. Genn et al (2007) *Twisting Arms: court referred and court linked mediation under judicial pressure.* Ministry of Justice Research Series 1/07, London.

4 Various studies in this regard are discussed in Clark, *supra* n. 1 at para 5.2.3.2

5 For evidence in the context of mandatory mediation in Ontario, Canada see J. Macfarlane (2001) *Culture change? Commercial Litigation and the Ontario Mandatory Mediation Programme* chapter III, available at http://dsp-psd.pwgsc.gc.ca/collection_2008/lcc-cdc/JL2-70-2001E.pdf

Confidentiality

Confidentiality in mediation is of course one of the most commonly touted benefits of mediation. Unlike the public glare one suffers in court proceedings, mediation affords parties with the luxury of privacy. Dirty laundry does not need to be aired in public; trade secrets and commercial sensitive information can remain under wraps. Mediation generally follows the 'without prejudice' rules that apply to standard negotiations; matters disclosed in the mediation cannot be used in evidence in any ensuing court action and mediators cannot be cited as witnesses in litigation. Confidentiality is not absolutely assured in every case and in many jurisdictions the privacy can be waived in certain circumstances such as where matters disclosed at mediation suggest the commission of a crime, to provide evidence that an agreement has in fact been reached at mediation, because a party may have suffered some form of undue duress within the process, or because both parties agree to waive confidentiality. My own jurisdiction of Scotland is somewhat curious in that there is specific legislation governing the issue of confidentiality and evidential privilege in relation to certain mediation contexts only - i.e. in the family context[6] and also in respect of cross border disputes[7]. In all other mediation contexts, the position as regards confidentiality and evidential privilege is left to the vagaries of the common law position developed in the general arena of negotiations. The significant uncertainties inherent in the general common law in this regard and how the relevant rules may be applied in the context of mediation may undermine the confidence of potential users of the process. My view is that statutory intervention governing the issue of confidentiality in mediation across all fields is thus desirable to provide a measure of certainty for users of the process, although I accept that determining the specific provisions governing when confidentiality should be waived are open to debate. On such matters, confidentiality provisions may have to be tailored to different contexts. What is appropriate in private, voluntary mediation involving commercial parties with legal teams, for example, may not be appropriate in court-connected environments in which unrepresented parties mediate in a tightly time framed mediation setting, perhaps under some pressure to settle quickly.

Ethical issues and 'fairness'

Determining agreed ethical standards in such an emerging and diverse field as mediation is no easy task. Expected ethical standards are normally addressed through training programmes and captured in codes of practice that mediators belonging to or accredited by certain bodies adhere to. One issue that is of significant concern to me in the ethical field is the extent to which mediators should attempt to ensure that

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6 Civil Evidence (Family Mediation) (Scotland) Act 1995 available at http://www.legislation.gov.uk/ukpga/1995/6

7 The Cross Border Mediation (Scotland) Regulations 2011 No 234 available at http://www.legislation.gov.uk/ssi/2011/234/contents/made

the agreements they preside over are fair. Most of the codes of practice in Scotland for mediation that I am familiar with are silent on the issue. This perhaps reflects the prevailing view that mediators are not concerned with the quality of outcomes produced in the sense that under standard facilitative mediation that is a matter for the parties to determine. Seeking to help weaker parties reach fairer outcomes may place the impartiality of mediators in doubt. Nonetheless, some codes of practice do make specific reference to the issue. The Relationships Scotland Code of Professional Conduct (in respect of mediation in cases of divorce or legal separation) makes explicit, for example, the duty of mediators to in so far as possible address any arising power imbalances between the parties (which may otherwise translate into outcome which are detrimental to one party).[8] How this achieved without breaching impartiality or compromising party self-determination is not articulated, however. While the standard view that outcomes are matters for parties to bargain themselves seems entirely legitimate in voluntary mediation in which parties have access to legal advice and negotiate in the knowledge of their respective bargaining positions, it is more difficult to advance this argument in other contexts. Particularly where mediation takes place within the shadow of the court and involving *pro se* parties with no access to legal advice and assistance, an ethical duty imposed upon mediators to ensure that some measure of fairness seems appropriate. How this is defined and achieved in practice is no easy task of course. Perhaps mediation in this context must be such as to appropriately engage legal justice norms to ensure that unfair outcomes are avoided. This could be done through the provision of independent legal advice within the process (from mediators or outside advisors) for those who need it or by the judicial rubber stamping of settlements agreed in mediation. In providing access to justice for the poor and disempowered in society, court mediation needs to be able to facilitate 'just' settlement it should not simply, to use Professor Dame Hazel Genn's phrase, be "just about settlement"[9].

Regulation and Training

The issue of fairness and ethical values leads us on to the more general issues of regulation and training. In terms of whether or not mediators should be regulated, there exist a wide divergence of practice and views on the issue across the globe. Some jurisdictions, for example, many civil law jurisdictions in continental Europe, have moved quickly to legislating in respect of such issues as who may mediate, how they should be trained, how they should be regulated and scrutinised and by whom. Other jurisdictions, especially those in the common law world, have by contrast favoured *laissez faire* regimes with generally no legal rules governing who may mediate in certain contexts, requisite training and what regulatory regimes those practising should be subject to. In Scotland we have no legal regulation of the

8 See http://www.relationships-scotland.org.uk/family-mediation/what-happens-at-mediation

9 H. Genn (2010), *Judging Civil Justice: the 2008 Hamlyn Lectures* (Cambridge University Press: Cambridge) at pp 117

mediation activity as such. Nonetheless a light touch form of self regulation exists through the offices of the Scottish Mediation Network – a publically funded linking organisation seeking to set standards in such matters as requisite training, adoption of appropriate ethical codes of practice, requisite CPD requirements, and adoption of complaints and grievance procedures for mediators across all fields in Scotland.[10]

Opinions when voiced on the matter of regulation are often sharply divided. Arguments in favour of regulation include: the effect of building consumer confidence in the process; helping entrench and legitimise mediation as a mainstream form of dispute resolution; raising the profile and professional standing of mediators; the quality assurance essential as process becomes more linked to formal justice process can only be achieved by regulation. On the other hand it is argued that regulatory regimes may be 'captured' by influence professional groups (such as lawyers); regulation may have the effect to homogenise practice and limiting plurality and innovation; 'grassroots' endeavours in the field may be stifled by raising required standards for accessing practice in mediation; operation of the market is most efficient regulatory mechanism.

My own view on this issue is that as mediation becomes more entrenched in a jurisdiction and in particular in contexts in which the process becomes more institutionalised and linked to formal justice through for example, public funding, rendering it a pre-requisite for legal aid, embedded within statutory dispute resolution schemes or attached to the court through in-house schemes or court-referral rules, then the argument for regulation becomes irresistible. The need for accountability and assurance of adequate standards in such cases is paramount. There is, however, in my view, an equally powerful argument that in respect of high end commercial mediation, the market is perhaps best left to govern itself. The reality is that at this level, mediators are appointed by reputation and standing in the eyes of disputants and their lawyers. This view as to the desirability of appointment as mediator is often not gleaned from training or experience as a mediator, but from their general experience, standing and gravitas gained in another professional field (as, for example, judge, barrister, accountant, banker or surveyor). Subject specific expertise is also highly prized in certain contexts (for example the construction mediation field). Against this backdrop, and the fact that mediation remains generally a buyers' market, it is hard to see a pressing need for standardised regulation of the field.

In terms of the specific issue of training for mediation practice, in general terms at least there can be seen to be a civil law/common law divide on the issue. Civil law countries have generally moved quickly to the adoption of rigorous educational requirements for mediators marrying substantial theoretical learning with practical

10 See http://www.scottishmediation.org.uk/

skills training.[11] Traditionally, at least in general civil or commercial areas of practice, standard mediation training in common law jurisdictions has tended to take the form of skills-based short courses, typically 30 or 40 hours in duration. These are often seen essentially as 'bolt-on' courses adding to trainees existing experiences as, for example, lawyers or other professionals[12].

The schism over the issue of training in fact relates to a debate over the extent to which mediation practice represents a distinctive skill-set in its own right or whether or not mediation practice is something that one bolts-on to an existing set of professional skills and experience. Equally there is a debate as to whether mediators are born rather than made – ie to what extent is mediator ability borne out of innate personality characteristics rather than being based upon skills that can be learned[13]. There are no easy answers to these questions. With the best will in the world, many will struggle to learn the ways of mediation no matter how extensive their training while, others – like ducks take to water – will find translating their innate abilities into mediation practice a relatively effortless endeavour. Equally the extent to which the dispute context in which mediation practice takes place is important too. Beyond education in mediation skills, mediators may benefit (and be more attractive propositions in the market) from a pre-existing grounding in the dispute area in which they are to be mediate. This means that regardless of standards of mediation training *per se* family lawyers will always be seen as appropriate mediators in divorce cases; architects and surveyors may be seen as such in construction disputes; and human resource managers and employment tribunal judges as such in workplace disputes. The extent to which standardised training provision under, for example, statutory regulation takes into the account the prior learning and experience of individuals in related professional areas is a complex and likely controversial issue.

Conclusion

In this paper I have tackled a mere smattering of the many important issues facing different jurisdictions in terms of developing mediation as a form of dispute resolution. The Mediation Ordinance passed on June 2012 which came into effect on 1st January 2013 and related efforts to set up a single accrediting body for mediation practice has shown Hong Kong's willingness to be bold in the way it is seeking to engage with and propagate the process. Clear and definitive choices have

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11 See discussion of such programmes in N. Alexander (2006) "Introduction" in N. Alexander (ed) *Global Trends in Mediation* 2nd edn (Kluwer, Alphen aan den Rijn)

12 In Scotland, the Scottish Mediation Network has a minimum requirement of 40 hours training. Issues to be evaluated in the training include the understanding of ethical values in mediation, communication skills, conflict management skills, displaying empathy, understanding the legal context of disputes and active listening.

13 Goldberg and Shaw identified the following as the most important attribute of effective mediators: the ability to establish a relationship of trust and confidence with the parties (SB Goldberg and M Shaw (2007) "The secrets of successful (and unsuccessful) mediators continued: studies two and three" Negotiation Journal 23(4): 393-418)

been signalled by Hong Kong in respect of many of the issues outlined in this paper. Although my own country, Scotland, received mediation (in its modern form) prior to Hong Kong, we have since been left in the slipstream and the process has quickly taken a hold and gain prominence in your jurisdiction. Sadly, from my perspective at least, support for mediation from government, the judiciary and the bar is also evident in Hong Kong to a much greater degree than in Scotland. In this sense there is much that we can learn from you. I hope to continue to participate in the development of mediation in Hong Kong in the future and foster stronger links between the mediation communities in your country and mine.

The American Law of Mediation[1]

Prof. Dwight Golann [2]

A. Confidentiality

One of the important qualities of mediation, emphasized by those who advocate its use in America and around the world, is that the process is confidential. Participants in mediation regularly sign agreements, like the one in the Appendix, in which they commit not to disclose to outsiders anything communicated during the process. Approximately half the fifty American states, and the U.S. federal government, have enacted laws or regulations that give mediation varying levels of confidentiality protection.

Sometimes, however, participants in mediation seek to disclose, or outsiders attempt to discover, what occurred during the process. Disputes over mediation confidentiality arise in the U.S. in three basic ways.

- Litigants sometimes attempt to take confidential information from the mediation process and use it in another context, usually in court or arbitration. ("Isn't it true that in mediation you admitted that…?"). We can think of these as *litigation* breaches.
- Disputants sometimes allege that the mediation process itself went awry ("Your Honor, I signed the agreement at 2 a.m. and wasn't thinking clearly. The mediator just wouldn't let me go home!"). This can be thought of as a *supervisory* intrusion, because confidentiality is being invaded allegedly to protect the mediation process itself.
- Parties may also disagree about whether they reached agreement during mediation and if so about the terms, and call participants or the mediator to testify. If this is alleged to have occurred because the process itself was flawed, we have a supervisory breach. If the allegation is that the process was proper but one party is simply refusing to implement an agreement allegedly reached in mediation, we have an *enforcement* intrusion.

1. Contrasting American views on mediation confidentiality

There is a general consensus that some degree of confidentiality in the mediation process is appropriate, but U.S. courts and commentators do not agree on how strong the protection should be. In particular, there is a question whether mediation

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2 Prof. Dwight Golann is Professor of Law, Suffolk University, Boston Massachusetts USA.

requires a formal legal "privilege" or simply a contractual agreement by the parties to respect confidentiality like the one in the Appendix. Others argue that confidentiality protection should be even stronger than a legal privilege, so as to bar participants from disclosing anything said in mediation not only in court or arbitration, but in any setting, legal or non-legal.

People who had been sexually abused as children sued the priest who abused them and the Roman Catholic Archbishop of Boston, Massachusetts, USA, who they argued had failed to use reasonable care to prevent the abuse. After years of litigation the parties agreed to mediate and eventually announced a settlement. A dispute soon arose, however, over its terms. The defendants argued that the settlement, which required the Church to sell real estate, was subject to review by the Archdiocese's financial council. The plaintiffs, however, maintained that the agreement was not subject to any such condition and called the mediator as a witness. The mediator objected and moved for a court order that he need not testify.

Frances Leary & others v. Father John J. Geoghan & others
(Single Justice, Mass. App. Ct. 2002)

Cohen, Single Justice [The plaintiffs] have represented…that their sole purpose in calling the mediator is to ask him whether a document that was drafted at the conclusion of the mediation contained all of the terms that the parties wished to include in an agreement to settle….

…The [trial] judge construed the [state confidentiality] statute as not establishing an absolute bar to disclosure, but as creating a waivable privilege, belonging solely to the parties to the mediation and capable of being waived explicitly or by conduct. Because she found that the privilege was waived by both the plaintiffs and the supervisory defendants, she concluded that the statute created no impediment to the mediator's testimony….

…As mediation has gained popularity…virtually all states have promulgated statutes or court rules providing for varying degrees of confidentiality in mediation….The underlying rationale of these statutes and rules is that confidentiality is crucial to the effectiveness of mediation. As one commentator has explained:

The willingness of mediation parties to "open up" is essential to the success of the process. The mediation process is purposefully informal to encourage a broad ranging discussion of facts, feelings, issues, underlying interests and possible solutions to the parties' conflict. Mediation's private setting invites parties to speak openly, with complete candor. In addition, mediators often hold private meetings— "caucuses"—with each of the parties…. Under such circumstances, mediation parties often reveal personal and business secrets, share deep-seated feelings about others, and make admissions of fact and law. Without adequate legal protection, a party's candor in mediation might well be "rewarded" by a discovery request or the revelation of mediation information at trial….Participation

will diminish if perceptions of confidentiality are not matched by reality. Another critical purpose of the privilege is to maintain the public's perception that individual mediators and the mediation process and neutral and unbiased.…[Kirtley 1995]

…There are those who have suggested that the need for strict confidentiality may be overstated….However, our legislature has enacted a statute that plainly reflects a policy judgment in favor of confidentiality, and it is that statute and that policy judgment that dictates the result here….

…I conclude that whether or not the parties have chosen to maintain the confidentiality of the mediation, [state law] does not permit a party to compel the mediator to testify, when to do so would require the mediator to reveal communications made in the course of and relating to the subject matter of the mediation. Compelling such testimony, even if potentially helpful to the motion judge's decision on the merits of the parties' dispute, would conflict with the plain intent of the statute to protect the mediation process and to preserve mediator effectiveness and neutrality….

An example of an early state law on mediation confidentiality, that of Massachusetts, appears in the Appendix

2. American Law on Mediation Confidentiality

There are five primary sources of rules governing confidentiality in American mediation:

- Rules of evidence
- Privileges
- Confidentiality statutes and rules
- Mediation agreements
- Disclosure statutes and rules

a. Rules of Evidence

Virtually every U.S. jurisdiction has adopted a rule of evidence to protect the confidentiality of settlement discussions. The key federal provision is Federal Rule of Evidence (FRE) 408.[3] Most states have evidentiary rules patterned on FRE 408 (Cole et al., 2008). The first point to note about FRE 408 is that it is a rule of evidence,

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3 The text of the rule is as follows: *Rule 408. Compromise and Offers to Compromise*. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

not a guarantee of confidentiality. FRE 408 is intended to limit what litigants can offer in evidence in a court proceeding, not what parties or observers can disclose in any other context. The rule does not, for example, apply to discovery depositions, nor does it limit what a person can say in a conversation or a media interview. In addition, FRE 408 and its counterparts typically apply only to court proceedings, and may therefore not be effective in less formal forums such as administrative hearings and arbitrations; whether a mediation conversation will be admissible in another forum will depend on its rules and the philosophy of the presiding officer.

Even in court FRE 408 may not prevent information about settlement discussions from being disclosed. The rule and its state counterparts cover only evidence that a person offered or agreed to accept "valuable consideration" to compromise a claim, not everything said in settlement discussions. Thus, for example, the rule does not protect a trade secret disclosed in mediation from being introduced into evidence unless it formed part of an offer to settle.

Indeed, even an offer of compromise is not necessarily sacrosanct under FRE 408, because the rule has many exceptions. The rule applies only if an offer of compromise is introduced for the purpose of proving "liability for or invalidity of the claim or its amount." Confidential information offered, for example, to show that a witness is biased or that a party did not bargain in good faith is not protected by the rule.

Other uncertainties arise from the fact that only the person against whom evidence is being offered can make an FRE 408 objection. The rule, in other words, is designed to prevent a party from being shot in court with a "gun" it provided to the other side during settlement discussions, not to help nonparties or mediators keep discussions confidential. Finally, a rule of evidence can often be hard to enforce, as parties who evade it ordinarily risk at most a judicial reprimand.

b. Privileges

Roughly half of the fifty American states now have confidentiality statutes that apply generally to mediation, and every state has some law which relates to the use of mediation in specific types of cases or settings, such as environmental disputes or court-connected programs. Of the states with general statutes, most have created formal legal privileges.

It is important to bear in mind the following distinction: Although a privilege bars evidence from being admitted in adjudication, it does not bar persons from disclosing the same information outside a court proceeding. *The fact that a matter is "privileged," therefore, does not necessarily guarantee that it will be kept completely confidential*. A privilege alone may not bar persons from disclosing the information in non-court settings, such as over the internet. By contrast, a statute providing "confidentiality" ordinarily bars the release of information in all contexts. The terminology can be confusing, however: The lawyer-client privilege, for example,

does bar disclosures in all circumstances, in and out of court, unless waived by the client who is the "holder" of the privilege.

A privilege is less subject to evasion than an evidentiary rule such as FRE 408 because privileges bar the admission of evidence, regardless of the purpose for which it is offered. Violations of privileges may also give rise to a cause of action for damages. To understand the level of protection offered by a privilege in any particular setting, consider the following issues:

- What privilege applies to the process?
- What does it cover? Testimony in litigation only, or disclosure in any context?
- In what phases of the process does the privilege apply?
- Who can invoke it?
- Is it subject to exceptions or exclusions?

What Privilege Applies? Courts almost always apply their own rules of evidence, but this is not true of privileges. Thus, if a mediation takes place in State A but the case later goes to trial in State B, which state's privilege will be applied will depend on choice-of-law principles. This makes the outcome hard to predict. As Professor Ellen Deason has commented, "Mediation confidentiality would make an ideal poster child for the shortcomings of choice-of-law" (Deason, 2002).

A few federal courts have recognized a mediation privilege as a matter of federal common law, but their rulings are not binding on federal courts in other areas, and there is no general mediation privilege in federal proceedings. FRE 501 authorizes courts to apply either state or federal privilege rules in a federal case, making it difficult to predict how confidential communications will be treated in federal court.

What Is Covered? In What Phases of the Process? As noted, some privileges apply only to testimony given during litigation, whereas other privileges impose confidentiality in non-court settings as well. A particular privilege may, for example, apply only to the mediation session itself, but not to conversations and e-mails between counsel and the neutral before and afterward. The rule on what phases of the mediation process are covered by privilege varies from state to state and is sometimes poorly defined.

Who "Holds" the Privilege? Only persons designated as "holders" of a privilege are entitled to invoke it. Typically the parties to a case hold a mediation privilege and thus can prevent disclosures. The mediator, however, may not be entitled to use the privilege as a shield, just as lawyers are not usually permitted to invoke the attorney-client privilege unless their client elects to do so. Thus, if a neutral is called to testify about what occurred during a mediation he may have to ask a party to protect him from testifying. In *Hauzinger v. Hauzinger,* 892 N.E.2d 849 (N.Y. App. 2008), for

example, a New York appellate court ruled that when both parties in a divorce case waive a right to confidentiality granted by state law, and the mediation agreement contemplates possible disclosure, a court can order the mediator to testify.

By contrast, in the *Leary* sex abuse case the judge barred the mediator's testimony even though both sides had waived their objections. The Uniform Mediation Act (UMA), discussed below, similarly grants mediators the right to prevent disclosure of their own mediation communications (UMA § 4). California's law is even stronger: The consent of the mediator and the parties is needed for anyone to testify as to the content of a mediation and mediators may not testify at all (Cal. Evid. Code §§ 1122, 703.5).

Is the Privilege Qualified or Absolute? What Exceptions Apply? Some states have adopted mediation privileges that are absolute, meaning that they contain no exceptions. The UMA allows disclosure and other statutes require disclosure in certain situations, for example, to report evidence of a felony, threats of harm to children, perjury, and other matters. Even when a privilege is absolute on its face, courts sometimes create exceptions as a matter of common law.

c. Confidentiality Statutes and Rules

Many state confidentiality laws go beyond establishing an evidentiary privilege to make the entire mediation process confidential, which bars participants from making disclosures out of court as well as in court, in informal communications as well as formal testimony. A Massachusetts statute, for instance, states that any communication during a mediation, as well as the mediator's work product, "shall be confidential," as well as inadmissible in adjudication, and California statutes similarly provide that the mediation process shall be "confidential." (See Mass. Gen. Laws ch. 233, § 23C; Cal. Code §§ 1115-1128.)

Neither Congress nor the federal courts, however, have provided any general guarantee of confidentiality to mediation. Confidentiality provisions do exist in specific federal statutes, such as the Administrative Dispute Resolution (ADR) Act of 1996, 5 U.S.C. § 574, which provides that neutrals and parties in mediations of administrative cases "shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication." The ADR Act of 1998, 28 U.S.C. § 652(d), requires that federal district courts adopt local rules to provide for the confidentiality of ADR processes that occur within their court-connected programs. As a result, parties are more likely to find confidentiality protected in federal cases if they mediate under the aegis of a court ADR program than if they go to a private mediator.

State court and private mediation programs also typically provide that mediations held under their auspices will be confidential. The rules of such programs often do not specify, however, what is meant by confidentiality. In one sense a party's

incentive to comply with the rules of a court-affiliated program is strong, because litigants may be concerned that if they violate a rule they will incur the wrath of the judge who will hear their case. This is not to say, however, that a party will have a legal cause of action or other remedy if an opponent does violate a confidentiality rule.

d. Mediation Agreements

Mediation agreements offer the best opportunity for a lawyer to tailor confidentiality protections to the needs of particular clients. An example of a commercial mediation agreement appears in the Appendix.

A mediation agreement is a contract, however, and thus is subject to the limitations inherent in any contractual undertaking. First, agreements bind only those who enter into them, not nonparties. In the case of mediation, this means that outsiders to the process, such as third-party litigants, are not bound by agreements between parties to maintain confidentiality. Second, if a breach does occur, the only remedy is usually to sue for monetary damages, which rarely can be proved. Even in the unusual situation in which a litigant knows of an impending violation and is able to seek a court order to prevent it, a judge may refuse to act out of concern that a contract not to provide evidence in court violates public policy. This said, however, practicing neutrals report few complaints from parties to commercial mediation that an opponent agreed to confidentiality and then violated it.

Parties also often contract for confidentiality as part of settlement agreements. Such agreements typically provide that the terms of settlement shall remain confidential and sometimes specify liquidated damages for any breach.

e. Disclosure Statutes and Rules

Public policy sometimes weighs against secrecy concerning settlement negotiations. Many American states, concerned that secret settlements have operated to hide serious social problems from officials and society, have considered statutes that would bar courts from ordering certain kinds of settlements sealed.

Some states also have decisional law or statutes that require persons who become aware of certain offenses to report them to authorities. Thus, for example, some jurisdictions require therapists to report potential physical harm that they learn about from clients (see *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425 (1976)), and many states require mediators to report instances of child abuse.

Finally, individual states and the federal government have enacted "sunshine laws," which require that certain meetings involving government officials be open to the public. As a result when government officials participate, the mediation process may have to be open to outside observers.

3. Other Intrusions into the Process

To this point I have focused on the confidentiality issues that arise when a litigant discloses confidential mediation information for an ulterior purpose—usually to support a position in court. Another major category of confidentiality disputes involves claims that the mediation process itself went awry—what I have called a "supervisory" intrusion. In these situations a litigant is typically alleging either that mediation was thwarted because an opponent did not participate in good faith or the process itself was badly flawed. This kind of claim poses a conflict between a court's need to gather evidence to supervise the process and the interest in preserving confidentiality.

A few states bar the introduction even of signed agreements reached in mediation if they do not meet specified conditions. A California statute, for instance, requires that for evidence of a mediated agreement to be admissible over objection, the document must either state that it is admissible or intended to be enforceable or binding, or words to that effect, or be offered to show illegality (Cal. Evid. Code § 1123(b)).

The issue of invading confidentiality to establish an agreement arises most often, however, when one party alleges that disputants reached an oral meeting of the minds. An example is the *Leary* sexual abuse case at the start of this article. Some laws contain exceptions to permit introduction of evidence of oral settlements, and other statutes, although absolute on their face, have been interpreted to permit such testimony. In many states, however, it is not clear whether disputants may testify about the existence of an oral settlement, or whether the mediator can be called as a witness on the issue.

Sections 4(a) and 6(a) of the UMA, discussed below, prevent participants from testifying about agreements reached in mediation, but allow the introduction into evidence of accords that are signed and in writing or electronically recorded. The effect of the UMA is to bar enforcement of purely oral settlements, but permit enforcement of written or recorded ones.

4. Confidentiality in Caucusing

So far I have discussed confidentiality in terms of disclosures that are made to persons outside the mediation process or the courts. In caucus-based mediation, however, there is an additional layer of privacy: Mediators typically assure disputants that if they request that information disclosed in a caucus be held in confidence, the mediator will not disclose it to their opponent. As we have seen, however, one of a mediator's key functions is to facilitate communication between parties to a dispute.

This creates continuing issues in determining the appropriate balance between confidentiality and communication in caucus-based mediation. There is no law on the subject, but mediation agreements such as the one in the Appendix may include assurances of confidentiality as between the parties.

5. A Movement Toward Consistency: The Uniform Mediation Act

a. The Current State of Protection

How serious is the problem of mediation confidentiality in practice? From the discussion above and the varying responses of courts, it is plain that many gaps and ambiguities exist in American mediation's "confidentiality safety net," and there is disagreement about how much confidentiality protection the process needs. Although court cases over confidentiality issues exist, they appear to represent only a tiny fraction of all disputes mediated. Commercial mediators report, for instance, that they rarely hear parties complain about breaches of confidentiality and cases in which a party seeks a mediator's testimony in court are rare.

Confidentiality cases do arise, however: Over a seven-year period between 1999 and 2005, for example, researchers at Hamline University identified nearly 250 reported decisions that dealt with mediation confidentiality. See *www.law.hamline.edu/adr/mediation-case-law-database.* Some scholars cite this as evidence that "misuse of mediation communications is common" (Cole et al., 2008). At the same time, such a number amounts to less than one reported case per year per state, in an environment where courts in states such as Florida send more than 100,000 cases a year to mediation (Press, 1998).

Why do disputes over confidentiality not arise more often? For one thing, a large majority of mediated cases reach agreement, and even those that do not settle in mediation are very unlikely ever to go to trial. If a case is never adjudicated, the parties have less reason to breach confidentiality. It also appears that when people enter into a clear commitment to keep information confidential, they honor their agreement. And, as we have seen, when the mediation process focuses on distributive bargaining, disputants are less likely to reveal sensitive information in the first place. Finally, we should bear in mind that to the extent that mediation brings a sense of peace to a situation, the process itself may induce participants to treat rules with respect. Whatever the cause, parties' compliance with confidentiality obligations appears to be higher than a purely tactical analysis would suggest.

Reported cases involving confidentiality arise largely in the context of court-connected mediation. This may be because parties are often compelled to participate in court programs, whereas they usually enter private mediation voluntarily. A person unhappy to be in a process is probably less likely to respect its rules. Also, litigants are probably more apt to complain, and judges to impose sanctions, when a problem arises in a court-affiliated setting. That said, "courts rarely punish parties who misuse mediation communications" (Cole et al., 2008). It is rare for parties complaining about confidentiality abuses to sue for damages, perhaps because it is so difficult to prove that an ascertainable monetary loss resulted from the alleged breach (Moffit, 2003).

b. A Response

What level of protection should be given to confidentiality in mediation? Assuming that confidentiality is necessary, the lack of uniformity among jurisdictions, and the resulting uncertainty about what rule will apply to a given mediation, is troublesome. One possibility is for states to adopt a uniform confidentiality statute. To this end the National Conference of Commissioners on Uniform State Laws has proposed a Uniform Mediation Act.

The Act states that communications made during mediation are not "subject to discovery or admissible in evidence" in a legal proceeding (§ 4(a)). The UMA thus prevents parties from using mediation communications in adjudicatory proceedings. It leaves them free, however, to make disclosures outside litigation, for example in conversations or media interviews, unless they agree not to do so. (See comments to UMA § 8.) Disputants in UMA jurisdictions who wish mediation communications to remain confidential in all circumstances must therefore enter into confidentiality agreements.

The UMA contains exceptions to its bar on disclosure in legal proceedings. Sections 5 and 6(a) of the Act permit a court to order disclosure of mediation communications about:

- Agreements signed by all parties.
- Documents required to be kept open to the public.
- Threats to commit bodily injury or crimes of violence.
- Plans to commit or conceal an ongoing crime.
- Information needed for a mediator to respond to claims or charges against him.
- Situations involving child abuse and neglect.

Section 6(b) of the UMA creates an additional exception to confidentiality in situations where a tribunal finds that a party has shown that:

- Evidence is not otherwise available,
- There is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and
- The mediation communication is sought or offered in a court proceeding involving a felony or litigation over a contract reached in mediation (but in the latter situation the mediator cannot be compelled to testify).

The UMA has provoked disagreement within the mediation community. Some commentators argue that its provisions are inadequate because they do not cover out-of-court disclosures, and others consider the UMA's restrictions excessive. In addition, some mediators and lawyers who practice in states with stronger confidentiality rules object to "watering down" their protections in the interest of national uniformity. If the UMA is enacted on a widespread basis, confidentiality rules will become more uniform from one state to another, and the likelihood that

federal courts will develop a uniform rule may also increase. As of this writing ten states have adopted the UMA, but it is not yet clear whether it will achieve nationwide acceptance.

B. Enforcement of Participation in Mediation

1. Agreements to Mediate

Parties entering into relationships, particularly ones that are lengthy or complex, are increasingly likely to include in contracts a clause obligating them to mediate any disputes that may arise in their interactions. Businesses entering into commercial supply agreements or divorcing parents with young children, for instance, can expect to encounter changes in circumstances over the term of their agreement and would benefit from a process to address such changes. Commitments to mediate are also required by law in some states; Arizona and Washington, for example, require divorcing couples who seek court approval of joint custody or other parenting arrangements to include an ADR provision in their plan (Cole et al., 2008).

The first question raised by a mediation clause is whether a court will enforce it. In early cases defendants objected successfully to enforcement, arguing that it would impossible to determine whether a party was in compliance or to supervise participation. "Until the mid-1980s, courts refused to enforce mediation… agreements on the theory that a court would not use its equity powers to order a 'futile gesture'…[but] enforcement is gradually becoming routine, and little is heard today about futile acts, vain orders, or the problem of adequate remedies" (Katz, 2008).

California residential real estate purchase contracts, for example, permit the prevailing party in litigation to recover attorneys' fees, but deny recovery to parties who fail to mediate before suit. Applying this language, courts have refused to grant fees to prevailing parties who refused to mediate. *Frei v. Davey,* 124 Cal. App. 4th 1506 (2004). Another enforcement option is to dismiss complaints filed by parties who have failed to comply with an obligation to mediate. See *Halcomb v. Office of the Senate Sergeant-at-Arms of the U.S. Senate,* 205 F.Supp. 2d 175 (D.D.C. 2002).

Parties who have the right to compel mediation may decide not to enforce it, on the theory that a forced process would be meaningless. At the same time, a party who is opposed to mediation but subject to a requirement may decide that it is easier to go through a mediation session than to litigate over it. Still, between 1999 and 2005 the Hamline mediation case law project identified nearly 500 reported court decisions that dealt with parties' duty to mediate.

One commentator has suggested the following guidelines for drafting an enforceable obligation to mediate:

- Keep the language simple,
- Avoid ambiguity; in particular keep commitments to mediate separate from obligations to arbitrate,

- Include specific reference to sanctions and other consequences for breach, for example, dismissal of the claim or imposition of attorneys fees, and
- Make the process fair, given the context of the contract (Katz, 2008).

2. Mandates to Mediate

a. Issues of Court Authority

Many court systems, impressed with the potential of mediation, have decided to make participation in the process mandatory. Courts sometimes do so in the belief that disputants and counsel are unfamiliar with the benefits of mediation and need to be compelled to "try some." Or they may impose mediation out of concern that the very parties most in need of the process, or most likely to consume judicial resources unnecessarily, will not enter mediation voluntarily. Thus, for example, many states require parents involved in child visitation or custody disputes to mediate before seeking a court order.

Early in the development of court-connected mediation commentators were concerned that for a court to order parties into ADR might be unconstitutional—for instance that such requirements might interfere with state constitutional provisions that give citizens a right to free access to justice. Courts have upheld mediation mandates against arguments that they violate constitutional guarantees, probably because participation is inherently no more burdensome than other steps in the litigation process, such as compelled appearance at depositions (Golann, 1989).

The fact that mandatory ADR is constitutional, however, does not mean that a particular court has the authority to order it. Courts ordinarily derive their authority from specific statutes and rules. Many federal courts, for example, base orders compelling litigants to mediate on plans and rules adopted pursuant to the Civil Justice Reform Act of 1990 or the ADR Act of 1998. The 1998 Act, in particular, bars federal courts from forcing parties to arbitrate but says nothing about whether disputants can be required to mediate, which some courts have interpreted to mean that they can adopt rules requiring mandatory mediation.

Can a federal court that has not adopted a rule nevertheless order parties to mediate as a matter of "inherent judicial power"? The Court of Appeals in *In re Atlantic Pipe Corp.*, 304 F.3d 135 (1st Cir. 2002), confronted the issue in a complex construction dispute with many parties. It confirmed the inherent power of a trial judge to order mediation over a party's objection, to require an objector to pay part of the cost, and to name as a mediator a private neutral nominated by one of the parties. The appeals court nevertheless expressed concern over the lack of any conditions on the appointment, particularly in light of the fact that the mediator charged $9,000 per day, and remanded the case to the trial court to enter additional orders.

Courts in other jurisdictions have reached contrary results. In *Jeld-Wen v. Superior Court,* 146 Cal. App. 4th 536 (2007), for example, an appellate court found that

although California courts have the statutory power to order smaller civil cases to mediation processes whose cost is paid for by the state, they could not order parties to attend and pay for private mediation.

b. Good-Faith Bargaining Requirements

If a court has the power to order disputants to mediate, should it require them to satisfy any minimum standard of conduct? If the adoption of rules is any guide, the answer is plainly yes. Professor John Lande found that at least 22 states have "good-faith bargaining" requirements for mediation, and that many federal district and state trial courts have local rules imposing such duties on disputants, usually in connection with a court-related ADR program. The problem is that virtually none of these rules defines what "good faith" means. According to Professor Lande, the reported cases on good-faith obligations break down as follows:

- Failure to attend mediation at all.
- Failure to send a representative with adequate settlement authority.
- Failure to submit required memoranda or documents.
- Failure to make a suitable offer or otherwise participate in bargaining.
- Failure to sign an agreement.

In practice courts have found it easiest to sanction objective acts, such as a party's failure to appear or file a statement. They have found it much more difficult to assess subjective matters, such as whether a party's offer was adequate in the circumstances. Apart from having to define amorphous concepts such as good faith, courts would usually have to take evidence about what occurred in the mediation process, raising confidentiality concerns. Only a few decisions to impose sanctions based on a trial judge's subjective conclusions about mediation misconduct have been upheld on appeal (Lande, 2002).

Even if enforcement is feasible, good-faith bargaining requirements arguably conflict with a key value of mediation, self-determination. The first principle in the Model Standards of Conduct for Mediators states that "Parties may exercise self-determination at any stage of a mediation, including…participation in or withdrawal from the process." Under this standard, can a court order parties into mediation or compel and specific level of participation? Suppose, however, that one party in a compelled process expends substantial resources to participate—should an adversary be permitted to frustrate the effort by failing to prepare or refusing to bargain? The following questions illustrate the issue.

The fact that mediation often leads people to change their minds makes it particularly important that the persons who attend have the authority to adopt new positions. If a negotiator ultimately decides that a difficult compromise is appropriate, for example, he needs the authority to implement his judgment. Recognizing this, mediation agreements and program rules usually require that if a party does not appear personally—which is not possible for a corporation—it must send a

representative who has "full" or "adequate" settlement authority. This raises similar issues to the problem of defining good faith.

In response to the difficulty of defining and enforcing "good-faith" requirements, some have argued that such rules should be discarded entirely. Professor Lande, for example, warns that

> *Sanctioning bad faith in mediation actually may stimulate adversarial and dishonest conduct.…[It] might also encourage surface bargaining.… Because mediators are not supposed to force people to settle, participants who are determined not to settle can wait until the mediator gives up.…Similarly, tough mediation participants could use good-faith requirements offensively to intimidate opposing parties.…[Innocent] participants may have legitimate fears about risking sanctions when they face an aggressive opponent.…[In addition, a] good-faith requirement gives mediators too much authority…to direct the outcome in mediation.*

He has proposed that litigants instead be given education about the value of interest-based processes, and that courts limit themselves to enforcing objective standards of conduct, for example that parties appear at mediation for a minimum period of time (Lande 2002).

3. Enforcement of Mediated Settlements

Mediation is a voluntary process, but if it is successful then the parties usually enter into a binding contract—a settlement agreement. Even settlements, however, may provoke new controversies over issues such as the following:

- Did the parties actually reach a final agreement? If so, what were its terms?
- Should the agreement be invalidated on grounds such as duress, mistake, unconscionability, or lack of authority?

We have seen that such issues provoke disputes over confidentiality, as courts are asked to take testimony about what occurred in the process. Apart from confidentiality concerns, however, there are substantive questions: What is required to make a settlement binding? And how much deviation should courts permit from an "ideal" process before overturning its result?

a. The Existence of an Agreement

Good practice calls for parties who settle in mediation to memorialize their agreements in writing. To ensure that this occurs, mediation texts counsel neutrals, however late the hour or strong the settling parties' wish to depart, to push the disputants to sign a memorandum that summarizes the settlement before they leave. Sometimes, however, the parties do not execute an agreement, for instance if an insurance adjuster agrees over the telephone, or an agreement is alleged to be incomplete.

Most courts test mediated settlements by the standards that apply to contracts generally. If an agreement is oral, the first issue is whether it complies with the applicable statute of frauds. Courts in several states have held oral mediated settlements to be enforceable contracts, and although there are few reported cases it appears that federal common law also permits enforcement of oral settlements. Where a court has refused to enforce an oral agreement reached in mediation, it has usually been because state law imposes procedural rules more severe than the requirements of the common law of contracts. Florida and Texas, for example, mandate that pending court cases may be settled only through a written document signed by the parties or their counsel (Cole et al., 2008).

Another possibility is that the parties sign an agreement but one side later argues that the writing is incomplete, as in the *Leary* case at the start of this article. Such claims raise issues under evidentiary rules, as well as concerns about invading confidentiality.

b. Grounds for Invalidation

Suppose, following a successful mediation process, the lawyers draw up an agreement and the parties sign it. Is that enough to ensure that a settlement will be enforced? Generally the answer is yes, but not always. Again there are potential concerns. Some of these are formal in nature. First, settlement agreements must contain the essential terms of the parties' bargain. If, for example, a settlement provided that "the parties shall exchange mutual releases," a court would probably find the language sufficient to form a binding agreement. If, however, a settlement stated that a defendant would make payments "in installments" but did not specify a schedule, a challenge would be more likely to succeed. A few jurisdictions also require that mediated settlements of pending litigation be approved by a court.

The most serious basis for invalidating a mediated settlement is a substantive one: that the process of mediation itself was so deficient that any resulting agreement is invalid. On the one hand, the presence of a neutral person would seem to make it less likely that a "bad" settlement would result. On the other hand, aspects of the process that are intended to push litigants to confront unpleasant realities can also create stress that inhibits good decision making. An example is a California case, *Olam v. Congress Mortgage Co.,* 68 F. *S*upp. 2d 1110 (N.D. Cal. 1999), decided by a leading writer and supporter of ADR, Judge-Magistrate Wayne Brazil. In *Olam* an elderly individual who agreed to a settlement in the early morning hours later claimed that she did so under duress. Judge Brazil issued an opinion in which he weighed the arguments, and concluded that he should hold an evidentiary hearing and call the mediator to testify. He did so, and decided after hearing the evidence to affirm the agreement reached in mediation.

c. Certification

In the United States, mediators, unlike many professionals, do not need a license to practice—there is no equivalent to bar membership for an attorney, or even a driver's license, for mediators. A child can act as a mediator, and in fact some schools encourage students to mediate peer disputes. This reflects the history of modern American mediation, which was fueled in large measure by frustration with the litigation system and peoples' wish to find new ways to approach disputes. The idea of creating a licensing system for mediators, with the need for an official body to define and test good practices and exclude and perhaps sanction those who do not qualify, strikes many in the field as antithetical to its basic values.

There is more of a debate over whether mediators should be certified. Certification is less centralized and has less restrictive impact than licensing. While lack of certification prevents people from working in situations in which it is required, it does not foreclose them from mediating generally. It is carried out by a variety of private and public organizations rather than a single government agency.

Certification does, however, allow mediators to indicate that they have been "certified by" a particular organization. Professional associations of mediators, for instance, have established membership requirements and certification schemes to encourage quality mediation and allow members to indicate that they have been "certified" by the organization. In the domestic relations field, for example, Family Mediation Canada has created a private certification scheme that includes videotaped mediations observed and evaluated by experienced mediators and a written examination; those who pass the test can advertise that they are certified by the organization.

Another form of certification involves imposing requirements on mediators who wish to be part of a mediation program. Thus professionals who want to be listed on court-connected mediation panels are often required to meet specific criteria, reflecting the view that a court, as a branch of government, should take responsibility for the quality of those who practice under its aegis. Florida was the first state to establish qualifications for court-connected panelists and other states have followed; California, for example, recently adopted "Model Qualification Standards" for mediators recommended, appointed, or compensated by its courts. There is no uniformity in the standards applied by court mediation programs, however, and admission to a court's program does not ordinarily authorize a mediator to say that she has been "certified" by the court.

The absence of any general system of state regulation or certification of mediation is not for lack of proposals. In California alone, hundreds of bills have been introduced to control or regulate mediation, and the American Bar Association and many state bar associations have worked to formulate policy proposals on the issue.

Why have these efforts met resistance? George Bernard Shaw is credited with saying that any effort to professionalize services is a conspiracy against the public, and this cynical note may have relevance to efforts to certify mediators. Although mediation is now widespread in the United States, consumers have not come forward to register frequent complaints or make claims of being damaged by non-certified mediators. This may reflect the fact that in commercial cases at least, parties are usually represented by counsel who are well-positioned to select, assess, and—through their control over hiring—exclude neutrals who are ineffective. Indeed most of the push for certification and licensing has come from mediators wanting the field to have the status of a distinct profession rather than from parties or lawyers.

One example of a jurisdiction that decided against a system of statewide mediator certification is the state of Maryland. Maryland did so in part, it appears, because of the difficulty of reaching a consensus on what constitutes "acceptable" mediation practice, given the wide differences in approaches and philosophies. A statewide consensus building process also reached the view that the key to quality practice would be to encourage mediators to learn and reflect over a lifetime of work, rather than test them for skills at the outset of their practice.

Assuming some public benefit in certifying mediators, the question remains whether it would create more problems than it resolved. Certification raises questions about diversity and exclusion, defining competence, squelching creativity, increasing costs, encouraging misplaced reliance, and deciding who to make the gatekeeper. One example of the divisiveness that can be created by the issue is the debate regarding what is "real" mediation. If, for example, a gatekeeper believed that mediation must be facilitative, then mediators who help parties evaluate outcomes would be disqualified and consumers deprived of a choice of styles. If, on the other hand, evaluative mediators dominated the process, purely facilitative approaches might be excluded.

Most court systems and private organizations that offer mediation do, however, impose standards for admittance to their panels. The effect is that certification standards have become widespread, especially in connection with court-connected mediation programs. The popularity of certification in this setting probably reflects the view that courts, as official institutions, should take responsibility for the quality of mediators who practice under their aegis. However there is no national, or in many cases even statewide, uniformity in U.S. standards for certification even where they exist.

Appendix

1. MEDIATION AGREEMENT
(Plaintiff) and (Defendant), agree to mediate the dispute pending between them, and any issues arising from or related to that dispute, with Dwight Golann as the Mediator.

Purpose
The purpose of the mediation is to attempt to arrive at a mutually acceptable resolution of the dispute in a cooperative, informal manner.

Mediation Process
Representatives of the parties with full settlement authority will attend the mediation. The parties will follow the recommendations of the Mediator regarding the agenda most likely to resolve the dispute. The Mediator may review written information, have private conversations with the participants, and conduct a mediation session with representatives of the parties and their counsel. If it appears to the Mediator that discussions after the mediation session will be useful, the parties and/or their representatives will make themselves available for them. The Mediator may, in his discretion, provide an evaluation of the likely resolution of the dispute if it is not settled. The parties agree that in doing so, the Mediator is not acting as an attorney or providing legal advice to any party.

Confidentiality
The entire process is a compromise negotiation. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, or by the Mediator are confidential. Such offers, promises, conduct, and statements shall not be disclosed to third parties, including without limitation any judge or other person who participates in the adjudication of this dispute. They are privileged and inadmissible for any purpose, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provision. Upon request by any party, the other parties and the Mediator shall return to the requesting party the original and any copies of any documents and other materials in their control that were provided by the requesting party in connection with this mediation. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its use in the mediation.

The Mediator may engage in separate and private meetings with the parties and their counsel. If a party or counsel informs the Mediator that information is being conveyed by the party to the Mediator in confidence, the Mediator will not disclose that information.

Disqualification of Mediator and Limitation of Liability
The parties agree not to call the Mediator, and agree that he will be disqualified, as a witness or expert in any pending or subsequent litigation or arbitration involving the parties and relating in any way to the dispute. They agree that the Mediator is not a necessary party in any arbitral or judicial proceeding relating to the mediation or to the subject matter of the mediation, and undertake to defend the Mediator from any subpoenas from outside parties arising out of this Agreement or mediation. For purposes of this agreement, employees of the Mediator shall be deemed Mediators as well.

The parties understand that the Mediator may have mediated, or may presently be mediating, disputes involving counsel or parties who are also involved in the present dispute. They agree that such activities do not disqualify the mediator from acting in this case. They also agree that the Mediator shall not be liable for any act or omission in connection with this mediation, other than for acts of gross negligence or bad faith.

Compensation
The Mediator will be compensated at the rate of $____ per hour for the time he spends conducting the mediation, and for his reasonable out-of-pocket expenses if any. Unless the parties otherwise agree in writing, these costs will be divided in equal shares between the parties. Time expended shall include time reasonably spent reviewing documents furnished by the parties and private conversations, conference calls, or meetings conducted outside the formal mediation sessions.

Each side shall provide a deposit of $__ in advance. The deposit is neither a minimum or maximum charge. Each deposit will be applied to the charges attributable to the party furnishing it. Additional statements or refunds will be sent to each party at the end of the mediation. Checks should be made out to Dwight Golann, Esq. and sent to Suite 340, 120 Tremont Street, Boston, MA 02108.

Notice of any change in date or cancellation of the mediation should be given to the Mediator and other parties by telephone or email. A party who cancels a mediation date less than fourteen days in advance, or who does not appear at mediation, is subject to forfeiture of one-half of the total deposits from all parties unless the mediator is able to reschedule the time. If multiple parties cancel or fail to appear, those parties will share a single forfeit charge.

Miscellaneous
This is a voluntary, non-binding process of assisted negotiation. The parties agree to participate in good faith in the entire mediation process. However, any party may terminate its participation at any time and for any reason by notifying the Mediator.

_____	_____
Counsel for	Counsel for
Date:	Date:

2. State statute on confidentiality

Massachusetts General Laws Chapter 233:
Section 23C. All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

For the purposes of this section a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.

3. Engagement Email

The following is the email routinely sent by Prof. Golann to introduce parties to the mediation process, including confidential pre-mediation conversations with the mediator.

Dear Counsel,

I understand that you have selected me to assist you with the_____dispute. Thank you very much for your expression of confidence. I will do my best to assist you.

- I understand that we will mediate on _____. I'll assume that we will start at 9:30 am, but if the start time should be changed, please let me know.
- We will mediate at Resolutions llc, located on the 10th floor of 222 Berkeley Street in Boston (at the corner of Berkeley and Boylston Streets). There is parking on Berkeley and at the Boston Common Garage.

- A deposit of $ _____ per side is due before the start of the mediation. The deposits will be held in escrow and applied against charges computed pursuant to the mediation agreement. You will be refunded any excess payment or billed for any additional amount at the conclusion of the process. Checks should be made out to Golann Dispute Resolution and sent to Suite 340, 120 Tremont Street, Boston MA 02108.
- It would be helpful to read in advance any material that you think might assist me to understand the situation. The material need not be prepared expressly for the mediation. I will leave it to you to decide what materials, if any, would be suitable. It would be preferable if you could see each other's material, so that we can discuss it freely, but I would also be willing to receive material on an ex parte basis.
- If possible, please get your materials to me by _____ at Suite 340, 120 Tremont Street, Boston MA 02108. If you would like to fax it, my fax number is 617-305-3086, or it can be emailed.
- You should check with each other to satisfy yourselves that each side will have an appropriate decision maker present. If you have any concerns about this, please let me know as soon as possible.
- During the week before the mediation I would like to call each of you. My purpose is not to ask about the merits, which I will learn about from the submissions, but rather to learn if there are any special issues that should be addressed before we meet. My goal is to learn about any non-legal factors that you think may have an influence on the negotiation.
- Please be sure to send the names of everyone attending for your side to lori@resolutionsllc.com, so that she cansend them to building security and arrange for passes.

I would be happy to answer any other questions that you or your clients may have, and look forward to working with you.

The New Mediation Ordinance and How it Fits into Hong Kong's Regulatory Landscape for Mediation

Prof. Nadja Alexander [1]

On 15 June 2012 the Hong Kong Legislative Council passed the Mediation Ordinance (MO).[2] The MO came into force on 1 January 2013.[3] MO has attracted considerable attention from the legal community, the judiciary, universities, and government bodies. The topic of mediation and the new Ordinance have also featured in the Hong Kong press.[4]

The enactment of the MO was one of the 48 recommendations by the Working Group on Mediation. The preparation and drafting of the MO is the result of the work of the Mediation Taskforce and its sub-committee on the regulatory framework for mediation, referred to in this article as the Taskforce.

The MO, comprising 11 provisions and two schedules, is the first Hong Kong law that focuses on mediation. The MO is a law of general application. It provides a territory-wide legislative framework for all professional mediation conducted in Hong Kong. It applies to all mediations and mediation communications where parties have entered into a written agreement to mediate (s 5). The requirement for a written agreement to mediate aims to cover all professional mediations and not those mediations conducted on a non-professional basis, for example mediations conducted by village elders, school mediations and the like. Also not covered by the MO are conciliation and similar processes dealt with under specific Hong Kong legislation and listed in Schedule 1 to the MO. Of particular note is that mediation under the Arbitration Ordinance remains regulated under that Ordinance and is not captured by the MO (Schedule 1).

The MO applies to domestic and cross-border mediations (s 5) and it specifically applies to the Hong Kong government (s 6). Thus, it has far-reaching application and consequences for all people involved in resolving disputes through mediation.

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1 The author is Professor and Foundation Director of the International Institute for Conflict Engagement and Resolution at Shue Yan University, Hong Kong. The author wishes to acknowledge and thank Ms Venus Cheung (LLB, BBus (Banking & Finance) for her comments on an earlier draft. The author also wishes to acknowledge Ms Emily Diu, JD candidate at the Chinese University of Hong Kong for her research on aspects of this article.

2 Mediation Ordinance, Ord. No. 15 of 2012.

3 See Mediation Ordinance (Commencement) Notice, L.N. 167 of 2012.

4 See, for example, 'Mediation wins favour as way to solve disputes', *SCMP*, 17 September, 2012; ‚Dispute centre set for launch', *SCMP*, 15 June, 2012; ‚New body will uphold mediation standards', *SCMP*, 23 July, 2012;, HKMA to provide mediation service', *The Standard*, 31 October, 2012.

However the MO does not stand-alone. It must be viewed as part of the broader mediation regulatory landscape for the practice and professionalisation of mediation in Hong Kong. Four essential pillars form the basis of Hong Kong's regulatory approach to mediation. These four pillars refer to different regulatory functions in relation to mediation, namely:

1. *Triggering mediation*: How are mediation processes triggered?
2. *Mediation Process*: How is the internal mediation process regulated?
3. *Mediator Accreditation Standards*: What are the prerequisites and standards required of professional mediators?
4. *Right and Obligations of Participants in Mediation*: What are the various rights and obligations of participants in the mediation process.

The MO primarily deals with the fourth function: rights and obligations of participants in mediation. It also offers some insights into mediation process matters, however it does not regulate the internal process of mediation.

In order to present a coherent and structured perspective on how the MO operates and the implications it is likely to have on mediation practice, this article will outline Hong Kong's approach to each of the four functional pillars of mediation regulation and highlight where the provisions of the recently enacted MO fit in (and where they do not).

Triggering mediation: How are mediation processes triggered?
The MO does not *trigger* mediation. In other words it does not provide any incentives for parties to attend mediation.

There are a number of practice directions and legislative provisions in Hong Kong that have this function.[5] The best known of these is Practice Direction 31. PD 31 applies to all civil proceedings in the Court of First Instance and the District Court begun by writ, with certain specific exceptions. It effectively imposes a pre-filing duty on parties to engage in mediation where it is reasonable to so.[6] Legal advisers

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5 These include Practice Direction 15.12 'Matrimonial Proceedings and Family Proceedings List' ('PD 15.12'); Direction Issued by the President of the Lands Tribunal Pursuant to Section 10(5)(a) of the Lands Tribunal Ordinance (Cap 17) 'Case Management and Mediation for Building Management Cases' ('LTPD BM 1/2009'); Practice Direction 6.1 'Construction and Arbitration List' ('PD 6.1'); Practice Direction 1.1 'Admiralty Actions' ('PD1.1'); Practice Direction 18.1 'The Personal Injuries List' ('PD 18.1'); Practice Direction 18.2 'The Employee's Compensation List' ('PD 18.2'); Practice Direction 27 'Civil Proceedings in District Court' ('PD 27'); Practice Direction 31 'Mediation' ('PD 31'): relates to all civil proceedings in the Court of First Instance and District Court began by writ except for cases in Appendix A (note that PD 31 came into effect on 1 January 2010); Practice Direction 3.3 'Voluntary Mediation in petitions presented under sections 168A and 177(1)(f) of the Companies Ordinance (Cap 32)' ('PD 3.3').

6 See PD 31 Part A, para 4, 5.

are under a duty to advise clients of the consequences of non-compliance with this obligation.[7] Costs sanctions may be imposed in certain circumstances. Some of the main features of PD 31 include the filing of the Mediation Certificate, the Mediation Notice and the Mediation Response, which aim to focus the minds of the parties on the use of mediation in relation to their dispute.[8] Legislative provisions that encourage and therefore potentially trigger mediation include the Companies Ordinance, the Employment Ordinance and the Estate Agents (Determination of Commission Disputes) Regulation.[9]

Mediation Process: How is the mediation process itself regulated?
This area of mediation regulation deals with process and procedure, that is, the manner in which the internal mediation process is conducted and the procedures employed for the appointment of mediators, payment and administrative matters. Like many jurisdictions around the world, Hong Kong has chosen to use mainly soft forms of regulation in relation to process aspects of mediation.[10] Internal mediation processes are usually regulated by the terms of the mediation clause and agreement to mediate—in other words, by private contract. The advantage here is that contractual provisions can be altered with the agreement of the disputing parties, thereby ensuring party autonomy and flexibility of the actual process of mediation. In addition, applicable mediator codes of conduct may also influence how the mediator conducts the process.

As indicated previously the focus of the MO is not on internal mediation processes, however the Ordinance does deal with a number of process points. The MO offers a definition of mediation in s 4.[11] It states that,
'mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following–
(a) identify the issues in dispute;
(b) explore and generate options;
(c) communicate with one another;
(d) reach an agreement regarding the resolution of the whole, or part, of the dispute.'

This detailed definition is significant for a number of reasons. Section 4 describes mediation as 'a structured process', which immediately differentiates it from the

7 See PD 31 Part A, para 4.
8 See PD 31, Part B. A detailed explanation of PD 31 and other Hong Kong mediation triggers can be found in chapter 8 of N Alexander, Mediation: Principles and Practice in Hong Kong, Lexis Nexis 2010.
9 See the Companies Ordinance (Cap 32), the Employment Ordinance (Cap 57) and the Estate Agents (Determination of Commission Disputes) Regulation (Cap 511 D).
10 See F. Steffek, *ZKM* 2009, 21, 23.
11 Also dealing with terminology, note that Schedule 2 to the MO contains a series of amendments which aim to standardise the Chinese language terminology for mediation and conciliation and to bring it into line with terminology used in the Arbitration Ordinance (Cap. 609).

settlement process of negotiation and acknowledges that there is a recognised and recognisable process that mediators follow. Further the definition describes and promotes what is known as a facilitative (non-advisory) model of mediation and this is likely to shape the underpinning values and principles of mediator codes of conducts and accreditation standards into the future. At the same time, for all of the 'facilitative' encouragement in s 4, it falls short of *prescribing* facilitative mediation for mediation practice in Hong Kong. According to s 4, mediators cannot 'adjudicate a dispute or any aspect of it', and while they are encouraged to *facilitate* the parties to reach their own agreement, there appears to be little in the definition to prevent mediators moving into an advice-giving role.

Another process issue that is covered by the MO relates to the involvement of party representatives and advisers at mediation. Section 7 of the MO specifically allows non-lawyers and foreign lawyers to participate in mediation to provide support and assistance to a party. This provision was drawn from the Hong Kong Arbitration Ordinance and is in line with the notion of mediation as an interdisciplinary, interest-based process. In relation to cross-border mediation, it may be the case that foreign (non-Hong Kong) law is applicable and that there is a need for foreign lawyers with expertise in the applicable law.

Mediator Accreditation Standards: What are the prerequisites and standards required of professional mediators?

As is the case in numerous jurisdictions such as Australia and Germany, Hong Kong has embraced industry-based regulation to set uniform accreditation standards for mediators. For this reason the MO does not deal with accreditation issues.

As a developing profession, it is important for mediators to have professional standards of competence and it is important for users of mediation to be assured that mediators have attained a level of competence. At the same time the mediation field is undergoing rapid professionalization and experiencing ongoing change. Against this backdrop, it is useful to have the capacity adjust accreditation requirements as needs and circumstances change and as the nascent mediation profession learns from early experiences. Industry-based schemes can offer responsive forms of regulation, which can adapt effectively to changing circumstances. Conversely legislation is a rigid form of regulation and less flexible and able to adapt. Legislative solutions to professional accreditation and certification are usually expensive and require government financing, compared to industry regulation, which is often supported by the industry itself in financial and other ways.

The Hong Kong Mediation Accreditation Association Ltd (HKMAAL) is an industry-based body that was formed in 2012 with a view to unifying mediator accreditation standards in Hong Kong and establishing a territory-wide accreditation scheme. At the time of writing the accreditation standards have yet to be articulated, however it is likely that HKMAAL will follow the standards of the major accrediting bodies

in Hong Kong, that is a 40 hour training course that meets certain specifications followed by practical role-play assessments. CPD requirements are also expected to be put in place. HKMAAL enjoys the support of the government, the judiciary and the major mediation bodies in Hong Kong.

Even though the MO does not regulate mediator accreditation, one might reasonably ask why it does not expressly endorse the mediator accreditation system. Specifically, one might ask why the application of the MO is not restricted to mediations conducted by HKMAAL accredited mediators? The answer is disappointingly pragmatic. While these ideas were discussed in the mediation Taskforce, HKMAAL did not exist as a legal entity until some two months after the Mediation Bill was passed. In other words, even though the HKMAAL blueprint had been finalised, it was not considered appropriate for a piece of legislation to refer to an accreditation body that did not yet exist. It will be interesting to see how HKMAAL develops and whether future amendments to the MO refer to HKMAAL and its accredited mediators.

Right and Obligations of Participants in Mediation: What are the various rights and obligations of participants in the mediation process.
The MO primarily deals with rights and obligations of participants in mediation especially in relation to confidentiality and the non-admissibility of mediation evidence in courts and tribunals (including judicial, arbitral, administrative or disciplinary proceedings).

The relevant provisions are ss 8, 9 and 10. Section 8 deals with the general duty of confidentiality with which all mediation participants must comply subject to specified exceptions. Section 9 deals with the admission of evidence of a mediation communication in a court or tribunal. [12] Section 10 deals with applications to the court for leave to disclose a mediation communication within the terms of s 8(3) or to admit a mediation communication in evidence within the terms of s 9.

To better understand how these provisions operate it is useful to refer to the definition of 'mediation communication' in s 2 of the MO as this term defines what is protected and what is not under ss 8 - 10. Section 2 defines mediation communication to mean,

'(*a*) *anything said or done;*
(b) any document prepared; or
(c) any information provided,
for the purpose of or in the course of mediation, but does not include an agreement to mediate or a mediated settlement agreement'.

12 For the remainder of this article, references to court mean court and tribunal.

It is a broad definition, which aims to encompass all that occurs in the mediation space whether by word, action or documentation. In s 8 the MO extends the protection of mediation confidentiality to mediation communications. In accordance with mediation practice, the MO protects the mediation process (i.e. mediation communications), but not the agreement to mediate nor the mediated settlement agreement. Parties wanting to ensure the confidentiality of either of these contractual instruments or particular clauses within them may insert an appropriately drafted confidentiality provision.

The general duty of confidentiality in s 8 does not permit mediation participants to disclose mediation communications (s 8 (1)), subject to certain exceptions set out in s 8 (2) and (3). These exceptions are drawn from common law exceptions to privilege in Hong Kong and statutory exceptions to mediation confidentiality in other jurisdictions. Generally such exceptions help support the integrity of the mediation process by balancing confidentiality with accountability and common sense. For example, mediation parties who make threats of harm to another or who misrepresent their negotiating position during mediation cannot hide behind the promise of confidentiality. Similarly mediators who do not perform their service to a competent standard may be made accountable despite the confidentiality of mediation. These and other exceptions are now explained.

Section 8 (2) sets out exceptions relating to:

- consent to disclosure by parties, the mediator(s) and the person who made the mediation communication (assuming it's not the mediator or a party): s 8 (2)(a);
- information that is already in the public arena: s 8 (2)(b);
- information that is subject to discovery in civil proceedings or similar procedures: s 8 (2)(c);
- concerns about the welfare of children or potential injury to a person: s 8 (2)(d);
- the conduct of mediation research: s 8 (2)(e);
- seeking legal advice: s 8 (2)(f);
- a requirement imposed by law s 8 (2)(g).

The above exceptions appear reasonable. For example, if those for whom confidentiality protection is in place do not want it and offer their consent for disclosure, there seems little point in insisting on confidentiality (s 8 (2)(a)). Further, the provision dealing with public information (s 8 (2)(b)) is arguably not an exception to confidentiality as the very nature of public information means that it cannot be confidential and therefore falls outside the scope of s 8. However the subsection aims to make this point clear and to avoid potential doubts and confusion on the matter.

Information subject to discovery must remain subject to discovery, otherwise every litigator would seek to hide otherwise discoverable information by revealing it in

mediation (s 8 (2)(c)). Finally, the provision dealing with mediation research and education allows disclosures of mediation communications, provided strict de-identifying conditions are met (s 8 (2)(e)). As such this exception, with its strict conditions on disclosure, is likely to protect confidentiality rather than compromise it. The final exception in s 8 (2) is intended to extend to existing and future laws which specifically require otherwise non-admissible information to be admitted in court.

Further exceptions to confidentiality of mediation communications are found in s 8 (3). Here the hurdle is higher for those who wish to disclose a mediation communication as this subsection requires them to seek the leave of the court in order to do so. The exceptions in s 8 (3) relate to disclosures:

- for the purpose of enforcing or challenging a mediated settlement agreement: s 8 (3) (a);
- in relation to allegations or complaints of professional misconduct against mediators or other professionals in the mediation: s 8 (3) (b);
- that the court considers justifiable in the circumstances: s 8 (3) (c).

By way of example, a party may wish to disclose a mediation communication when making a complaint about a mediator to an ADR organisation or another professional body (for example, the Law Society) of which the mediator is a member. Here the requirement to seek leave of the court is intended to serve as a disincentive to those seeking to disclose for frivolous or non-legitimate reasons. In addition to the payment of application fees, applicants will need to present cogent prima facie argumentation to convince the court of the need to compromise the confidentiality of the mediation process. Without the requirement to seek the court's leave, a party would be entitled to breach mediation confidentiality in order to make a vexatious complaint in relation to a mediator or his or her own legal representative. Such a scenario would be the undoing of mediation and lead to a general loss of credibility for the process.

As indicated above, the requirement to seek leave of the court to disclose a mediation communication is limited to the circumstances set out in s 8 (3). However once a person seeks to introduce evidence of a mediation communication into a court, leave is always required (s 9). Once again, this requirement highlights the seriousness with which the MO treats the principle of non-admissibility of mediation evidence. It suggests that the court will depart from this principle reluctantly and only in accordance with the terms of s 10.

In preparing the Mediation Bill, the Taskforce seriously considered not only what should be in the MO but also what should be left out of it. It is important to note two areas that are intentionally not regulated by the MO as their absence has legal consequences for mediators and legal representatives.

First, rights and obligations that relate to mediated outcomes are not dealt with by the MO but rather left to the general law of contract. Here the Taskforce adopted a non-interventionist approach that preserves flexibility in relation to the nature of form of mediated outcomes. In other words, it is up to the parties and their representatives to determine the legal form and status of a mediated outcome, that is whether it should take the form of a legally binding contract, a settlement deed or a court order by consent. This approach is consistent with the practice in many common law jurisdictions.

Next, the MO does not grant mediators immunity from suit. The Taskforce considered this issue at length; it eventually adopted the view that mediators, like other professionals, must be accountable for delivering mediation services to a professional standard, and that such accountability would support the professionalisation of the field and encourage quality practice. This view is consistent with the exception to confidentiality in s 8 (3) (b), which permits disclosure of a mediation communication in relation to professional misconduct issues. As a matter of practice, most mediators retain provisions in their agreements to mediate limiting or excluding their legal liability. The effectiveness of these clauses, however, remains to be tested in Hong Kong courts.

In summary the MO offers a legislative foundation for Hong Kong's overall mediation regulatory landscape. By offering a detailed definition of mediation in s 4, the MO sets a strong baseline from which contractual instruments and codes of conduct can tailor specific mediation processes to the needs of users on a case-by-case basis. The choice of Hong Kong as a place for cross-border mediation is enhanced insofar as s 7 permits foreign lawyers to assist parties in mediation.

By far the MO's greatest contribution to the regulatory landscape for mediation has been establishing uniform legislative principles in relation to mediation confidentiality and non-admissibility of mediation evidence. Here the MO presents a comprehensive framework to protect the integrity of the mediation process by prohibiting disclosure of mediation communications subject to certain exceptions. In relation to the introduction of mediation evidence in court, the leave of the court is required and the court will be guided by the general principle of confidentiality and the exceptions to it set out in s 8.

The MO is a legislative instrument that set out to offer a robust yet minimalist foundation for a process characterised by its flexibility, scope for innovation and creativity. For this reason the MO is best read and understood in conjunction with the other elements of the mediation regulatory landscape.

Mediator's Qualifications and Obligations

Prof. Christopher To

In the 2007-2008 Policy Address, the Chief Executive announced that a cross-sector working group headed by the Secretary of Justice would be set up to "employ mediation more extensively and effectively in handling higher-end commercial disputes and relatively small scale local disputes".[1]

In total, the Working Group made 48 recommendations covering the areas of regulatory framework, training and accreditation, and publicity and public education.[2] The public were given an opportunity to express their views regarding the recommendations. In order to consider the recommendations in light of the views submitted by members of the public, a Mediation Task Force was set up comprising of members of the judiciary, legal professions and major mediation service providers.[3] The Task Force was assisted by the work of three subgroups working on specific areas, namely: (1) Mediation Ordinance; (2) Accreditation; and (3) Public Education and Publicity.[4]

This Chapter deals with two aspects relating to the training and accreditation of mediators. The first aspect is with respect to the Task Force's recommendation that a "non-statutory industry-led single accreditation body"[5] should be set up in Hong Kong. The second aspect relates to the effect of the Hong Kong Mediation Code, promulgated by the Working Group in 2010, on mediators in Hong Kong.

The Qualifications of Mediators

Currently, there is no single regulatory framework that applies to the mediators in Hong Kong.[6] The mediators accredited in Hong Kong are subject to the respective regulations set by the separate bodies accrediting them. Similarly, for mediators who trained and were accredited abroad, they are regulated by the overseas bodies that accredited them. Each body adopts its own training and accreditation criteria.

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1 Department of Justice, 'Mediation', (2012) available at <http://www.doj.gov.hk/eng/public/mediation.htm>

2 Department of Justice, Working Group on Mediation, *Report of the Working Group on Mediation* (2010) ch 8.

3 Department of Justice, 'Mediation Task Force Terms of Reference' (2011) <http://www.doj.gov.hk/eng/public/pdf/2011/mediation20110729e.pdf>

4 Department of Justice, (n1).

5 Ibid.

6 Department of Justice, Working Group on Mediation (n2) 59.

The Working Group recommended in 2010 that a single accreditation body is desirable because it can "assist to ensure the quality of mediators, consistency of standards, education of the public about mediators and mediation, build public confidence in mediation services and maintain the credibility of mediation".[7] However, with no legislation as backing, it would be a challenge to persuade existing accrediting bodies to surrender their jurisdiction. Thus, it was decided that this matter would be reviewed in five years' time after mediation had become more entrenched in Hong Kong.[8] However, the majority of the submissions during the consultation period were "overwhelmingly supportive of the establishment of a single body for accrediting mediators much sooner".[9] Therefore, the Taskforce, with the assistance of the Accreditation Subgroup had to consider how this could be implemented in Hong Kong.

Having said that it would be a challenge to set up a single accreditation body with no legislative backing, the Mediation Bill, which was passed on 15th June 2012,[10] contains no provisions relating to the accreditation of mediators. The Government had explained that it is working together with stakeholders "on the development of a single non-statutory industry-led accreditation body for mediators".[11]

The Government explained that while there is no timetable for making legislation in respect of an accreditation system of mediators, the Accreditation Subgroup of the Mediation Task Force has been tasked to facilitate the establishment of a single non-statutory industry-led accreditation body for mediators.[12]

The setting up of a single mediation accrediting body

The Mediation Task Force and its Accreditation Subgroup are working towards the establishment of a single non-statutory industry-led mediation accrediting body for mediators in the form of a company limited by guarantee, i.e. the Hong Kong Mediation Accreditation Association Limited ("HKMAAL").[13] It is intended that the draft Memorandum and Articles of Association of HKMAAL will be finalised for registration with the Companies Registry within this year.[14]

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7 Department of Justice, Working Group on Mediation (n2) 60.
8 Opening remarks by Secretary of Justice at Mediate First Conference (2012) <http://www.info.gov.hk/gia/general/201205/11/P201205110350_print.htm>
9 Ibid
10 Bill Committee on Mediation Bill (2012) <http://www.legco.gov.hk/yr11-12/english/bc/bc52/general/bc52.htm>
11 Legislative Council Bills Committee (LC Paper No. CB(2)2049/11-12) para 17.
12 Ibid para 19.
13 Ibid para 24.
14 Ibid para 24.

The council of HKMAAL will consist of not more than 10 council members including:[15]

(a) four ex-officio members (each to be nominated by the Law Society of Hong Kong, the Hong Kong Bar Association, the Hong Kong Mediation Centre and the Hong Kong International Arbitration Centre;
(b) not more than four other members elected by members of HKMAAL; and
(c) two co-opted members who are not members of HKMAAL.

A condition for membership will be imposed so that the mediation service providers will give up their existing individual accreditation system and future mediators will be accredited through HKMAAL only.[16] It is intended that the HKMAAL, when established, can be the default appointing body of mediators when parties to mediation cannot come to a consensus on the appointment of a mediator.[17] The reason why the Law Society of Hong Kong, the Hong Kong Bar Association, the Hong Kong Mediation Centre and the Hong Kong International Arbitration Centre are made the founding members of HKMAAL is because they are the leading organisations in the development of mediation in Hong Kong. [18]

However, there are some issues relating to this new body that have not been resolved. It was raised during the discussion of the issue in the Legislative Council that conflict of interest situations may arise if the conditions for membership are to be determined by the four founding members.[19] It was suggested that a review should be conducted in a few years after the establishment of HKMAAL to see whether the ex-official membership of the council should be maintained or whether all of the council members should be elected by all members of HKMAAL. It was further suggested that once the HKMAAL is formed, provisions relating to it should be incorporated into the Mediation Ordinance.[20]

The Obligations of Mediators

The Accreditation and Training Sub-group was given the task to review the accreditation and training for mediators in Hong Kong. In relation to mediator standards and obligations, they considered whether there was a need to develop a common Code of Conduct applicable to all accredited mediators.[21]

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15 Ibid para 24.
16 Ibid para 24.
17 Ibid para 24.
18 Ibid para 25.
19 Ibid para 26.
20 Ibid para 26.
21 Department of Justice, Working Group on Mediation (n2) 65.

Promulgation of the Hong Kong Mediation Code

During the consideration of this issue, the Subgroup reviewed and studied Codes of Conduct for Mediators applied in Hong Kong and other jurisdictions, which included the following:[22]

- Hong Kong International Arbitration Centre
- The Law Society of Hong Kong
- The Hong Kong Mediation Centre
- Centre for Effective Dispute Resolution (CEDR)
- The Chartered Institute of Arbitrators (East Asia Branch)
- The Model Standards for Conduct of Mediators (America)
- The Australian National Mediator Standards (Australia)

When studying the respective Code of Conducts, the Subgroup believed that it was practical for a Code of Conduct regulating mediators to be introduced in Hong Kong.[23] In doing so, it proposed and drafted the Hong Kong Mediation Code, consisting of a code of conduct for mediators in Hong Kong together with a sample Agreement to Mediate. The Code sets out the minimal professional standards expected of mediators in the following areas:[24]

- the engagement by the parties to a mediation of a mediator;
- the mediator's conflict of interests;
- the duty of confidentiality;
- the mediation process;
- the payment of fees; and
- the promotion of mediation services.

The Subgroup proposed that the Code should be widely promoted in Hong Kong as it provides a minimal standard of protection.[25] It was intended that mediators who subscribe to the Code would promote themselves in the market accordingly to give the parties confidence in their role as a mediator. By further increasing the awareness of mediation through education and promotion, parties wishing to engage in mediation can be able to use the Code as an indicator of the minimal standard of protection of mediation services.

A targeted consultation exercise was conducted on 26th June 2009 to discuss the Code with mediation service providers.[26] Over 60 people including representatives from 25 mediation service providers attended the consultation meeting. There were

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22 Ibid 65.
23 Ibid 65.
24 Ibid 65.
25 Ibid 65 - 66.
26 Ibid 66.

lively discussions which were all in favour of the Code being a voluntary Code to be adopted by mediators in Hong Kong.

The Effect of the Hong Kong Mediation Code

Although the Code is voluntary in nature, a number of regulatory bodies have adopted it, including the Joint Mediation Helpline Office.[27] Formed by eight organisations in 2010, each organisation has robust complaints and disciplinary processes to enforce the Code. The eight organisations are:[28]

- Hong Kong Mediation Council
- Hong Kong Bar Association
- The Law Society of Hong Kong
- The Chartered Institute of Arbitrators (East Asia Branch)
- Hong Kong Institute of Arbitrators
- The Hong Kong Institute of Architects
- The Hong Kong Institute of Surveyors
- Hong Kong Mediation Centre

The Code is split into four headings: (1) General Responsibilities; (2) Responsibilities to the Parties; (3) Defining the Process; and (4) Responsibilities to the Mediation Process and the Public.

General Responsibilities

The general responsibilities relate to the duty to act fairly and to show no bias to the parties.[29] Furthermore there is a requirement that the mediator has no interest in the outcome of the mediation. Also the mediator should be certain that the parties to mediation have been informed about the mediation process.

Responsibilities to the Parties

The responsibilities to the parties include (1) impartiality; (2) informed consent to mediate; (3) confidentiality; (4) suspension or termination of mediation; and (5) insurance.

Impartiality

The mediator shall disclose to the parties any interests he/she may have with any of the parties.[30] Prior written consent from all the parties is required before the mediator proceeds with the mediation.

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27 Legislative Council Bills Committee (LC Paper No. CB(2)1943/11-12) para 14.
28 Joint Mediation Helpline Office Limited (2010) <http://www.jointmediationhelpline.org.hk/index.html>
29 The Hong Kong Mediation Code, Section 1.
30 The Hong Kong Mediation Code, Section 2.

Informed Consent to mediate
The mediator should make sure that the parties understand the nature of the mediation process before they proceed with the mediation.[31] Parties should sign an Agreement to Mediate, containing all the responsibilities and obligations of the mediator and parties, prior to the commencement of mediation.

Confidentiality
The provisions dealing with Confidentiality can be found in Section 4 of the Code. It deals with the duty of confidentiality that mediators should not disclose any information arising out of or in connection with the mediation. It also deals with the duty internal to the mediation, where information disclosed by one of the parties to the mediator shall not be disclosed to the other party without prior permission. It is important to note that the Code expressly states that the duty of confidentiality is subject to exceptions such as situations compelled by law, actual or potential threat to human life or safety or public policy grounds.

Suspension or Termination of Mediation
The mediator should ensure that the parties understand that they have the right to withdraw from the mediation.[32] Also the mediator should explain that if he or she believes that a party is unable or unwilling to participate effectively, the mediator can suspend or terminate the mediation.

Insurance
It is left open for the mediator to consider whether it is appropriate for them to be covered by professional indemnity insurance.[33] There is no requirement in Hong Kong compelling mediators to be covered by insurance.

Defining the Process
Where a party is without legal representation or relevant expert opinion, the mediator shall consider whether it is necessary to encourage that party to obtain legal advice or relevant expert opinion.[34] Also, the mediator has a duty to define and describe in writing the fees charged for the mediation.[35] The Code expressly states that mediators are not allowed to charge contingent fees or base the fees upon the outcome of the mediation.

31 The Hong Kong Mediation Code, Section 3.
32 The Hong Kong Mediation Code, Section 5.
33 The Hong Kong Mediation Code, Section 6.
34 The Hong Kong Mediation Code, Section 7.
35 The Hong Kong Mediation Code, Section 8.

Responsibilities to the Mediation Process and the Public

The mediator shall be competent and knowledgeable in the process of mediation.[36] The Code requires that where the mediation deals with specific matters, such as separation/divorce, the mediator should have attained the relevant specialist training and be accredited accordingly.

When considering whether to accept an appointment, the mediator must have the time available to ensure the mediation can proceed expeditiously.[37] The mediator must be satisfied to the time commitment before accepting an appointment.

With regards to the promotion of mediator's services, the Code expressly states that the mediator may promote his/her service but shall do so in a professional, truthful and dignified manner.[38]

36 The Hong Kong Mediation Code, Section 9.
37 The Hong Kong Mediation Code, Section 10.
38 The Hong Kong Mediation Code, Section 11.

The Development of a Unified Mediation Accreditation System

Mr. John Budge, SBS, MBE, JP [1]

In Hong Kong various bodies accredit mediators. It is thought that there are more than 30 mediation accreditation bodies in Hong Kong. However the three major accreditation bodies are as follows:-

(a) Hong Kong International Arbitration Centre – Mediator Accreditation Committee
(b) Hong Kong Mediation Centre
(c) The Law Society of Hong Kong

There is no legislation in Hong Kong stopping the creation of mediator accreditation bodies and moreover, there is no prohibition using the words "Accredited Mediator".

Historically in Hong Kong we have 3 types of accreditation for mediators:

- General
- Family
- Family Supervisor

With regard to the HKIAC and The Law Society, General Mediators have to undergo a 40-hour course and 2 mock mediations. For Family Accreditation, there is a basic course of 40 hours, a 22 hours advanced course and 2 actual mediations under the supervision of a Family Supervisor.

In response to the report of the Secretary for Justice's Working Group on Mediation, many comments were received suggesting that a single body for accreditation of mediators in Hong Kong be formed. An Accreditation Subcommittee of the Secretary for Justice's Task Force was therefore formed. Since there is no legislation at this stage with regard to the creation of a statutory accreditation body, it was proposed by the Task Force that a "premier" accreditation body in Hong Kong be formed. This suggestion was endorsed by both the Department of Justice and the Judiciary. On the 28th August 2012, the Hong Kong Mediation and Accreditation Association Limited ("HKMAAL") was incorporated. The four founder members are:

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1 Mr. John Budge, SBS, MBE, JP, is Chairman of the Hong Kong Mediation Accreditation Association Limited.

- Hong Kong International Arbitration Centre
- The Law Society of Hong Kong
- Hong Kong Mediation Centre
- Hong Kong Bar Association

There is a great interest from the mediation community with regard to HKMAAL and also from the Legislation Council. It is proposed that HKMAAL be purely a regulatory and standards body including disciplinary powers. It will not be involved in the promotion of mediation. The four founder members have agreed that as from a date to be appointed, they will no longer accredit mediators. Other accreditation bodies with a proven track record in mediation will be entitled to apply to be members of HKMAAL. If their application for membership is accepted, it will be a condition that they will have to give up their accreditation procedures.

The maximum number of directors of HKMAAL will be ten. Four will be elected in due course by the members and the Board will have the power to co-opt two other members of Council who are not involved in any of the accreditation bodies.

It is still early days with regard to the creation of HKMAAL but it is hoped that if it is a success that in due course it will become a statutory body dealing with regulation and standards for the mediation industry.

The Development of Mediation in UK & Europe

Mrs. Eileen Carroll [1]

I have been asked to enlighten the audience about the development of mediation in the UK and Europe.

'It appears that mediation is very much accepted by the public and there is no need to enact legislation and set up a single accreditation body in order to enhance the confidence as we need to do in Hong Kong.' I have been asked to address why it may have evolved in this way.

Who am I?
Introduction and explanation of my own background and qualifications and how I got involved in mediation and why.

My starting point was as a practising lawyer and one who had positive experience of using mediation and working with experienced mediators in San Francisco back in 1988.

Today I have over 20 years of mediation experience and spend a majority of my professional time mediating commercial business disputes. A good many are international in nature.

What I observed and saw at the time:

San Francisco experience
In 1988 I lived and worked in San Francisco and represented clients in mediation and was fortunate enough to shadow some first class US mediators. Interestingly these individuals still have flourishing mediation practices today.

When I returned I published a paper in the International Financial Law Review in 1989 asking the question *whether we were ready for alternative dispute resolution in Europe?* When I reviewed this paper, written some 24 years ago, I was struck by the relevance of what I said then, now.

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1 Mrs Eileen Carroll is the Deputy Chief Executive Officer and Director of Strategic Development, CEDR.

'The success of the mediation process does to a very large extent depend on the quality of the mediator. He or she should be a creative problem solver, a good listener, a person who inspires confidence. He must know how much to intervene or stand back. It is also very important that the managers involved have authority to negotiate a settlement. Problems may arise with the mediation process if the mediator is not of sufficient calibre and/or a party to the mediation is not represented at management level.'

Let me roll back to 3 weeks ago. I was mediating 4 day case with both West and East coast US parties in London. It was without doubt one of the most challenging mediations that I have undertaken in my 20 years of being a mediator. The parties had already had one unsuccessful mediation in the States. I was very heartened at the end of the process to receive very positive communications from the parties and their advisors. One of the lawyers from Los Angeles said it was one of the most difficult cases to settle that he had encountered in nearly 40 years of litigating civil law suits. In reviewing the feedback from the individuals (over 25 participants) here are some of their views on what helped make a difference and a successful mediation process. What was appreciated and acknowledged as being most helpful included:

- Leadership
- Persistence
- The ability to grasp details very quickly and to absorb and understand what is being said
- To manage the information and the sharing of information in the most effective way
- Energy
- Skill and expertise
- Understanding the inter-party personal dynamics involved
- Holding together the very contentious multi-party negotiations
- The force of one's own personality of the mediator
- Handling difficult parties and advisors

Identifying the skills and ensuring quality

How effective are we as practitioners in bringing about a result that works for those clients, is acceptable to those clients and they feel sufficiently confident in and bought in to?

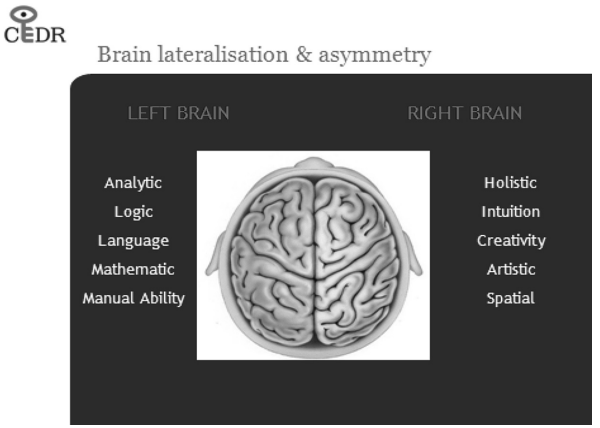
What is necessary and what can you add as a mediator by way of process, understanding, relationship building and clarity of issues that will make a difference to all previous attempts to negotiate and find resolution?

What is it that clients say?

It is the impact and effect we have working with clients and their advisors in difficult deadlock situations that matters and is most relevant. In what is after all a process

where the clients have the ultimate control whether they are prepared to reach a resolution.

In search of some answers we have analysed the mediator feedback from satisfied clients



Mediator feedback from clients:

High energy	Persuasive
Energy	Very dynamic
Breaking the Ice	Tireless
Strong grasp of the Issue	Evaluative
Perceptive approach	Excellent grasp of salient issues
Straight to point	Focussed on relationship issues
Moving forward	Ease of bringing parties together
Very intuitive	High focus
Very High E.Q	Un-waving focus on end result
Really comfortable with "M"	Very adaptive – shifts attitude and tactics
Conciliatory approach	Very friendly
Very much in control	Good building rapport
Excellent facilitator	Very commercial
Good communicator	Forceful not appearing to be forceful at all
Good gaining confidence	

Do mediators need to have subject matter expertise?
In our book 'International Mediation: The Art of Business Diplomacy' an extract from which is included in your papers at page 80 we list some of the key factors that may be important in finding the right mediator and we suggest the following:

1. Experience and track record of the mediator
2. Style and chemistry
3. Authority balanced with humility
4. Patience and persistence
5. Ability to work with a range of people
6. Creativity and persuasiveness
7. Language and cross cultural skills

Let me also take you to the next part of our analysis and a very key question that has been asked for the last 25 years is 'should mediators have expertise in the subject matter of the dispute?' The reaction from clients is often yes but there are dangers as well as perceived benefits to this belief. A mediator with knowledge of the subject matter may well be able to get to the heart more quickly but the hidden danger is that the mediator may become an evaluator or an adjudicator or may not be as well trained in mediation skills as a more generalist commercial mediator.

A well-trained mediator will understand the problem of premature evaluation. The key to being effective in helping clients unlock their deadlock is to create the opportunity for the key negotiators to re-evaluate the commercial, technical, legal and emotional factors enabling them to come to a point where they feel they want to control the outcome and make a decision. The tactic of short circuiting the mediation process with often imperfect views of what judges may or may not do tends to be quite counter-productive and fails to engage the negotiators in a productive way.

Trust
'Is a fragile commodity.'
Steve Davy, International Red Cross

The word I have not yet mentioned, but is central to any effective mediation process, is Trust. How do you win the trust and confidence of all the clients however difficult the situation is.

Let me now draw to your attention to an essay written in 1960 entitled 'The Ten Commandments for a Negotiator' written by Janos Nyerges former Director General of the Hungarian Ministry of Foreign Trade. I have summarised his observations which include:

- The need to be a good and attentive listener
- To be emotionally and psychologically aware
- To be able to empathise
- To be a good communicator
- Logical
- Have quantitative assessment

- To be an original thinker
- To be diplomatic
- To be ethical

These skills will help a mediator gain trust and respect.

The mediator's role as the Negotiating Coach
The new and emerging feature that I have observed of the last 10 years and would add to the message is the need for the mediator to be a negotiating coach and to be an effective coach some of the key skills involved are:

- Energy
- The asking of great questions
- Listening effectively
- Toughness and robustness
- Providing motivation and direction
- Holding the ring for all the players

Remember it is a marathon and not a sprint.

How do you develop good and effective mediation practitioners?
This is the question that we had in 1990.

At the time the resources we had available to us were a number of individuals who had experience as both lawyers and arbitrators and were interested in the field. We also had experts from other disciplines, engineers, surveyors etc who were also interested in the field.

I was responsible for finding our first Skills trainers and chose Karl Mackie, Psychologist and Barrister and had deep experience in adult education. I teamed him up with Eric Green another wonderful mediator and trainer.

Our method of training and teaching at that time was to immerse our participants in both theory and hands on practice and demonstration. At this time it was a 2-day workshop which has over the twenty years emerged into a globally recognised training programme which I am very proud to say has allowed us to align globally with a number of training partners, including, IFC World Bank, United Nations, Hong Kong Bar Council and Law Society and the EU to mention just a few.

What I remember from those first training courses was the focus on getting the lawyers and other professionals to think about Interests rather than Positions and to act more fluidly in the negotiating context. Over the years the course that we teach, which some of you have attended, gives participants the opportunity to develop

the necessary skills and qualities. Some of those skills and qualities we list in our training handbook:

- Establishing rapport and gaining trust
- Recognising effective behaviours
- Asking useful questions
- Giving constructive feedback
- Motivating behavioural change
- Using care and courage
- Balancing support and challenge for the person
- Applying theory to practice
- Operating as a colleague rather than as a performer or competitor with all • participants.

Development of Mediation Training in England and Wales

I have included in the papers an article written by my colleague and CEDR's Director of Training, James South (Development of Mediator Training in England and Wales, April 2009) which you can read at your leisure.

When the pioneers started on this road back in 1989 in designing the first training courses. We were very mindful of the need to have very practical based training and we were mindful that by and large we would be dealing with training lawyers as mediators although our net was cast wider to a broader group of professionals. We were undoubtedly assisted by the expertise of Dr Karl Mackie and his knowledge of adult education and the learning needs of adults, to be very practically-based and to recognise the professional skill set that people already brought with them when coming to training of this nature but it also required them to be very aware of the set of learned behaviours of different professions, particularly lawyers, that might need to be unbundled so that one could develop extremely effective and robust mediation practitioners.

At the heart of their learning and training was the use of case studies originally developed at Harvard and elsewhere at the time developed from their own knowledge and experience real cases. What we knew and understood from our experience of dealing with commercial mediation deadlock scenarios was that they came from every industry and dispute type and that whatever the background whether it be intellectual property, breach of contract, partnership fallout, employment, environmental or insurance coverage, there was often at the heart of these disputes, a great deal of highly charged emotions.

The early training programmes concentrated on Harvard School of Negotiation moving away from positional bargaining to interest based negotiation and some of the skills required by mediators to extract the information and knowledge that

would help the parties come up with acceptable and sometimes innovative solutions that would be broader more effective in scope than third party rulings.

The areas that professionals certainly find the most valuable to help them broaden their skills are the areas of communication involving:

- Rapport building
- Non-verbal communication
- Active listening
- Silence and minimal prompts
- The art of questioning, the different types of question and the effects and the challenge
- The art of paraphrasing, reflecting and summarising
- The art of effective problem solving

In the early development of the UK and European mediation practice there was also a heavy emphasis on mediation pupillage and early pioneers often worked as co-mediators. Originally teaming up with American mediators and then as the early pioneers got their wings taking other new mediators and assisting them in developing the confidence and skills necessary to work effectively.

Facilitative Vs. Evaluative Approaches

In the early years there was also quite a lot of conversation about the difference between facilitative and evaluative mediation.

The Facilitative School appeared to concentrate on holding back from expressing direct opinions on the merits (in this case meaning the merits of the legal argument and the likely outcome before third party tribunal.) Whereas the evaluative model seemed to be aligned with the practice of ex-Judges, where they would give non-binding evaluations of prospects of success. It quickly became apparent that what was required and needed for effective mediation practice was the fluency and skill to assist that parties to revaluate the many layers of complexity sitting beneath the surface of what sometimes seems to be a simple deadlock. In other words delving deeper than the legal but looking at the commercial and the inter-personal issues that are often at the heart of what at first blush looks like quite a straight forward for example, copyright dispute.

The experienced mediator needed to be a very experienced negotiating coach today our programme which has evolved over many years of learning takes on a number of different methodologies.

- Theory by way of pre-course reading
- Presentation of information

- Participative skills exercises covering negotiation, effective questioning and non-verbal communication
- Simulated role plays of commercial disputes
- Group leader learning and debrief facilitated by the trainer
- Personal one to one feedback and coaching followed by the reflective learning process of learning logs and post-course assessment

As James South has told you in his article, mediation in the UK developed without any form of regulation in relation to training provision. There was no certification or registration system post-training and given this free-market approach and in a bid to establish a base line of competence for mediators in order to instil confidence in users in the marketplace, it was decided early on that we would have a competence based assessment of genuinely tough standards (they have got tougher over the years) so that not every participant would meet the required standards.

Today to gain accreditation our delegates must attain a majority of competencies across twelve competency areas:

- Relationship skills cover creating an environment conducive to mediation and developing communications and interactions with each of the parties.
- Process skills establish and maintain an effective working structure, manage the process and the phases of the mediation.
- Content skills facilitate the parties in creating solutions and moving towards settlement and facilitating momentum through active engagement with the parties and the content.

We also develop Continuing Professional Development (CPD) programmes which have grown in sophistication over the years allowing for the different levels of development in the market place.

Client Lead Demand

One of the key things to bear in mind is the marketplace and the client lead demand. In the UK our annual audits of mediator activity show that there are less than 100 individuals who are collectively involved in at least 70-80% of commercial cases. Fortunately many of the participants who come on the mediation courses recognise that this is not going to be a swift or big career change. But they participate recognising that they will gain much value including improving as negotiators and they describe they effect of coming on our courses as changing their whole approach to negotiation.

Rethinking Accreditation

CEDR's CEO Dr Karl Mackie our Former Vice-Chair of the Civil Mediation Council in the UK, wrote passionately on this subject:

'I suggest that at a philosophical, strategic level that we should positively become a standard-bearer globally to challenge the trend of bureaucratisation of mediation by way of over-definition of standards. We should support the evolution of ideas and variety of training approaches on a free-market basis because of the core values in our field of flexibility and adaptability. We should be proud that we can celebrate diversity and flexibility of the mediation process while others attempt to narrow its boundaries into mechanical formulae.'

Give the UK has some of the most stringent training standards, codes of practice and highly skilled mediators (and this has been born out recently by feedback from North America. Attorneys have spoken about the quality of their European experience working with London based mediators.) We are very proud that this has been done largely through organic development under a self-regulatory environment and also delighted the EU Directive has to date remained reluctant to impose formal registration schemes.

Training and Assessment of Mediators and the Development of Specialist Mediations – The Australian and Hong Kong Experience

Mrs. Robyn Hooworth [1]

Over the past 20-30 years the formal training and assessment of mediators has increased significantly on the global educational stage; partly due to the demand for alternative dispute resolution processes and partly to satisfy the requirements of a growing move toward professionalism of the mediation field and practitioners and the requirements of different countries' accreditation processes. Although any training institution can conduct Mediation Training and Assessment courses, (the free market approach) to satisfy market demand and to make courses financially viable, training bodies recognise that course content must teach to the criteria and competencies required for assessment and accreditation. The dilemma for trainers then becomes teaching the minimum standards to meet these criteria for training and assessment or teaching advanced thinking, theoretical knowledge and skill development for mediation, and how to achieve both. The dilemma for Assessors is how to ensure the fair and equitable assessment of competencies to meet the standards for mediator accreditation.

For the purpose of this paper, I have maintained a distinction between the processes of Training; Assessment and Accreditation. Training is defined as: "A learning process that involves the acquisition of knowledge, sharpening of skills, concepts and rules and the changing of attitudes and behaviours to enhance performance of the trainee." Assessment refers to: "The establishment of clear, measurable expected outcomes of learning; providing a process for a trainee / student to demonstrate achievement of these outcomes; the systematic gathering and analyzing of evidence of achievement of these learning outcomes and the evaluation of the trainee's performance based on a review of the assessment information to make a judgement or recommendation." Accreditation is: "The certification of competence in a specified subject or area of expertise awarded by a duly recognized and respected accrediting organization." [2]

During the 1980s the USA, Canada, Australia and the UK were pioneers in the development of formal processes for the training and assessment for mediators. These 'western' training courses were then adapted to be culturally relevant for the Asian, Pacific and European market.

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1 Mrs. Robyn Hooworth BSW (Hons). CIArb Accred.Mediator; HKIAC Accred. Family Mediator/ Supervisor; Aust. National Accred. Mediator; Aust. Accred. Family Dispute Resolution Practitioner/ Mediator; Fellow (Mediator) CIArb, UK and Australia, is the Mediation Senior Instructor/Co-Trainer/Lead Assessor of Dispute Resolution Centre, School of Law, Bond University Australia.

2 www.websterdictionary.com

Brief Historical Perspective – Hong Kong

In the 1990s the then Centre For Dispute Resolution in Boulder Colorado, Global Mediation Services and The Accord Group conducted some of the first General Mediation Training Courses in HK whilst Professor Irving, Canada and DRC, Bond University, Australia conducted Family Mediation trainings to ensure a required number of professional mediators to conduct the Pilot Scheme for the HK Family Court.

The system of parallel accreditation of specialist mediators in Hong Kong at the time; that is, separate accreditation of General Mediators and Family Mediators necessitated the two streams of training courses and assessment requirements. Moreover, to distinguish training from assessing of mediators, these processes were developed as two distinct entities and stages in the accreditation process. In HK, to ensure compliance with Accreditation requirements and to maintain standards, mediation training courses have needed to be accredited by the Mediator Accreditation Committees of the HKIAC and / or The HK Law Society. [3] This process has also ensured participants on these training and assessment courses can subsequently apply to these organizations for General or Family Mediator Accreditation.

The introduction of the Civil Justice Reforms in Hong Kong in 2009-2010 has cemented mediation into the litigation process as a primary dispute resolution method. [4] The recent Financial Dispute Resolution and Children's Dispute Resolution processes within the Family Court System has formalized what has been well recognized in the Family Mediation area in Hong Kong since the mid 1990s; that parents and children's well being is better served in a less adversarial process of decision making following separation and divorce. These reforms have brought a further need for the formal training, assessment and accreditation of General and Family Mediators in HK.

Brief Historical and Current Perspective - Australia

The system of accrediting General Mediators and Family Mediators separately (specialist mediators) has been adopted in Australia since 2007-2008. As in most countries, whilst anyone can advertise and do either General or Family Mediations without being accredited most organisations, employers, referrers and consumers prefer mediators to be either a Nationally Accredited Mediator [5] or a Family Dispute Resolution Practitioner (FDRP) registered with the Australian Government Attorney General's Department.[6] Moreover, Family Dispute Resolution Practitioners cannot issue s60I certificates in children's matters enabling parties to file an application to

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3 Refer to Mediator Accreditation at www.hkiac.org

4 Refer to www.civiljustice.gov.hk

5 National Mediator Accreditation System (NMMAS). Refer to: www.wadra.law.ecu.edu.au/pdf/Final%20 Standads_200907.pdf and www.wadra.law.ecu.edu.au/pdf/Final%20Practice_200907.pdf

6 Refer to Family Dispute Resolution Registration at www.ag.gov.au/Families/Familydisputeresolution/pages/

the Family Court of Australia, unless they have received a registration number from the Attorney General's Department. This will only be approved once the person has completed the required Family Dispute Resolution (FDR) training and assessment.

One wonders if the reason for changing the name from Family Mediators to Family Dispute Resolution Practitioners was to highlight the difference between general and family mediators and the different requirements to practice (specialist mediators). As such, specialist Mediation Training Courses and Assessment processes have developed in Australia to meet this accreditation requirement.

To satisfy the requirements to be an Australian Nationally Accredited Mediator, a person must comply with the Training and Assessment processes as outlined. [7]

a.) complete an undergraduate degree;
b.) attend 38 hours of 'regulated' facilitative mediation training to develop competency in mediation process, skills, attitudes and behaviours. (These competencies are in line with those required in Hong Kong.);
c.) successfully conduct a formal role play assessment either in person and / or by tape.
*Note: These are separate processes.

The person can then apply for accreditation to one of approximately 25 recognised Mediator Accreditation bodies in Australia. Whilst there are many approved Mediator Accreditation bodies in Australia, the NMAS has become the 'endorsed' system for accrediting General mediators. To satisfy these accreditation requirements the person must also:

- Ensure the required police checks are completed and /or satisfy the requirements to be of good character and
- ensure mediator liability insurance is in place and
- ensure a mediator complaints process is in place

To maintain accreditation, the person must also complete 20 hours of continuing education each 2 years plus 25 hours of mediation practice.

As in Hong Kong, Australian Training and Assessment courses for general mediators are conducted by a range or organisations; University Law or Social Science faculties, Mediation Bodies / Institutions; Law Societies; Government Departments; Non-Government Agencies and Registered Training Organisations / Practitioners. They may be conducted as a 5 day Mediation training with a 1 day Assessment course;

7 Australian National Mediator Standards – Approval Standards. November 2008. Page 7 - 9

a 4 day training with a 2 day Coaching / Assessment Course or training spaced over weeks to meet university / organisational schedules and then attendance at an Assessment course.

For National Accreditation (General Mediation), the training courses focus on modules relating to: Definition of Mediation and Principles, Theories underpinning Mediation; Understanding, Assessing and Diagnosing Conflict; Power imbalances; Understanding the Negotiation Basis for Mediation; Stages of the Process and understanding the purpose of each stage and the mediator's role; Standards and Ethics for Mediating; Appropriate attitudes and behaviours for Mediators and Drafting Agreements. There must be 9 coached role plays during the training. [8]

The process to become a Family Dispute Resolution Practitioner / Mediator is more complex to reflect the need for additional modules in the Training Courses related to Family Law, the Psychological Process of Separation / Divorce for Adults and Children; Children's Best Interests; Managing Domestic Violence and Child Abuse; Working with Vulnerable Parties; Financial Matters; Child Focused Mediation; Child Inclusive / Informed Mediation; Standards and Ethics for Family Mediators; Drafting Parenting Plans and Financial Matters as well as teaching the basic modules required for General or Nationally Accredited mediators. [9]

In Hong Kong, this need for additional modules in the Training is reflected in the requirement for a Family Mediator to have an additional 3 days of training (8 days in total) so these teachings can be inserted into the Basic and Advanced Family Mediation Training Courses. In Hong Kong there is also a requirement for 2 supervised Co- mediations in family cases with strict conditions attached.

In Australia, an FDRP / Family Mediator must now complete the following to become registered with the Attorney General's Department. [10]

1.) 10 Units of Competency of the Vocational Graduate Diploma of Family Dispute Resolution if the person does not have a university degree OR
2.) 6 Units of Competency of the Vocational Graduate Diploma of Family Dispute Resolution if the person already has an undergraduate degree in Law, Conflict Management or Social Science OR has National Mediator Accreditation.

AND for either 1. or 2. (The Training Component) additionally

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8 For a more detailed outline of the Training requirements, refer to NMAS –Approval Standards – Threshold Training and Education Requirements Page 7-8 and Competence Section of the NMAS – Practice Standards Sept. 2007. Page 10-11.

9 www.ag.gov.au/Families/Familydisputeresolution/pages/

10 www.ag.gov.au/Families/Familydisputeresolution/pages

3.) 10 Hours of Supervised Family Co-Mediation with real cases (The Assessment component)
4.) Completion of Police Checks; issuance of a Child Safety Card to work with children; Liability insurance in place and a Complaints Handling Process.
5.) Application to the Attorney General's Department for a Registration Number as a FDRP so as to be able to issue Certificates under s60I of Family Law Act.
6.) Complete 20 hours of continuing education each 2 years.

In order to train the 10 or 6 Units of the Vocational Graduate Diploma in Family Dispute Resolution, most approved training organisations offer this over 12 months, with some on line training and some intensive classroom modules. They also try to organise internships for students so they can complete the training and the 10 hours of supervised co-mediations in a Family Mediation Agency or with a registered FDRP.

The second method of obtaining this FDRP / Mediator training requirement has led to a small number of organizations, such as Bond University, Dispute Resolution Centre being approved by the Attorney General's Department to offer the 6 Units by means of providing the additional modules for those people who have satisfied the requirements to be Nationally Accredited Mediators as part of a post graduate program. That is, people can obtain their National Accreditation and then complete an intensive 40 hour training in the specific Family Mediation Modules to complete their 6 Units. (Completion of training requirement). [11]

Current Training Dilemmas

There has been much debate in Hong Kong over the past 10 years about whether General Mediators can also obtain their Family Mediation Training requirement by doing an additional reduced number of training days to complete the Family Mediation specific modules. There is also debate over whether Family Mediators who have already been through a stringent training and assessment to become accredited should have to take additional training and / or the Assessment role plays for Stage 2 General Mediator accreditation. My understanding is that the HKIAC MAC has recently reviewed whether to approve the conducting of these conversion courses in Hong Kong.

Much is still open for debate. One thing is for sure; the Training of Mediators will continue to evolve. One stream will satisfy the requirements for Accreditation whilst

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11 "Being Accredited Twice as a Mediator" by Prof. John Wade, Dispute Resolution Centre, Bond University. 2009
Refer to FDRP Training Courses on the Bond University, School of Law website: www.bond.edu.au Dispute Resolution

another may flourish in response to consumer demand for 'advanced' or 'specialist' training. eg. Evaluative mediation; settlement mediation; transformative mediation; narrative mediation; therapeutic mediation; online dispute resolution; telephone dispute resolution; med-arb; cross cultural mediation; preparation for mediation; mediation for specific types of disputes such as in the General mediation area : insurance; personal injury; franchise; contracts; construction; probate; shipping; finance; banking; farm debt; workplace; ombudsman; residential tenancies; housing; information technology; copyright; international warfare; religious differences and in the family mediation area: teenager / parent; extended family; marriage; pre-marriage; step parenting; blended family; cross cultural marriage and cross border marriage.

Current Assessing Dilemmas

The process of conducting Mediation Assessments continues to pose challenges for organizations conducting these. Some of the concerns currently being discussed in many countries, but recently aired at an Assessors Forum in Hong Kong include the following: [12]

- How to ensure fair and equitable assessments?
- How to develop consistency / parity between assessors?
- How to ensure consistency of grading / marking standards and recommendations?
- How to develop a minimum standard of assessment of competencies?
- How to assess standard competencies across the many training courses / providers?
- Should assessment be based on role plays or other means?
- How to ensure consistency of role playing in assessments?
- How to ensure consistency in standards of role plays used for assessments?
- Should cultural context and / or language be taken into account?
- Should training organizations accepted as approved by Accrediting bodies be required to undertake to train to standards / competencies?
- Should approved trainers be allowed to assess their own trainees?
- Should training and assessment be separate entities or conducted simultaneously?
- Should the assessment process have a de-briefing / feedback component or does this mix roles of training and assessment?
- Should assessment courses be required to adhere to standardized checks and balances? (eg. Written Competency Forms; Marking rubrics / guidelines)

12 Mediator Assessor Skills Training Report to HK Academy of Law by Robyn Hooworth 2010 and discussion at Mediator Assessors Forum conducted by Assoc Prof Leung Hing-fung and Robyn Hooworth May 2012

Much is still open for debate. Any situation where people are in business, contractual, community or personal relationship with each other means there is potential for both conflict and disputes. As such, the need for basic and specialist mediation training, assessment and accreditation to ensure professionalism and ethical practice of both General and Family Mediators will continue. Globally, the mediation community is small. The dialogue and cultural exchange should continue whilst formal Mediation Training, Assessment and Accreditation processes and standards evolve.

"Mediate First" Conference in Hong Kong

11 & 12 May 2012

Day 2

Development of Mediation in Hong Kong

開幕辭
調解為先

■

林文瀚法官[1]

在2007年12月香港9個關注調解應用的組織聯合舉辦了一個名為Mediation in Hong Kong： The Way Forward 的會議。 由當時的首席法官李國能作開幕致詞。 在李法官的致詞中，他提到關於調解方面的發展，香港要走的路還很漫長，他並且說調解的成功實在有賴法律界、其他專業界別、商界及市民大眾的廣泛接受。 他亦提到在各方面向有關人士及廣大市民推廣調解並使他們深入認識調解及其好處的重要性。

今天，我們在這裡舉行《調解為先》的會議，正好讓我們回顧過去5年調解在香港的發展及展望將來如何能使調解更有效及在不同的範疇內更廣泛被應用為解決紛爭的途徑。

環顧在過去5年內，司法機構除了在不同類型的訴訟內引入調解的先導計劃：包括土地審裁處的建築物管理案件；公司案件；人身傷亡案件等，我們更加在民事司法制度改革當中引入了《調解實務指示：PD31》，訂立程序，鼓勵訴訟人士在高等法院原訟法庭和區域法院的民事訴訟中，採用調解來解決爭議。 司法機構並且成立了調解資訊中心，定期舉辦調解資訊講座，向法院使用者介紹調解的安排。 在高等法院大樓內，司法機構又撥出地方，由多個專業團體聯合運作聯合調解專線辦事處，向公眾人士提供適切的調解員轉介服務。

香港司法機構並且在網站上成立了一個關於調解的網頁，提供多方面關於調解的資訊，包括介紹調解的短片，向公眾人士解釋調解程序提及如何可以透過調解處理他們的紛爭。 這網頁十分受歡迎，截至2012年3月止，點擊率達到54萬多次。

除了司法機構由終審法院首席法官委任的調解工作小組外，律政司司長亦在2008年成立工作小組，檢視和研究在香港推廣調解的3個相關領域：公眾教育及宣傳；評審資格及培訓；規管架構。 小組轄下的公眾教育及宣傳專責小組於2009年5月展開「調解為先」運動，提高商界對調解服務的認識並鼓勵他們使用調解服務。 Mediate First「調解為先」的口號自2009年經已在香港推行。

該工作小組於2010年2月提交報告。 在報告發表後，政府就報告書的內容作廣泛的諮詢。 基於諮詢的結果，律政司司長成立調解專責小組，負責

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1 林文瀚於2012年擔任香港特別行政區高等法院上訴法庭法官 (現任上訴法庭副庭長)。

落實該報告書內的一些建議，包括繼續向公眾推廣調解，就調解進行立法，對調解員認可資格評審的檢視及質素保證。

今天的會議便是在專責小組轄下的公眾教育及宣傳組統籌下，透過多個機構聯合舉辦。　本人藉此機會向一切籌辦的委員及有關人士作衷心的感謝。

經過過去幾年的實踐經驗，調解在香港經已奠定了一些基礎，香港對調解的運用亦摸索出一些路線。　香港法院基本採納的方針是鼓勵自願性質的調解，法院不會強制性地命令訴訟人士進行調解。　與此同時，法院亦強調訴訟人士及律師均有責任協助法院實踐民事司法制度改革的基本目標。所以他們都有責任積極考慮透過比訴訟較合符效益及相稱的途徑來解決紛爭。　《調解實務指示》清楚說明法院行使酌情權裁定訟費時，會考慮訴訟一方是否有不合理及固執地拒絕調解的建議。

在現行的制度下，調解員均不是法院的法官或司法機構的僱員。　他們大多數是由非官方機構提供調解訓練後通過該機構或其他組織評核的認可調解員。　他們來自不同的行業，包括律師、大律師、工程師、測量師、社工、商人及其他行業心士，訴訟人可按他自己本人的需要及案件的複雜程度在不同的認可調解員名單內選擇適合自己的調解員。　雖然調解在每宗案件所需要的費用及時間各有不同，但按照司法機構近年來收集的數據及從其他機構所得的資訊，調解肯定是比訴訟需要較低的費用及較短的時間完成有關程序。　很多時調解所需的費用提及時間不及訴訟的十分之一，至更少比例。

但是調解是需要訴訟各方透過務實及誠懇的態度來進行商討，以尋求雙方均可接受的解決方案。若訴訟其中一方固執地採納橫蠻無理的態度，堅持不合理的要求，調解便可能以失敗場告終。雖然調解員對調解過程及有關爭議事項可以給予爭議雙方客觀及務實的引導分析，但最終和解是需要爭議各方共同努力，從多方面探討，尋求務實及適切各方需要的解決方案。調解員須保持中立及公正，因此不可以為任何一方提供法律或其他專業意見，或把某一方案強加於任何一方，更不可代任何一方作和解的決定。

所以，在參與調解前爭議各方及他們的律師就案件爭議點的理解及各方對本身實際需要的認知，及他們對不同處理紛爭方式在金錢、時間及精神上之負擔能力的評估均十分重要。　若當事人能夠清楚掌握自身的情況，對訴訟不存在不切實際的期望，並以誠懇及積極的態度參與調解，調解成功的機會將可以大大提升。

雖然調解在香港已被廣泛地推廣，律師行業對調解亦有一定之認識，從法庭的經驗來看，律師在與當事人探討解決紛爭的模式及為當事人提供適切的輔導，以積極務實的心態來參與調解之準備功夫，在很多案件中都尚未足夠，還有很多可以改善的空間，在最近一宗案件中，法官作出以下評論:

若一名律師透過不符現實的評估引致他的當事人對訴訟勝數把握有不設實際的期望，因而導致調解不成功，而訴訟亦以敗訴為結局，他的當事人將會承受十分嚴峻的後果，而該名律師亦沒有切實履行他作為律師的責任。除了律師在這方面尚要下更多的功夫外，調解員質素的保證也是保障調解在香港健康發展的因素。　在這方面，律政司轄下調解專責小組經已就調解員認可制度作出一些建議，本人相信在今日的討論環節內亦會提及。

總括來說，經過過去5年來的發展，調解在香港經已建立一定的認受性。但要達至廣泛及有效地應用，我們需繼續努力。　要深化調解成為在香港解決紛爭的其中一項主要模式，我們不單需要制度上的改革，更需要律師及社會各階層心態上的轉化。　<<調解為先>>的會議之舉辦可以使我們透過檢討及參考其他地方的經驗，為我們將來的工作帶來一些啟示及方向性的討論及反思

最後，本人謹祝今日的會議能夠成功並多謝各位的參與。

The Development of Accreditation of Mediators in Hong Kong - A General Overview

Mrs. Wong Ng Kit Wah Cecilia[1]

Since the 1980s, the facilitative model of mediation has begun to take its roots in Hong Kong. Different organizations such as the Hong Kong International Arbitration Centre, The Law Society of Hong Kong, the Hong Kong Mediation Centre and other organizations began setting up panels of accredited mediators. The mediation providers regulate mediators who are on their respective panels.

The mediation movement was rather slow till in about 2007 when the Hong Kong Government, the Department of Justice as well as the Judiciary endorsed mediation as an effective way to resolve disputes, and took initiatives to promote the use of mediation in Hong Kong.

Following the 2007-2008 Policy Address of the Chief Executive of the Hong Kong Government, the Government established a working group led by the Secretary for Justice to review the development of mediation and promote the use of mediation more widely in the community. The development of mediation took a giant step after the Hong Kong Government began to take the lead to promote the use of mediation.

In 2009, the Judiciary also took a huge step in the same direction in the Civil Justice Reform by requiring and encouraging the litigants to use Alternative Dispute Resolution, mainly mediation in the early stage of the court proceedings.[2]

The central figure in the mediation process is the mediator, as without him, there cannot be any mediation. There are much discussions about the quality and the standard of the mediators.

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1 Mrs. Wong Ng Kit Wah Cecilia, a Mediator, is a partner of Messrs. Kevin Ng & Co. Solicitors.

2 See Order 1A rule 1, Order 1A rule 4(e) The Rules Of The High Court (Cap. 4A)

O. 1A, r. 1 *The underlying objectives of these rules are-*

(a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
(b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
(c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
(d) to ensure fairness between the parties;
(e) to facilitate the settlement of disputes; and
(f) to ensure that the resources of the Court are distributed fairly."

O. 1A, r. 4(e) *"encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitation the use of such a procedure;"*

Although the mediator is only the facilitator in the mediation meeting and is not a judge, the parties must have trust in him before the parties would agree to appoint him to assist them in resolving their disputes. But should mediators be accredited?

Currently, there are two main categories of mediators, i.e. general mediator and family mediator. In relation to the requirements to become a mediator, different organizations have their own criteria regarding academic qualification, prior working experience and mediation training.

In addition to academic qualification, such as a university degree, and two to three years of working experience, typically, for the general mediator category, the candidate has to complete a mediation training course of at least forty hours. After completion of the mediation training course, the candidate has to take a test in the form of successfully passing two simulated mediation cases, or passing two simulated mediation cases plus a written examination. For the family mediator, the candidate has to complete a basic family mediation training course of at least forty hours, plus an advanced course of at least twenty hours. After completion of the family mediation training courses, the candidate has to co-mediate two actual family cases under the supervision of a family mediator supervisor, and demonstrate his competence.[3]

After public consultation, in 8th February 2010, the Secretary for Justice's Working Party on Mediation published its report and identified three major areas of developments of mediation, i.e.

(a) Public Education and Publicity;
(b) Training and accreditation; and
(c) Regulatory framework.

There is no unified standard for accreditation of mediators. How would the general public know of the standard and ethics of the mediators? At present, the individual mediation providers have their own standard. In respect of ethics of mediators, in February 2010, the Department of Justice promulgated the Mediation Code. The Mediation Code sets out the minimum code of conduct required for mediators in Hong Kong. All major mediation providers in Hong Kong have adopted the Mediation Code.

3 See the respective websites of:
Hong Kong International Arbitration Centre, http://hkiac.org/;
The Law Society of Hong Kong, http://www.hklawsoc.org.hk/;
Hong Kong Mediation Centre, http://www.mediationcentre.org.hk/;

From the perspective of the court, there are judgments in relation to the selection of mediator by the parties. There are some instances while the parties were litigating, they agreed to mediate. However as regards the choice of mediator, they could not reach any consensus, under such circumstances, they sometimes opted to apply to the court for the court's direction for the choice of mediator, pursuant to Practice Direction 31.[4]

In the case of *Upplan Company Limited, Li Po Ping, Wong Oi Ching, Li Siu Lund v. Li Ho Ming and Rainbow Point Limited (HKCA 1915/2009)*, Mr. Registrar K.W. Lung set out the approach of the court in the selection of mediator.

Paragraphs 12 to 15 of the said judgment are copied below:-

" 12. This court will adopt the following approach in deciding the choice of the mediator in case of a dispute between the parties.

The approach

13. First, the court will consider all the relevant objective data, in the following priority:

(a) the nature of the matter and the issues of mediation;

(b) the amount involved and the importance of the matter to the parties;

(c) the mediators' knowledge and experience in respect of the issues in order to determine whether the mediators are the appropriate persons to deal with the issues concerned;

(d) the experience of the mediators in mediation;

(e) the other relevant experience such as that of legal practice, arbitration or social experience;

(f) the fees and expenses for the mediation;

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4 See P.D. 31, paragraph 13:

"13. Where the parties are unable to reach agreement on certain proposals in the Mediation Notice and Mediation Response in relation to the mediation:

(1) If the parties are willing to have their differences resolved by direction of the Court, they may make a joint application to the Court for directions resolving the points of difference between them; and

(2) in the absence of such willingness, any party may apply to the Court for directions and the Court may give such directions as are appropriate to resolve differences between the parties regarding the proposals that they have each made in the Mediation Notice and the Mediation Response respectively, but only in respect of the matter of time referred to in paragraph 11 above and the matters referred to in paragraphs 4, 5, 6 and 7 of the said Notice and Response."

(g) the availability of the mediators, bearing in mind that mediation will be taking place near the trial;
(h) other relevant factors,

14. Second, the court will, on the materials and information before it, make an assessment of the nominated mediators to determine, on the balance of probabilities, who will most likely be able to conduct the mediation smoothly, successfully and economically.

15. Third, the court will make its rational and dispassionate decision accordingly."

The court has listed out the different criteria in the selection of a mediator, but it did not specifically mention that the mediator has to be accredited.

In January 2013, The Mediation Ordinance Cap.620 in Hong Kong became effective. The definition of mediator is in section 2 *"mediator (調解員) means an impartial individual referred to in section 4(1)"*.[5] The qualification of a mediator is that he must be an impartial individual. There is no requirement of accreditation.

Comparing to other dispute resolution mechanism, mediation is a highly flexible process. There are views that too much regulations on the requirements of becoming a mediator would stifle the development of this profession, but after the public consultation launched by the Secretary for Justice's Working Party on Mediation in 2009, the majority view of the public favored accreditation of mediator, and even urged the establishment of a single accreditation body in Hong Kong, replacing the accreditation function of various mediation organizations.

On 28th August 2012, the single accreditation body the Hong Kong Mediation Accreditation Association Limited ("HKMAAL") was founded, signifying the first important step towards unifying the training and accreditation standard of mediators in Hong Kong. Currently, HKMAAL is working on the accreditation requirement and standard, which would be published and implemented in due course.

In the meantime, there are various bodies which have moved one further step in raising the standard of mediators on its panel. The following are two examples:-

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5 Section 4(1) of Mediation Ordinance (Cap. 620):-
"(1) For the purposes of this Ordinance, mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following—
(a) identify the issues in dispute;
(b) explore and generate options;
(c) communicate with one another;
(d) reach an agreement regarding the resolution of the whole, or part, of the dispute."

(a) Land (Compulsory Sale For Redevelopment) Ordinance Cap. 545 Pilot Mediation Scheme administrated by Joint Mediation Helpline Office Ltd. ("JMHO")

JMHO was set up in 2010.[6] It provides mediation referral service to the general public. In 2011, the Land (Compulsory Sale For Redevelopment) Ordinance Cap. 545 Pilot Mediation Scheme (the "Pilot scheme") was set up. "The aim of the Pilot Scheme is to mediate dispute or difference between owners arising out of or in relation to applications for compulsory sale of land lot that has been made or is intended to be submitted to the Lands Tribunal."[7]

In order to be on the panel of mediators of the Pilot scheme, the mediator has to be accredited by his respective organizations and has to complete a compulsory training course on the Land (Compulsory Sale For Redevelopment) Ordinance Cap. 545.[8]

(b) Financial Dispute Resolution Centre Limited ("FDRC")

FDRC was set up in November 2011 by guarantee. It is a quasi-statutory scheme. "The aim of FDRC is to provide independent and impartial "Mediation First, Arbitration Next" processes of dispute resolution to facilitate the resolution of monetary disputes between individual customers and financial institutions in Hong Kong."[9]

In order to be on the panel of mediators of FDRC, the mediator has to be accredited by his respective organization, and has attended a compulsory training course comprised of training on regulatory framework for the financial sector in Hong Kong, experience sharing and FDRC workflow, self study on financial products and their selling process, and passed a written examination.[10]

Mediators are moving to specialization.

From the point of view of the parties to mediation, the more transparent the quality and standard of the mediator, the more confidence they will have in entrusting the mediator to assist them to resolve their dispute.

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6 Joint Mediation Helpline Office Ltd. website: http://www.jointmediationhelpline.org.hk;

7 JMHO's leaflet on Land (Compulsory Sale For Redevelopment) Ordinance Cap. 545 Pilot Mediation Scheme

8 Land (Compulsory Sale For Redevelopment) Ordinance Cap. 545 Pilot Mediation Scheme web site: http://www.lcsromediation.hk;

9 Financial Dispute Resolution Centre Limited web site: http://www.fdrc.org.hk

10 Standards and Procedures for Admission to the FDRC List of Mediators and FDRC List of Arbitrators, May 2012, Financial Dispute Resolution Centre Limited

In Hong Kong, the requirement of mediators has slowly moved from the side of unregulated to highly regulated, whether or not this swing to the more stringent requirement of the mediator would encourage the development of mediation in Hong Kong has yet to be seen.

The Training and Accreditation of Mediators in Hong Kong

Prof. LEUNG Hing Fung[1]

Introduction

The sign of use of mediation for the resolution of disputes in Hong Kong could be traced back to last century. As early as in the 1980s, in the promotion booklet of the Labour Department, a process called "conciliation" could be found for the resolution of employment disputes. Briefly, the nature of "conciliation" used then was to offer administrative support for the parties to meet and negotiate. After many years of use, nowadays the department describes the duty of the conciliation officer as "… a neutral intermediary who assists both parties to understand the problem and to have a frank dialogue so as to remove each other's differences and prevent the issue from deteriorating. He also endeavours to seek a settlement which is acceptable to both parties."[2] One could see that this is quite similar to the model of facilitative mediation commonly practiced nowadays in Hong Kong.

From a wider perspective, mediation has been promoted through various means in Hong Kong, such as the judiciary, Government departments, different mediation related bodies, and through adoption into clauses in standard forms of building contracts.

With the promotion in the use of mediation through these means, the number of mediation cases has been soaring in recent years. The number of mediation related bodies also has been increasing at tremendous speed. These bodies hold out to provide mediation services by establishing and maintaining their panels of mediators. They have their individual requirements in the training and accreditation of mediators. Most of them also have their own codes of conduct for mediators, or even their own rules of mediation.

A natural question arises: if more and more people are using mediation as a means of resolution of their disputes, is there a need for governing the standard of mediators? In particular, is there a need to set a standard in the training and accreditation for all mediators in Hong Kong?

This paper attempts to find out the current situation in the development of the training and accreditation of mediators in Hong Kong, with a view to identifying

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1 Chairperson, Hong Kong Mediation Council, Hong Kong International Arbitration Centre; Associate Professor, Department of Real Estate and Construction, University of Hong Kong

2 From booklet on *Conciliation Service of the Labour Relations Division*

the possible problems and the means to improve the system. It is hoped that the paper could be of benefit to policy makers and the mediation profession in Hong Kong.

For the purpose of this paper family mediation, for which the training and accreditation system is usually different from that of general mediation, would not be discussed.

Development of Mediation in Hong Kong in Recent Years

As mentioned above, from the author's observations, mediation in Hong Kong has been promoted through many different means. In the judiciary, it could be dated back to the pilot family mediation scheme introduced in 2000, initially for 3 years, which was extended for 1 further year. The scheme turned out to be a success in that the success rate was quite satisfactory: 78% in the first 3 years[3] and 77% in the extended year[4]. The scheme was followed by many other pilot schemes, such as those for building management and for shareholders' disputes. In 2010, the now well-known Practice Direction No. 31 was issued by the Chief Justice, which made mediation a standard practice in the process of litigation.

On the other hand, the Chief Executive, in many of his Policy Addresses in recent years, has emphasized on the importance of using mediation for the resolution of disputes[5].

Moreover, for a long period of time, the construction industry has included the practice of mediation into their standard forms of building contract[6], which has also contributed in the promotion in the use of mediation.

Historically, there have been very few mediation related bodies in Hong Kong during the inception stage of mediation. Examples of the earliest ones are Hong Kong Mediation Council (under the Hong Kong International Arbitration Centre ("HKIAC")) and Hong Kong Mediation Centre ("HKMCentre"), which were formed in the 1990s. In 2005, Hong Kong Institute of Surveyors and Hong Kong Institute of Architects set up their training and accreditation system for admission of mediators into their joint panel of mediators. The Law Society of Hong Kong has also set up its accreditation system for mediators in recent years.

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3 LC Paper No. CB(2)1717/03-04(01), Panel on Administration of Justice and Legal Services Pilot Scheme on Family Mediation prepared by Judiciary Administration dated 15 March 2004)

4 Hong Kong Judiciary Annual Report 2004

5 See for example paragraph 85 in the Chief Executive Policy Address 2007-8 and paragraph 102 in that of 2010-11

6 See for example the current Hong Kong Government General Conditions of Contract and the Standard Form of Building Contract published by HKIS, HKIA and HKICM, 2005

In the past 5 years, the number of mediation related bodies has been increasing at an alarming speed. It has been increased from less than 5 (author's estimation) before year 2000 to more than 20 at the time of writing (author's estimation)[7].

In 2009, under the Chairmanship of the Secretary for Justice, the Working Group on Mediation worked on the future direction of mediation in Hong Kong, in the areas of training and accreditation, public education and regulatory framework. The Working Group was aware of the importance in the training and accreditation of mediators. In its report published in year 2010[8], there were recommendations concerning training and accreditation for mediators, the notable ones include:

Recommendation 25
The establishment of a single body for accrediting mediators is desirable and can assist to ensure the quality of mediators, consistency of standards, education of the public about mediators and mediation, build public confidence in mediation services and maintain the credibility of mediation.

Recommendation 26
It is considered that currently the time is not right to prescribe a standardised system of accrediting mediators and that the emphasis should be on the provision of appropriate mediation information to potential users of mediation that will enable them to decide whether to choose mediation to resolve disputes and also assist them to be better able to choose competent mediators.

Recommendation 28
A single mediation accrediting body in Hong Kong could be in the form of a company limited by guarantee. The possibility for establishing this body should be reviewed in 5 years.

Pursuant to the recommendations, a body named Hong Kong Mediation Accreditation Association Limited ("HKMAAL") was incorporated in August, 2012. There are four founder members, namely HKAC, Hong Kong Law Society, Hong Kong Bar Association and HKMCentre. It is anticipated that HKMAAL will start operation in around April, 2013. How it is going to affect the training and accreditation of mediators in Hong Kong is yet to be seen.

Moreover, to continue its work, the Secretary for Justice has formed a Steering Committee on Mediation in early 2013 with a view to follow up on the recommendations made in the above report.

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7 For reference, see for example LC Paper No. CB(2)1916/08-09(01)

8 See Report of the Working Group on Mediation, http://www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf

Mediation related Bodies

If one looks at the number of mediation related bodies, one would not be surprised to see that many of them are keeping panels/lists of mediators, but not all of them are having an accreditation system. HKIAC, HKMCentre and Hong Kong Law Society are examples of bodies having an accreditation system. Moreover, in the early years of development, many of these bodies are not related purely to mediation. As one can see, some of them are bodies of well-established existing profession and mediation is seen as a potential area into which the profession could extend and develop into.

On the other hand, more and more mediation related bodies have been set up in recent years. The author's observation is that most of the bodies recently established are related purely to mediation, or at most to arbitration as well. There is apparently a trend that mediation is to be developed into a "stand-alone" profession instead of simply a value added practice for developed into by different traditional professions.

Training and Accreditation

In Hong Kong, the systems of training and accreditation of major bodies of mediation are very similar[9]. Basically, the system adopted by them comprise 40 hours of training (commonly in the form of training course (including lecture and practice sessions) and satisfactory results in the assessment of 2 simulated/real life mediation cases[10]. The systems are very similar as some of these bodies have modeled their systems on or simply adopted the system used by HKIAC, which has one of the most well-established systems for many years.

With the emergence of so many mediation related bodies nowadays, there are more and more panels of mediators set up by these bodies. For example, the Joint Panel of Mediators of the Hong Kong Institute of Surveyors and the Hong Kong Institute of Architects, which was set up pursuant to the new Standard Form of Building Contract published in 2005.

In the context of the development of mediation into a professional practice, a natural question is: would the current training and accreditation system be sufficient in coping with the trend?

To the author there are areas which should be added to the current commonly used system if mediation is to become a professional practice. Obviously areas such as

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9 For example, those of Hong Kong Law Society, Hong Kong Institute of Surveyors and Hong Kong Institute of Architects

10 The system of HKMCentre includes a written examination in addition to the assessment on two simulated cases

the requirement of good character for mediation practitioners, requirements for written examination and experience of the assessors in the simulated mediation cases are potential areas to be considered. Reference could be made to systems in other jurisdictions. For the sake of illustration the author would look at the system used in Australia.

The National Mediator Accreditation System of Australia

The National Mediator Accreditation System ("NMAS") was brought into operation on 1 January 2008. The scheme is industry based and relies on voluntary compliance by mediator organizations, which agree to accredit mediators in accordance with the standards. These bodies are named Recognised Mediation Accreditation Body ("RMAB") under the system.

Under the scheme, any person who seeks to be accredited must comply with the specified standards ("the Approval Standards"). In essence, the Approval Standards contain provisions to[11]:

a) specify requirements for mediators seeking to obtain approval under the voluntary national accreditation system;
b) define minimum qualifications and training; and
c) assist in informing participants, prospective participants and others what qualifications and competencies can be expected of mediators.

As a condition of ongoing approval, mediators must comply with the Practice Standards and seek re-approval in accordance with the Approval Standards every two years. There are also Practice Standards that apply to the mediators[12].
In order to be approved under the Accreditation Standards, the applicant needs to show that he/she has the personal qualities and appropriate life, social and work experience to conduct the process independently and professionally. Therefore the RMAB would require the applicant to provide, in addition to the evidence of training and education, specified documentation, amongst others:

a) evidence of good character;
b) an undertaking to comply with ongoing practice standards and compliance with any legislative and approval requirements;
c) evidence of relevant insurance, statutory indemnity or employee status; and
d) evidence of membership or a relationship with an appropriate association or organisation that has appropriate and relevant ethical requirements, complaints and disciplinary processes as well as ongoing professional support etc.

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11 *Australian National Mediator Standards - Approval Standards for Mediators seeking Approval under the National Mediator Accreditation System, November*, 2008
12 See paragraph 1(3), ditto

There are stringent requirements in order that a mediation body could qualify as a RMAB[13].

The applicant is required to meet the threshold approval requirements, which consist[14], in brief terms:

1) completion of a mediation education and training course that:

   a) is conducted by a training team comprised of a at least two instructors where the principal instructor[s] has more than three years' experience as a mediator and has complied with the continuing accreditation requirements specified for that period and has at least three years' experience as an instructor;
   b) has assistant instructors or coaches with a ratio of one instructor or coach for every three course participants in the final coached simulation part of the training and where all coaches and instructors are accredited;
   c) is a program of a minimum of 38 hours in duration (which may be constituted by more than one mediation workshop provided not more than nine months has passed between workshops), excluding the assessment process specified;
   d) involves each course participant in at least nine simulated mediation sessions and in at least three simulations each course participant performs the role of mediator;
   e) provides written, debriefing coaching feedback in respect of two simulated mediations to each course participant by different members of the training team.

2) Except for those experience qualified (which is a different route under the system), a mediator must also have completed to a competent standard, a written skills assessment of mediator competence that has been undertaken in addition to the 38-hour training workshop referred to above, where mediator competence in at least one 1.5 hour simulation has been undertaken by either a different member of the training team or a person who is independent of the training team. The written assessment must reflect the core competency areas referred to in the Practice Standards.

Moreover, there are "Continuing Accreditation Requirements", such that mediators who seek to be reaccredited must satisfy their RMAB that they continue to meet the approval requirements specified. In addition, mediators seeking re-accreditation

13 See paragraph 3(5), ditto
14 See paragraph 5(2), ditto

must, within each two-year cycle, provide specified evidence to the RMAB including basically 25 hours of mediation practice experience and 20 hours of continuing professional development within the period[15].

Possible Improvements in the Training and Accreditation of Mediation in Hong Kong

As at present, the training and accreditation systems adopted by most of the mediation bodies in Hong Kong are based on the model of specified requirements in the education of mediation skills and assessment based on application of the skills in simulated or real-life cases. It appears to the author that with the trend of the practice of mediation to become "professionalized", which means that public interest has become a matter of concern, appropriate measures should be included in the training and accreditation. In this regard the author would like to make the following suggestions:

1. Inclusion of a requirement to prove good character in the accreditation process. As seen above, this is a requirement in the NMAS. In fact requirements to that effect could be found in the requirements for the admission into practice of many professional bodies[16]. There are also character requirements in the statutes for the admission for many kinds of professionals, such as under the Surveyors Registration Ordinance[17]. This requirement is important because if mediation is applied commonly, the ethical requirement for the practice would clearly become a matter of public interest.

2. As most of the current mediation cases are related to litigation, and it is the author's observation that in most of the mediation cases, the parties would expect the mediator to be able to draft a settlement agreement ready to be signed by the parties or the mediator would be able to assist in ensuring better the enforceability of the settlement agreement reached by the parties, therefore the author would suggest that certain knowledge in legal practice, such as drafting skills and knowledge of common mediation related court procedures, such as consent order and sanction payment, should properly be included in the training and be tested in a written examination.

3. At present there are clear requirements in terms of the experience of the trainers and coaches in the training. However, it seems to the author that there is not much requirement in similar regard for the assessors for the simulated mediation cases. As far as assessment is concerned, the assessors are acting

15 See paragraph 6, ditto
16 See for example the requirement for a "Certificate of Good Standing" under section 4 of the Medical Registration (Miscellaneous Provisions) Regulation
17 See section 12 of the Surveyors Registration Ordinance

like the guard dogs for the last gate before one could apply for accreditation, and essentially they should be very experienced mediators themselves. In the author's view, the experience required of them should not be less than that expected of the coaches in the training stage. The skills acquired by practice could never be replaced by training courses and therefore assessors should not be chosen based purely on some assessors training courses. The in the practice of mediation should be given a significant weight when deciding whether one could act as an assessor.

Conclusion

It is clearly high time in the development of mediation in Hong Kong and there are different routes open for policy makers. The author's view is that the foundation of any professional practice is integrity, in addition to the knowledge and skills within the profession. For many years much of the training and assessment has been stressed on the technical skills and perhaps it is appropriate time that character requirements should be given due consideration in the accreditation stage.

On the other hand, with the fast development of mediation, there is a kind of specific culture developed in the local mediation practice, such as the expectation of the parties in the mediator's services in support of the skills to reach settlement. It is therefore, in the author's view, advisable to consider the inclusion into the training and a written examination the skills that would commonly be expected in mediation cases in Hong Kong. This would certainly enhance the services provided to the users.

Moreover, one must make sure that those assessors are very experienced mediators. As discussed above, the assessors are there to assess practical skills instead of anything academic. Practical experience should be given a very significant weight when choosing any assessor for ensuring the competence of mediators soon-to-be.

There are many other areas, such as whether accreditation should be on a periodic and continuous basis, the requirement for insurance and the requirement for CPDs. These are areas that obviously would merit more consideration and even public consultation. The author would hope that with the formation of HKMAAL, these areas would be dealt with comprehensively so that mediation practice in Hong Kong could be developed in a more professional and healthy manner.

Mediation Skill Training at Hospital Authority

Dr. David Dai Lok Kwan [1]

The City of Complaints

Hong Kong has been crowned not only a City of Vibrancy, but also a City of Complaints. While the right to complaint is considered a hallmark of democracy where persons are entitled to freedom of expression, complaints in healthcare can be channel to express dissatisfaction for the service receives and offer an opportunity for service improvement.

The Complaint System of Hospital Authority

The Hospital Authority of Hong Kong as the largest public provider of medical services takes a positive approach to complaint management as a two-tier system. Each hospital has a Patient Relations Officer housed with a team of staff as the first tier, supported by senior clinicians in the handling of conflicts and complaints. Complainants who are not satisfied with the first tier reply can appeal to the Public Complaints Committee which is an independent panel directly reporting to the Hospital Authority Board. An analysis of 10502 complaints received by hospitals in HA, in the 5 years period 2007-2011, showed 49%, 24%, 14% and 13% of the complaints to be related to medical services, staff attitude, administrative procedures and others, respectively.

The Heart of Healthcare Complaints: Communication and Mediation

Donaldson et al (1992) analyzed 215 complaints and found 77.9% to involve breakdown in communication. J McMillan (2007) as Commonwealth Ombudsman summarily stated that complaints are a fact of life, provide a window on systemic problems and organizational improvement and that complaint handling is a specialist task.

A specialty is characterized by a body of knowledge and skills which can be taught, learnt, acquired and applied. Based on such premises, we have constructed a "Complaint Management Loop" (fig 1) which can begin with the promotion and learning of conflict resolution skills by the doctor and clinician; this will gradually change the mind-set of the clinician to be less defensive and modify the doctor patient relation and behavior to reduce conflicts. This will also need to be connected to prevailing societal culture which will also need a change from an adversarial to a mutual solution seeking mode in complaint management. The art and practice of mediation serve this very purpose through the training of skills in acknowledging

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1 Dr. David Dai, MBBS(HK) LLB(London) FHKAM, Accredited Mediator, is Chairman of the Central Committee for Complaint Management and Patient Engagement, the Hospital Authority.

emotions, active listening, paraphrasing, summarizing, questioning to reframe, emphasizing common grounds and creating options and breaking impasse. The goal of relationship restoration is particularly important in healthcare disputes because the doctor-patient relationship is built upon rapport and a long term trusting partnership.

The application of mediation skills puts complaint management from a retroactive mode to a proactive mode in forging effective communication at the frontline; this will bring about lesser conflicts, which if skillfully handled and resolved, will dampen the occurrence of serious complaints (Fig 2). True incidents is also emotionally charged at the beginning and mediation skills can do much to alleviate by acknowledging anger and setting the scene for further damage control. The image of the "modern healthcare practitioner" is tainted by fictional scenes, such as working in chaos in an emergency room; practicing unconventional medicine by an eccentric physician; and engaging more in power play than direct patient care in an ivory tower. To us, the modern practitioner is one who is not adequately equipped in professional knowledge and skills, but need to attend to ethical considerations in care and understand the confines of legal constraints. The modern practitioner will also need to face not only the patient, but family members, have dialogue with colleagues and answer to the public under special circumstances such as an adverse event.

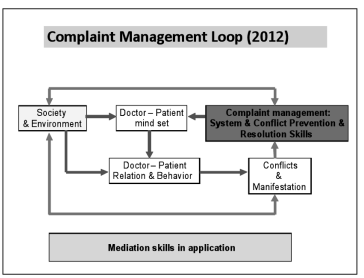

Figure 1

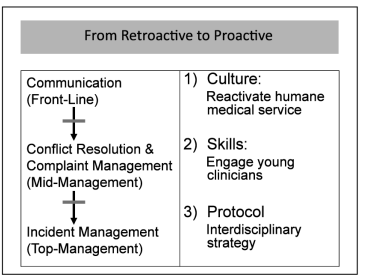

Figure 2

Mediation Skills Applied to Healthcare Conflicts

Central to these endeavors is communication, which necessitates different skills inherent in mediation under different scenarios. The teaching of soft skills, like communication, capitalizes that in mediation training using role plays. We have produced "High Temperature Theatres" featuring conflict scenes in ward setting such as a patient requesting to see a specialist immediately and intimidating the junior doctor; a son refusing to arrange discharge of his mother in hospital, giving rise to conflict because of shortage of bedspace in the hospital. "Frontline talks" delivered by doctors themselves touched on topics including "bad mouthing to patients", informed consent, facing sudden death, reframing an adverse event, and "do not resuscitate" orders. These talks pivot on the importance of communication and active listening.

Since 2010, 180 staff mainly middle-level clinicians and patient relation officers have completed a 40 hours mediation course and some have sought accreditation. Our Annual Signature Event of the Patient Relations and Engagement Department have promoted a mediation culture in healthcare management and in the 2012 event, 800 participants attended the function with mediation demonstrations and sharing of reframing techniques by staff and guest speakers on mediation. In the 2011 and 2012 Annual Hospital Convention, a session on mediation in healthcare practice was part of the programme.

In incident management, a mediating approach is adopted at the forefront, by acknowledging the emotions and feelings of the complainant, we express our sorrowfulness over the occurrence, then we encourage the family members to tell their story while we paraphrase, summarize and reframe towards common interest and grounds to generate options for subsequent actions. All the while, we show our respect for the "victim's" perception and we show our responsibilities in following through the issues. Our goal is to reestablish Trust between the patient, family and the hospital. Active listening, empathy and a heart for restoration of relationship pervade the entire process.

From Complaint Management to Positive Patient Experience

Among the different definitions of "an experience", that it "transforms", "is remembered", "to be shared" and "being a journey" characterize the expression. The patient experience can be seen as a journey and what and how the patients and their significant others perceive as the reality. In 2010, a Patient Satisfaction Survey (PSS) was conducted by the Hospital Authority, School of Public Health of the Chinese University of Hong Kong, with expert input from the Picker Institute of UK, in 5000 discharged patients from 25 acute and extended care hospitals. The questions posed covered the patient's hospital journey from admission, to staying in the ward, leaving the hospital and an overall impression. The results revealed more than 87% of the patients expressed confidence and trust in their doctors and nurses; 80% rated their care as excellent, very good or good; and 88% felt they have been treated with respect and dignity. Low scores however were obtained in the areas of "an opportunity to talk to doctors", "being informed on the side effects of medications", and "a channel to express or complain". The PSS initiative will take a further step to study patient engagement in care and the development of short form patient satisfaction questionnaire. The King's Fund Report (2011) on "What matters to patients?" identified relational dimensions of care to be crucial for patient centred care and satisfaction. These include compassion, empathy and responsiveness, information, communication and education, emotional support, relieving fear and anxiety and involvement of family and friends in the care process (Fig 3). The creation of a positive patient experience rely on the concerted efforts of the individual clinician, the team and hospital leadership in emanating a caring attitude and ambience.

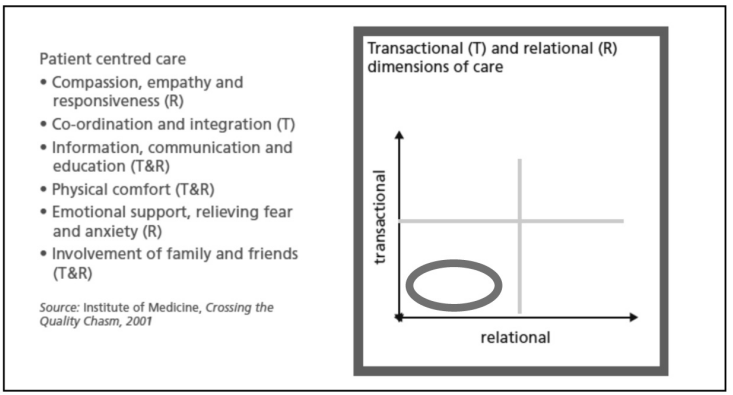

Figure 3

Changing Landscapes and "What is in a name"

However, we have to be sensitive to the evolution in culture of the doctor-patient relationship in a modern society to realize the patient is now more medically literate, more rights oriented, and this equally applies to the doctor and nurse, services are business modeled, treatments and care are highly technical but fragmented and uncoordinated. Professor Joseph Sung in a speech at the Medical Alumni Dinner Talk at the University of Hong Kong, 2011 showed his worries over the changing relationship between physicians and their patients. When physicians call themselves "providers", patients become "consumers". There is a lack of trust and when patients are not satisfied with the product, they will go to the Consumer Council. On the other hand, providers are providing the most "cost saving", most defensive and most convenient way of treatment. This is echoed by an article in the New England Journal of Medicine entitled the "The New Language of Medicine. Yet, the play of words can be insightful. While "***Hospital***ity" is hijacked by the hotel and service industry to emphasize customer relations, we should understand that Hotel, Hostel, Hospital, Hospice have the same latin root, Hospe.

Under similar reasoning, the "custom" in "***Custom***er" can carry different meanings in the "Customs and Excise Department", the "Custom tailor" and the "Customs of a nation". In "What Customers really want" Scott McKain defines customer wants to be a compelling experience, personal focus, reciprocal loyalty, differentiation and coordination of services, and innovation to address varying needs. This resonates with the "What matters to Patients" in the importance of the relational aspects. It should be noted that the Patient Charter spells out the Rights of a patients to medical treatment, information, choices, privacy, complaint and responsibilities; but do not reflect the Wants which needs to be satisfied for a positive patient experience.

Appreciation and Capacity Building towards Positive Patient Experience

From 2007 to 2011, 151571 appreciations have been received by our hospitals over the 5 year period. 38%, 22% and 40% were expressed for our medical services,

staff attitude and others respectively. While a complaint registry reflects the areas of the clinical process for improvement, a digest of appreciations which tremendously outnumber complaints is equally important for uplifting the morale of hospital staff. Political agendas may lie behind the sowing of distrust for the public health system, we must maintain our stands and present a positive perspective of our healthcare delivery. Again Professor Joseph Sung in his Gerald Choa Memorial Lecture, 2001, cautioned the trend young doctors to choose to specialize in **R**adiology, **O**phthalmology, **A**naesthesiology and **D**ermatolgy, namely the ROAD to success, reflected the motivation to be based on promotion prospects, monetary return and quality of life. From a patient relations perspective, the job nature of these specialties involve lesser doctor-patient interactions especially under life death situations which would be frequently encountered in the previously well sought after general medicine and surgery streams. We believe capacity building so that clinicians are equipped with the skills of communication will change the landscape towards positive patient experience. Many standard textbooks on "mastering communication with patients" and "difficult conversations in medicine" places active listening and dealing with conflicts as an important skill to acquire even for a junior medical practitioner. Asher (1972) stated " to give a patient the impression that you could spare him an hour, and yet make him satisfied within five minutes, is an invaluable gift and of much more use than spending half an hour with him during every minute of which he is made to feel he is encroaching on your time." We have constructed a Patient Experience Loop (Fig 4, 5), based on the previous model of the Complaint Management Loop. Again the start off point is the training in mediation and communication skills; this will transform the doctor-patient mindset to one of "Partnership"; a partnering approach will orientate the doctor patient relationship toward that of mutual respect and trust. At the same time, the society must emphasize the importance of harmony.

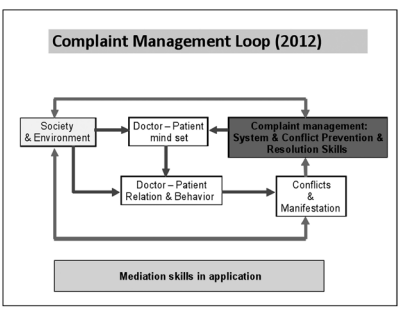

Figure 4

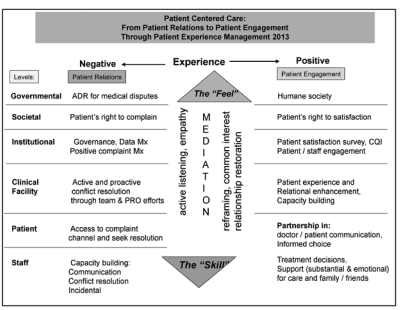

Figure 5

Trust and Partnership

Partner, part and party stems from the same root. They carry the meaning of sharing, associate, companion, player, united in a course and working together. A good doctor is often described as a compassionate doctor; a customer, satisfied; and a

person in a good partnership is described as a trusting partner. Trust is described as "an essential element in the successful delivery of health care" (in Renegotiating Health Care, 2nd edition). Stephen MR Covey in his book "Smart Trust" proposes a model of smart trust. This is similar to the model of Thomas and Kilman quoted in "Resolving Conflicts at Work, revised edition", which achieves collaboration when concern for people and results are exercised with equal fervor. In the healthcare scenario, enhancing medical literacy in patients will change blind trust into smart trust; informed consent, seeking agreement from the patient and consensus from family members in "do not resuscitate" orders belong to this strategy. A junior practitioner is necessarily inexperienced in showing a caring attitude and green in professional knowledge, he will need the assistance from seniors and the team to help him to gain trust from his patients. In complaints, clients are specially analytical in the sequence of events in a perceived adverse event; this is a demonstration of distrust and suspicion. A mediating complaint management approach will gradually and in steps unknot the disputes and reestablish smart trust. Trust, communication and conflict resolution is intertwined as explicated in the book "Conflict 101".

The Framework for Patient experience Management

The Society for Health Care Advocacy, 2012 laid down a framework (Fig 6) for positive patient experience to rest on healthcare management, date management, crisis intervention, mediation/conflict resolution, customer service and excellence, interpersonal communication, measuring patient satisfaction, grievance and complaint management, and sitting on the highest tier of the pyramid is patient rights. This reminds us of the Maslow hierarchy of needs; when applied to healthcare delivery places the hospital management and facilities to meet patient physiological need at the base of the triangle. Clinical effectiveness and safety sits on the next tier. Customer service, compassionate doctor-patient relationship and a partnership model emanates love and belonging. Mutual trust and respect ensures patient satisfaction reflecting esteem. Patient rights, complaint management and mediation to find a solution allows self actualization.

The vertex of the triangle is necessary sharp. We must cap this with Humaneness (Fig 7). And this is the essence of a Positive Patient Experience.

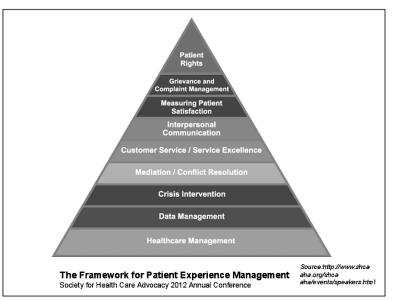

Figure 6

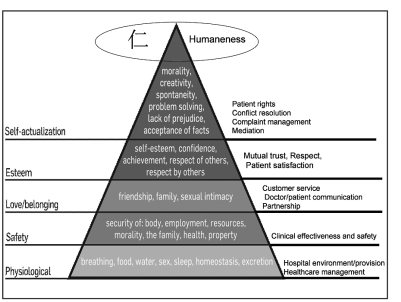

Figure 7

Preparation for Mediation in Different Mediation Schemes

Mr. Chan Bing Woon, SBS, MBE, JP [1]

Introduction

Similar to other jurisdictions which embrace mediation as an effective dispute resolution method, Hong Kong experimented and developed its own mediation practice through various mediation schemes. These schemes help us understand the receptiveness of the potential users to mediation, and how mediation practice may be improved to bring about its desired benefits.

Some examples of these mediation schemes include the Marriage Mediation Counseling Project (1988) of the Hong Kong Catholic Marriage Advisory Council, the Judiciary's Family Mediation Pilot Scheme (2000), the Commercial Mediation Pilot Scheme (2007) and the New Insurance Mediation Pilot Scheme (2008) of Hong Kong Mediation Council, the Lehman Brothers-Related Investment Products Dispute Mediation and Arbitration Scheme (2008) commissioned by the Monetary Authority and recently, the mediation schemes under the Joint Mediation Helpline Office ('JMHO') (2010) and the Financial Dispute Resolution Centre (2012).

Over the years, the evolution of these schemes has marked a step forward to building up a more mature practice in mediation. However, it is noted some of these schemes were more successful than others in terms of settlement rate, (89% vs. 41%). This remarkable difference makes it worthwhile to study the impediments encountered in mediation under these schemes in order to consider what practice model will produce a more promising outcome[2].

Having said that, this article only attempts to summarize the observations of the author at JMHO and offer suggestions as to how mediation can be managed effectively to optimize users' satisfaction and settlement rate. It seeks to provoke thoughts rather than drawing any conclusions.

Joint Mediation Helpline Office Limited

Mediation services providers in Hong Kong rallied their efforts and set up the JMHO in July 2010 to provide a one-stop mediation referral service for parties in

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1 Mr. Chan Bing Woon was Chairman of Joint Mediation Helpline Office Limited (2010-2013).

2 Settlement rate is only one of criteria used to measure the success of a mediation scheme. The author reckons that there are many other factors defining the 'success' of mediation, e.g. parties' satisfaction, information balance, relationship and communication improvement, etc. This article will focus on parties' procedural, emotional and substantive satisfaction.

need of mediation services. As of 31 December 2011, 65 cases have been referred to mediation, 46 cases had been completed of which 23 cases were settled, resulting in a settlement rate of 50%.

Features of Mediation under JMHO

Diverse mediation styles - There are 8 member organizations comprising the JMHO and each organization adopts a different approach to mediators' accreditation. As cases are referred to the member organizations by rotation, it follows that mediation practice under JMHO can be very diverse and mediators may adopt different styles, and sometimes, a different model.

Time constraint – the fee structure of JMHO is formulated in such a way to encourage parties to take time prepare for the substantive mediation by setting a fixed fee for preliminary meetings up to 4 hours. However, parties usually do not go beyond the 4th hour and therefore the mediator has to conduct the substantive mediation within this time constraint.

Mediation Rules – Mediation procedures under JMHO are governed by a set of mediation rules. This is an important feature of institutional mediation as it provides consistency and certainty to users. That said, the rules only provide a general procedural framework and mediators may negotiate their own agreement to mediate with the parties so as to maintain flexibility of mediation.

Parties to Mediation under JMHO

Among the mediations conducted under JMHO from 2010 to 2012, nearly half of cases (46%) involve litigants in person (LIP) whilst the other side is a corporate body. In 38% of the cases, both parties are individuals. Only 16% of the cases involve both parties which are corporate bodies. Hence, the majority of users of JMHO are individuals which have low awareness of mediation and are therefore very reluctant to use the process.

Generally speaking, the 'claiming parties' under JMHO are usually not resourceful. They tend to believe that they have nothing to lose and have high hopes in winning the litigation. The 'paying parties' on the other hand tend to demerit the case of the claiming party. As with their counterparts, they believe they have a strong case and would not consider giving in. Where the 'paying party' is a corporate entity, they may need to preserve a tough reputation so as to avoid opening floodgate of claims.

Representatives of corporate parties also have their own interests. They could not be seen by their superiors as showing weaknesses or being inconsistent with their past decision to reject the case if there is no new evidence or information comes into light. Some of them may also think that if the case proceeds to litigation, they will have a better chance to win and /or passing the buck to external lawyers and the judge if they lose.

Adaptation of mediation plan not the approach

Having to mediate under a specific set of mediation rules and time constraint does not mean a mediator has to cut the process short or to focus on monetary settlement at the expense of parties' procedural and psychological satisfaction. Experience shows that focusing merely on money may not work in cases where expectations are extreme. When parties start exchanging insulting offers and making multiple tiny concessions subsequently, patience and stamina will soon burn out and the negotiation breaks off. However, the author is not suggesting that money is not important to these mediations. It is as essential as in other mediations. The question is whether parties are psychologically prepared to offer and accept money within the ZOPA[3] within the time limit and whether the mediation process is conducive to the delivery of the right offer.

The approach is still what seems to be common sense to mediators - to identify the interest of the parties, how they connect to the dispute and how parties might assess the risks in connection with the dispute in order for parties to depart from aggressive tactics and enter the ZOPA. However, the mediator will need to adjust his plan in order the above is carried out effectively.

Preparation is the key

Imagine a situation: mediation is scheduled to be 4 hours; the Plaintiff is a LIP who cannot put together a good case whilst the Defendant is a company with a big hierarchy. Both parties have diverse interests.[4]

As the substantive mediation session is short, the only occasion the mediator can use to shift the parties' paradigm is the intake session. During intake session, exploration with the parties has to be completed as far as practicable and the issues to be resolved during the substantive mediation session have to be identified.

Preparing the LIP

The LIP needs to be coached to negotiate effectively. He has to understand in order to settle, he needs to do something more than morally justifying their claims. The mediator may assist the LIP to draw up a list of factors which the LIP considers favourable to both parties if the dispute is settled and a list of risk factors if no settlement reached. Sometimes it is necessary for the LIP to take one week or two to think through the risks and adjust his mindset for constructive negotiation. He also needs time to consider options which he can live with. It is important that the LIP has a range of options in mind during the substantive mediation session.

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3 Zone of Possible Agreement

4 This is a common situation in mediation in connection with the Land (Compulsory Sale for Redevelopment) Ordinance ("LCSRO Scheme") where one party is the property developer.

The effect of thorough preparation was seen in one recent case conducted under the LCSRO Scheme: a mediator spent 4 hours in preparing the parties before the substantive mediation which also lasted for 4 hours. The elderly disputant called JMHO after the mediation expressing his appreciation to all staff members, and in particular, he reflected that the mediator had empowered him to participate in the mediation effectively and his feelings were well understood and addressed.

Preparing the Corporate Representatives

On the part of the corporate entity, their representatives must adopt an integrated approach and be flexible to generate options for settlement. Hence, mediators have to go beyond the representatives and reach the decision makers in order to create the necessary room for negotiation. Mediators have to work hard to bring parties into the ZOPA and if business solutions are to be offered, the representatives will need extra time to seek authority and/or getting the relevant business units involved.

Whilst LIPs need to be coached in negotiation, the corporate representatives also need to be coached in making proper acknowledgement towards the other party's feelings and concerns. In another recent case, a party (an individual) reflected after mediation that his impression on the other party (a corporate body) got worse as their representatives used rude language during the mediation. There was no intake or preliminary meeting conducted prior to the substantive mediation and the mediation was terminated after 2 hours.

Mediators' own Preparation

Mediators have to devise a plan which will enable them to keep the time and enlist the interim results they need to achieve before the substantive mediation session, and during joint meetings and caucuses of the substantive mediation session. The plan will also enlist anticipatory impediments which mediators need to handle, including parties' reactions to insulting offers, so as to assist mediators in making conscious choice as to when joint meetings or separate meetings should be used. It is sometimes tempting to separate parties early on as the mediator may exert more control over the process but shuttle mediation will also reduce the opportunity for parties to exchange information and make acknowledgement.

A 'Prototype' calling for Further Development

The above case is but one possible scenario which may occur in JMHO's mediation. Some cases may involve more complicated personal or commercial issues. From the author's observations, however, an adaptation of the mediation plan along the line described above should be able to assist mediators to better facilitate settlement under time constraint. This plan, however, is far from being the best practice. It is yet to be tested and refined in order to be applicable across the board. By putting forward this 'prototype' the author would like to invite comments from other experienced mediators so that this prototype can be developed further into a good practice for the mediation community.

Price Cutting – in the Context of the Provision of Mediation Services

Mr. IU Ting-kwok [1]

Hong Kong is a free market and price control is an extremely sensitive issue. While some may say "let the market determine the price", others may express concern that price cutting may breed problems which are detrimental to the development of a new profession, which is now undeniably part of our legal system. Without the benefit of any survey results, a mediator who is also a solicitor would like to share his observations on price cutting in mediation.

One does not need to be an economist or a marketing guru to understand what price cutting is or why it tends to attract customers. While no one could tell with certainty why any given service provider cuts its prices below that of its peers, some of the usual reasons are:-

1) increasing market share with the intention of becoming the market leader and eventually eliminating its competitors;
2) promoting its services with a view to obtaining market share;
3) boosting turnover with a view to increasing its income; and/or
4) attracting users to its other services which have higher profit margins.

To facilitate an examination of whether cost cutting by mediators might serve any of these purposes, we should first take a look at what kind of service a mediator provides. A mediator provides professional services to facilitate the disputants and, where applicable, their legal representatives to conduct negotiations. He must not have an interest in the outcome of the negotiations; impartiality and equal treatment of the disputants is paramount. Thus, charging contingent fees is prohibited. In practice, most mediators charge either on a lump sum basis or on a time basis, the latter of which may or may not be subject to a ceiling. Some mediation schemes have a recommended scale of charges, typically by reference to the amount in dispute. In any event, mediators in Hong Kong are free to work out their fees with the disputants or their legal representatives. It is not regarded as unprofessional if a mediator is prepared to do a mediation on a pro bono basis or for a nominal fee.

Anyone who has any practical knowledge of mediation knows that the substantive services rendered by a mediator require the mediator's complete personal involvement and are not susceptible to being delegated to others. Unlike a senior lawyer, a mediator

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could not perform a merely supervisory role and expect his assistants or juniors to do the "ground work" so as to enable him to handle a larger number of cases. This is because with the knowledge gained from reading the papers the mediator lays the foundation for a productive mediation through her early interaction with the disputants in pre-mediation meetings. In this way, the mediator builds trust with the disputants – and their lawyers, if any - ahead of the mediation proceedings and applies knowledge gained by interfacing with the parties to adapt the conduct of the mediation to their particular needs and circumstances. With the requirement of confidentiality, and taking into account the general imperative to keep costs to a minimum, mediators in Hong Kong seldom have an assistant mediator or a co-mediator. Hence, a seasoned practising mediator usually finds that she does not have enough time to take on more cases. If a mediator has fixed a date for a mediation, it would be very difficult to squeeze in other appointments as the parties to the mediation, including the mediator, would hardly know beforehand how long the mediation would last and when it would be completed.

Therefore, the necessity for a mediator to be personally involved in each of the mediation cases from first approach, through all preparatory stages until conclusion of the mediation dictates that active mediators generally charge higher fees in order to sustain the economic viability of their practice. The very personal nature of mediation services and a mediator's unique relationship with the disputants tend to suggest that mediators with an active practice could and should command a higher fee.

What about newly accredited mediators? There is no denying that it is now more difficult to get the first appointment. Is price cutting a way out? Probably not. It is not but one should be cautious to impose any control on price cutting. If one is willing to conduct a mediation for a nominal fee or free of charge, one may in the short run have a better chance to secure an appointment as a mediator. For example, the "Entry Form- List of Accredited Mediator for the Building Management Cases in the Lands Tribunal" includes a question asking the participating mediators how many pro bono cases they are willing to take. Many newly accredited or junior mediators imagine that if they could gain a reputation through the successful handling of their first few appointments, they would then be likely to receive more appointments then increase their charges. Whilst it is probably true that – despite higher rates of charge - reputed mediators tend to be more in demand, and to be more likely to be recommended by lawyers to disputants who have no means of assessing which mediators are the most proficient, it is probably equally true that inexperienced mediators may not be in demand no matter how little they charge. Inexperienced mediators who have failed to satisfy the disputants in mediations they have conducted, which satisfaction is not invariably conditional upon the end result – as opposed to the process - of the mediation, may find that word gets around that they are not preferred for appointment. In those circumstances, the level of charges is not an issue anymore.

Giving the best preparation for the first (and each) mediation and working hard to make the parties and their legal representatives satisfied with the process is the ultimate marketing strategy that should be adopted by all mediators, whether junior or otherwise.

Junior solicitors may find it more difficult to use price cutting to establish a mediation practice because their role in the firm is mainly to work on files and fulfill the billing targets. As such, providing mediation services at a reduced rate would probably not be considered by the firm's management as a cost effective use of their time. Barristers are of course entitled to practise mediation in addition to their legal practice. The caution from a mediation practitioner and mediation-disciple is that while mediation is an efficient and effective alternative dispute resolution process to resolve disputes, our system expects the young (in terms of seniority rather than age) barristers, like their predecessors, to play a more active part in the jurisprudence of the system and they should not be merely process managers. It is understandable that barristers (like all other professionals) must earn sufficiently to maintain their practice and that some in the initial stages of their career may consider that they might attract better paid mediations in future if they agree to accept some appointments at an excessively reduced rate. The dilemma for such barristers, however, is that time spent in facilitating mediations is time not spent on developing their skills as an advocate for the party they represent in legal proceedings.

So, should lawyer mediators seek to use price cutting of mediation charges as a means to attract the service users to use their other legal services? Experience suggests that this would not be a sustainable business model. One would not be surprised that some law firms might, though reluctantly, maintain a low profit margin conveyancing practice in order to keep their clients so that these clients would not turn to other law firms for other legal services. However, as mentioned already, unlike conveyancing works, mediation services are hardly delegable. Besides and more importantly, solicitors referring a case to another solicitor for mediation have every reason to expect that the mediator would not in any way entice their clients away. Any lawyer mediator who gained a reputation for "stealing" clients from those instructing would soon find that they would not continue to be recommended by other lawyers for appointment in any mediation. In fact, many seasoned mediators have shared their experience that if a mediator has not managed to gain the trust of the legal representatives of the disputants, it is unlikely that the parties would be satisfied with the process. Therefore, solicitors who practise as mediators should not expect that their mediation practice would bring demand from the disputants for their other legal services. While there is no survey on how solicitors perceive a barrister who is known to be a price cutting mediator, barristers must realize that their professional "clients" know very well that the mediator's skills are not the same as advocacy skills and a practical understanding of the law. Solicitors are able to distinguish who are the better mediators and who are the better advocates. Further, it is unlikely that the same professional "clients" would allow the same barrister to

charge the "usual reasonable" rate of fees when it comes to non-mediation works. Price cutting is not restricted to mediation practice.

In conclusion, the level of charges are seen as a reflection of the fact that active lawyer mediators dedicate a substantial portion of their time to working personally on the cases that they have been appointed to mediate. Whereas newly qualified mediators might attract appointment by offering their services for low fees, this course by no means assures them of developing an active mediation practice. Mediators with passion and commitment, who always utilize their skills – impartially but considerately - to facilitate mediations even in the most difficult cases, will gain recognition by the high standards of the service they provide. Competent mediators will be able to enjoy a busy practice without price cutting.

At the end of the day, supply and demand will determine the level of fees that competent mediators may charge. Those mediators who, for whatever reason, choose to offer their services for a nominal fee or for free do not thereby occasion any adverse impact on the profession; nor do they hinder in any way the development of high standards of mediation in Hong Kong. Therefore, no justification is seen for imposing any restrictions on the level of charges sought by mediators.

The foregoing is a lawyer mediator's perspectives on price cutting and it has not discussed the charging practices of non-lawyer mediators who could be non-government organizations offering mediation services or individual practitioners.

亞拉丁神燈的啟示

胡子祥 [1]

有一個家傳戶曉的神話故事，講述擁有神燈的人，當他遇上困難時，可以依仗燈神的神力，隨心所欲，只要向燈神提出要求，都會如願以償，難題都可以獲得解決。雖然故事描述神燈擁有非凡威力，但故事的主人翁亞拉丁，仍要依靠著個人的智慧、才幹和不屈不撓的精神，來完成差事。

故事裡的神燈確實有許多優點，除了擁有能人所不能的法力之外，更竭力地為其主人效勞，運用無邊的法力，令其主人得償所願，而最為主人所滿意的，就是這燈神，在施展神力之後，會自動消失，而在施展法力的時候，既不會問長問短，又不會諸般推搪，總之，燈神會盡顯忠心不異的服務態度，使其主人對神燈絕無一點猜忌。而最理想者，燈神的神力用之不竭，當主人的，又毋須有任何的承擔。當主人有所要求之時，只要在燈邊輕擦兩下，燈神務必從神燈裡冒出，用最忠誠、專業及保密的態度，為其主人效力。

如果每人身邊都有一盞神燈的話，那麼事無大小，都可以迎刃而解，而人與人之間，自然不會產生那麼多的紛爭了。

雖然亞拉丁神燈只是神話，屬子虛烏有之物，但當人們遇到不能容易解決的困難時，它正正就是人們所渴望得到依靠的力量，希望得到有力的幫忙。

神燈雖然擁有那麼大的力量，我們還需認清一點，這神話故事最終都是需要這位主人自己去處理問題，而燈神只是按其要求，給予幫助而已。舉例來說，若燈神應要求而給了主人一筆可觀的財富，到最後都是由主人使用這筆財富，而如何使用，燈神再幫不上什麼的忙了。

這故事可能會令我們產生一些遐想，若然我們遇到困難時，身邊有一盞神燈做後盾，在處理一些阻滯事件之時，當然是無往而不利了。但事實上，神燈並不存在，若然真的存在，恐怕早已被人收藏起來，普羅大眾那有機會享受這麼優質的服務！

那麼，若普羅大眾遇上困難的時候，他們可有依靠嗎？他們身邊可有人幫忙嗎？我想那裡必然會有人幫忙的，只是那願意給予幫忙的人，卻不知道誰在需要幫忙而已。所以當事人必須要提出要求，就像亞拉丁一樣，當他需要燈神幫忙的時候，都要先輕擦神燈幾下，請出燈神，然後向它講出所要幫忙的事。

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其實我們身邊有許多關心我們的人，他們都時時刻刻在樂意給予幫忙，給予提醒，但是在每次的提點，我們都未必可以聽得入耳，有時會覺得他們喋喋不休；又或者，那些提點我們的人，他對事情並不清楚，難作軍師；有時還會覺得，每事都要人提點，反映自己屬一無是處，實在不甘心矮化了自己。

然而，人總會有固執的時候，以至矛塞未能頓開，不其然鑽到牛角尖也不察覺，對自己一廂情願的判斷，一意孤行，就像蠻牛般的亂闖亂撞，弄得一團糟，最後，對錯誤的決定，自怨自艾，還會抱怨身邊的人，為何不及早提醒自己的呢？

其實，旁觀者清，當局者迷，每一個人都需要在適當的時候，得到提點的，以免做錯決定。對那些提點我們的人，從心底裡都會有些要求，希望他們都具備以下的條件：-

1. 在提點的時候，不要婆婆媽媽，最重要一針見血，簡潔易明，字字珠璣；若是出於博學多才之士的口，則更為理想。
2. 當提點的時候，要多照顧我的感受，切勿諸多挑剔，有損我的尊嚴。
3. 在提點的時候，切勿「妹仔大過主人婆」，切忌指指點點，應該尊重當事人有絕對的決定權。
4. 切忌日後舊事重提，更不能在當事人未有同意之前，將事情向他人披露。
5. 在提點的時候，皆以當事人的權益為重，不可以籍提點之名，而犧牲了當事人的權益。
6. 提點之後，他會功成身退，就像燈神一樣，當施法之後，便會返回神燈，自動消失。

看來這些要求，像是天方夜談，像神燈一樣，只是神話，就算真的存在，恐怕也是鳳毛麟角，少之又少，要有幸才會遇到。然而在我們現時生活的社會裡，具備這些條件的人，確實存在，他們就是調解員，而且為數不少，他們都具備以上的特質。

調解員需要接受專業訓練，接受考核，成績達標之後，始能成為認可調解員，始能接受及處理調解的差事。只要爭執的雙方都願意委任同一位調解員，調解紛爭的服務便可以進行。

在推廣調解制度時，我們都可以列舉出調解制度的許多優點，一方面可以和平解決問題，另一方面又可以達至雙贏，建立和諧，而神燈的優點，調解制度亦不遑多樣，差不多有齊，但為什麼至今，普羅大眾仍沒有普遍地使用調解制度，來解決糾紛呢？

俗語有云：「有孽自然香，唔使東風揚」，只要實用、有價值而又名不虛傳的話，普羅大眾自然會爭相使用。然而調解制度若能及早深入民心，又

能做到有要求而又可以唾手可得的景況，何樂而不為？若要做到成效，便要有賴廣泛而有效的宣傳活動，使普羅大眾加深瞭解調解制度的好處，使調解制度及早成為普羅大眾身邊的一盞神燈。因此，社會上，應有一些常設的宣傳渠道，深入社會每一個角落，令市民大眾不斷接受到調解的訊息。

對一些較為保守的市民而言，他們不希望自己的麻煩事會打擾到其他人，尤其那些素未謀面的陌生人。他們仍然抱著幻想，希望糾紛會隨著時間的過去，而得到妥善及和平的解決；然而，當糾紛的結越纏越緊的時候，恐怕經已錯失了及早，並可以和平解決糾紛的機會。那麼，及早要求調解的幫助，才是有效解決糾紛的不二法門。

其實，調解制度比起神燈，有一處較為優勝的地方，燈神只服務唯一主人，而調解員卻沒有固定的服務對象，而他的服務對象，可以與這位調解員素未謀面。那麼，市民大眾遇到糾紛時，只需要向提供調解服務的機構提出， 雙方共同邀請調解員提供服務，便可以及早解決紛爭。

當市民遇到困難時，便要向人提出，好讓別人幫助　。例如：當身體不適時，可到診所、醫院求醫；需要解決生活困難時，可以向社工求援；受到不公平對待時，可以向有關部門求助；但當遇到糾紛時，又可以向那些組織傾訴呢？從哪些組織，才可以得到調解服務呢？所以，社會上不但要有常設的宣傳渠道之外，還要有一個完整的配套服務，在推廣的同時，也能聆聽當事人的傾訴，與他一同分享所面對的困難，表現出真摯的關懷，小心講解調解的過程，交待當事人在調解過程中的權利與義務，若他同意採用調解方法去解決爭端的話，便要協助他，接觸糾紛的另一方，作出一些有效的溝通安排，將調解的訊息也灌輸給對方，令他也明白在糾紛的事情上，並不一定要對立，還可以成為解決問題的伙伴，令對方也同意參與調解。這項任務當然富有挑戰性，而這環節更需要推廣調解的人士勇於克服。當雙方同意參與調解的話，便可以因應糾紛事件的性質，複雜性而作出相應的轉介，由調解組織提供，按情妥善處理。

雖然調解服務的好處極多，但要先得到市民的信賴，始能發揮它的威力，無奈調解制度就像燈神一樣，只能提供協助，對解決問題，都只能依仗當事人的智慧，用承擔的態度才能完成，因此，我們並不能保證，調解服務一定可以達到預期的目標或效果，而且沒法抹煞有失敗的可能。那麼，普羅大眾或有疑慮，望而卻步，恐怕調解失敗之後，「賠了夫人又折兵」，反而更為誤事。基於這些誤解，在推廣調解服務的時候，要有耐性，要小心妥善解釋調解過程的每一個環節，而最重要者，要灌輸解決問題的態度，鼓勵當事人在平衡得失的時候，要著眼未來，謀求雙贏。在推廣人才方面，推廣調解服務的朋友，本身也應對調解服務有深入、透徹的認識和瞭解，在推廣之時，要有策劃和有系統地推行。因此，在培訓調解員的同時，也應培訓大量「調解大使」，執行推廣的職責，配合調解制度的推行。

當市民考慮使用調解服務的時候，他們也憂慮如何委任調解員，當事人可能憂慮「成也蕭何，敗也蕭何」，恐怕所託非人，所以在挑選合適的調解員時，當然要多下一番工夫，在推廣調解的工作上，增加不少阻力。而在現實的世界裡面，沒有一位你委任的調解員，會是你認識的，因為你所認識的那位調解員，對方會憂慮，那裡會有利益衝突的存在，而不會謬謬然同意委任的。那麼，若雙方都同意委任一位獨立的第三者，為調解員的話，這個關卡，當然不應成為障礙吧。事雖如此，調解員的質素又怎可以置之不理？當事人對調解員在「忠」、「公」、「能」方面都有極高的要求。在這個問題上，筆者認為政府責無旁貸，應該推出政策，在法例及監管方面，都要做到令市民大眾可以放心，就像市民出外乘搭的士一樣，只管享受服務，而懶管其他問題，因為市民對政府，在的士行業的監管上，已經抱有信心。

在調解過程當中，當事人可能感覺到患得患失，這也許反映了當事人對調解制度，沒有百分百的信心；又或者他對這件糾紛個案，意識到自己抱著不切實際的期望；又或者他們心裡浮現出與虎謀皮的憂慮。雖然這些都是人之常情，但卻會大大減低調解的成效。

筆者相信，這些患得患失的心情，是可以透過適當的開導而得到消除的，只要開導他們抱有一個正確的處理態度，去面對整個調解過程，便能改善。例如：要調節心態，抱著「心寬路自然闊」的信念；並不聚焦於是非對錯，謀求雙贏；抱著成事在我手的信心，有胸襟的氣量，聆聽對方對這宗糾紛的觀點，亦有氣量去接受不同的意見；亦要積極參與制定解決糾紛的方案等等。

而這些開導，並不是在市民當遇到糾紛的時候，才急忙地，用填鴨式的方法灌輸給他們。反之，應該透過日常的調解推廣活動中，以潛移默化的方式，灌輸給市民，令普羅大眾及早地，萌生和平解決糾紛的心態，基於這心態，調解制度才得以有效地推行，令社會得到益處。

綜觀現時的調解推廣活動，普遍採取的策略，仍然停留在向市民灌輸調解制度的好處，而忽略了針對個別市民的切實需要。現時市民出現了無所適從的感覺，一方面不知道，當他遇上糾紛的時候，何時進行調解，才是最佳而又最有效的時機，另一方面，以他們面對的問題而言，他們應該向誰提出幫助的要求？這全因為這社會，正正缺乏了一個適合普羅大眾諮詢的渠道。

政府現時正大力推廣調解制度，協助市民用更快捷，更有效，更得益的方法，去解決民事糾紛，政府在推廣調解制度的同時，在培訓合資格的調解員的同時，亦應提出誘因，鼓勵社區人士，或者自願組織，推行一些較貼合市民個別要求的服務，例如在樓宇管理方面，加入調解的元素，又或者可以建立及組織一些調解互助機構等等，鼓勵他們有組織地、有策劃地和

有系統地，在社會每一個角落推行；與此同時，這些組織亦應有職能，接受市民的查詢，甚至可以應付一些簡單的個案。

政府方面，應該積極進行立法，將調解制度妥善地，而具體地規範，得到有效的監管；另外要統一調解員的質素，無論在知識培訓方面，考核方面，抑或操守方面，都要有明確的指引及規範，令普羅大眾對整套調解制度產生信任，在使用調解服務時更具信心。

Current Trends and Challenges of Mediation in Hong Kong with Particular Emphasis on Complaints Handling Mechanism and Disciplinary Framework and Enforcement

Ir. Dr. Raymond Leung H. M. [1]

Various mediation organizations in Hong Kong have their own individual Complaints Handling Mechanism within its own disciplinary framework and enforcement. They also have their own sets of Mediation Rules and Code of Ethics.

Many Hong Kong organizations have also adopted the Mediation Code promoted by the HKSAR government. Hong Kong Mediation Centre has its own Mediator Rules and Code of Ethics.[2] Law Society has its Mediation Rules in addition to adopting the government Mediation Code for its members.[3] Hong Kong International Arbitration Centre in consultation with Hong Kong Mediation Council also has its own set of Mediation Rules.[4] In addition, it has the General Ethical Code[5] and Rules for the Handling of Complaints against an Accredited Mediator[6]which was adopted by the Council of the HKIAC on 28 July 2006. The Hong Kong Bar Association is required to promote high standards of conduct and ethics. Any barrister who falls below those standards may be liable to disciplinary sanction.

Complaints Handling Mechanism

Generally speaking, all complaints are reported to the Secretariat of the concerned organization. It then refers to a special Disciplinary Committee. The Committee generally has the power to do investigation on the complaint. Recommendations are made to the Council for determination which may contain proposed actions to be taken. The Bar Association separates the investigation and disciplinary actions to be taken. The Investigation Committee makes recommendations to the Barristers Disciplinary Tribunal if misconducts for determination are involved or to the Chairman for other cases.

Hong Kong Mediation Centre has its own Disciplinary Committee. It is empowered to investigate and decide on any complaints made against any members on matters

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2 http://www.mediationcentre.org.hk/prorules_eng.html

3 http://www.hklawsoc.org.hk/pub_e/mas/doc/The_Hong_Kong_Mediation_Code.pdf

4 http://hkiac.org/index.php/en/mediation-rules

5 http://hkiac.org/index.php/en/mediation-rules/general-ethical-code

6 http://hkiac.org/index.php/en/mediation-rules/rules-for-the-handling-of-complaints-against-an-accredited-mediator

concerning the professional conduct of the member. It also recommends appropriate penalties if any for Council's consideration. The Committee also operates under a set of Rules in Handling Complaints and Disciplinary Matters. This set of Rules covers how the Disciplinary Committee is being formed, authority to investigate, procedure for handling complaints, penalties and sanctions, and appeal.

Most organizations have similar process in the handling of complaints.

Examples of Complaints

Complaint cases involve: Overcharging of preparation work by the mediator, lack of coordination work by the mediator, conflict of interest of the mediator, refund of deposit by the mediator etc. With the increase in caseload for mediation, more and more complaints of different nature will surface and all organizations will need to address them individually with due care and fairness. Some complaints may be mediate and resolve swiftly but others may require detail investigation.

Disciplinary Framework and Enforcement

When a complaint is filed with the Secretariat, a committee will generally be set up by the Council of the organization subject to the sereneness of the complaint. The committee generally has the authority to handle and investigate complaint made against members of the organization. The committee will make recommendation to the Council for certain penalties and sanctions against members who have been found guilty of professional misconduct and/or breach of the Mediators Code or any rules and regulations made by the Council or Code of Ethics.

Such a committee usually comprises not less than three persons appointed by the Council. A copy of the complaint will be sent to the Respondent requesting reply within 14 days and asking to comment on the complaint. The time limit may be extended at the discretion of the Disciplinary Committee.

If the complaint is found unsubstantiated by the Disciplinary Committee, the Secretariat will notify the Complainant accordingly. On the contrary, the Disciplinary Committee may have a hearing requiring both the Complainant and the Respondent to attend to answer questions. The Committee shall have full power to decide on the rules in conducting the hearing.

If the complaint is substantiated, the Committee can make recommendation to the Council:

1) Letter of warning is to be issued.
2) Recommendation to Council for suspension of membership with or without terms
3) Recommendation to Council for termination of membership.

The Council will make final decision on the course of action.

Respondent shall have a right to appeal within 30 days from the date of notice. The President/Chairman shall decide on the appeal which shall be conclusive and final or not. Peaceful negotiation and conciliation are highly recommended to resolve matters. The entire process must be kept confidential.

The Way Forward

An impartial independent committee is often needed to do the impartial investigation and make necessary recommendation to the concerned Council for appropriate action taken against the Member if the complaint is found to be substantiated.

It is therefore recommended that all complaints will be handled by a Disciplinary Committee by assigning them to an Investigation Task Force comprising at least three members, including a chairman, for investigations, and the results of the investigations shall then be put before the Disciplinary Committee comprising another three members, including a chairman, for deciding on the merits of the complaint and making recommendations for the appropriate penalties and sanctions on the basis of the findings of the Investigation Task Force to the Council for final decision. The separation of the two roles will eliminate any subjectivity made during the investigation. I think that it is dangerous, if not difficult, to stipulate objective benchmarks for each complaint case in terms of how serious it is except by references to different levels of seriousness, which may still be faulted for being subjective. The aforesaid procedure, having separate task forces for investigation and disciplinary decisions, would address the concern for absolute objectivity. Even for relatively less serious complaints, the above procedure would require not too much time by the two separate task forces, and may not result in inefficiencies.

The decisions of the Disciplinary Committee should then report the same to the Council. As the Council is vested with the decision making powers of the institution/organization, the decision of the Council, even if different from that of the Disciplinary Committee, shall prevail. The Council will need to act with due care and the greatest degree of fairness. This may be the way forward for our mediation community. I hope this proposal will receive favorable responses from the mediation community and I welcome further comments from all on this subject.

Disciplinary Framework And Enforcement

Lam Wai Ying Christine[1]

Introduction

In Hong Kong, accredited mediators are subject to the disciplinary regime of their respective accrediting bodies. This paper serves to study the disciplinary framework and enforcement of two accrediting bodies – The Hong Kong International Arbitration Centre and The Law Society of Hong Kong.

Hong Kong International Arbitration Centre

The Hong Kong International Arbitration Centre ("HKIAC") adopts a set of rules for handling complaints against an accredited mediator – Rules for the Handling of Complaints Against an Accredited Mediator ("The HKIAC's Rules for Handling Complaints"). This set of rules was adopted by HKIAC on 28th of July 2006.

Two sets of rules are referred to by HKIAC when deciding whether a mediator's conduct is considered to be proper or not - the General Ethical Code and the Guidelines for Professional Practice of Family Mediators of the Hong Kong Mediation Council. It is noted that though the Hong Kong Mediation Code[2] is posted on the website of HKIAC under the section of Mediation Rules, no reference was made to it in the HKIAC's Rules for Handling Complaints.

HKIAC's Procedures for Handling Complaints

Once a written complaint is filed with the Secretary-General of HKIAC, the mediator being complained of shall be notified in writing that a complaint has been made. The mediator is then invited to submit his response to the complaints within 21 days thereof.

The Chairman of the Mediation Accreditation Committee (MAC) of HKIAC shall convene a meeting in order to review and investigate the complaint, to determine whether in its view there is a prima facie case of improper conduct to answer. If there is a prima facie case of improper conduct to answer, the MAC shall instruct the Secretary-General to write to both the mediator and the complainant, informing them of the findings and advise them that the matter is being referred to a Complaint Determination Committee (CDC).

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1 Solicitor of the Hong Kong Special Administrative Region; Accredited Mediator on the panels of the Law Society of Hong Kong and the Hong Kong International Arbitration Centre

2 The Hong Kong Mediation Code was published by the Working Group on Mediation, established by the Department of Justice, Hong Kong Special Administrative Region

CDC is appointed by the Chairman of the MAC according to the composition provided under the Rules. A hearing shall take place unless agreed otherwise among the CDC, the complainant and the mediator. The CDC will then decide whether the mediator's conduct in the mediation in question is to be considered as improper.

If it is concluded that there is improper conduct on the part of the mediator, the Chairman of the MAC shall convene a meeting of the MAC and present the findings of the CDC. The MAC shall order the Secretary-General to remove the mediator from all the panels on which the name of the mediator in question appears.

According to The HKIAC's Rules for Handling Complaints, an "Improper Conduct" is an act or behavior, including without limitation an act of omission, on the part of an Accredited Mediator which a reasonable and objective person, knowing the facts of the matter, would consider to:

- be such a serious breach of the Code; and/or
- so seriously bring the Accredited Mediator's professional abilities and/or personal temperament into question; and/or
- so seriously bring discredit upon and/or damage to the HKIAC, the MAC and/or the panels

To constitute a finding of improper conduct, the misbehavior of the mediator must be so serious that it will bring disrepute to HKIAC, the MAC and/or the panels. The threshold is high and there is only one single kind of penalty, which is the removal of the mediator's name from all the panels[3] to which the mediator in question is accredited. The CDC has no power to award costs penalty.

The Law Society of Hong Kong

The Hong Kong Mediation Code was adopted by the Law Society of Hong Kong ("The Law Society") as the standard of conduct expected from the mediators on their panels. By way of Circular 11-272(PA), all members on the Law Society General and Family Mediators Panels are to be bound by the Hong Kong Mediation Code in the course of their mediation practice. Breaches of the said code may result in disciplinary action taken against the solicitor-mediator.

Looking more closely at the General Ethical Code adopted by HKIAC and the Hong Kong Mediation Code adopted by the Law Society, the two sets of codes are very similar save in the following aspects:

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3 The three panels of mediators maintained by Hong Kong International Arbitration Centre are, namely, General Mediators, Family Mediators and Family Supervisors

- Pursuant to paragraph 3(b) of The Hong Kong Mediation Code, the Mediator shall ensure that an Agreement to Mediate has been signed by the mediating parties prior to the commencement of substantive negotiations between the parties, whereas in the General Ethical Code, there is no such a requirement.

- It is stated under paragraph B4 of the General Ethical Code that "… If the mediator believes that participants are unable or unwilling to participate effectively in the mediation process, the mediator should suspend or terminate the mediation." The word "should" is used, clearly stipulating that the mediator is under an obligation to suspend or terminate the mediation if he/she considers that the parties are not participating effectively. Whereas under paragraph 5 of the Hong Kong Mediation Code, a greater discretionary power is granted to the mediator by adopting the word "can" instead of "should": "…If the Mediator believes that a party is unable or unwilling to participate effectively in the mediation process, the Mediator can suspend or terminate the mediation."

- The Hong Kong Mediation Code specifies the standard of conduct expected concerning the advertising/promotion of the Mediator's services under paragraph 11– "The Mediator may promote his/her practice, but shall do so in a professional, truthful and dignified manner". This issue is not dealt with in the General Ethical Code.

Disciplinary Procedure Adopted by the Law Society of Hong Kong

Needless to say, members of the Law Society are subject to "The Hong Kong Solicitors' Guide to Professional Conduct" ("the Guide"), in particular the chapter on disciplinary proceedings (Chapter 16), however, the Guide makes very little reference to mediation. There is no express reference to any ethical code concerning mediation in the Guide. Could it therefore be taken that the Hong Kong Mediation Code shall be the only set of ethical code to be relied on by the Law Society of Hong Kong?

Commentary 3 to paragraph 1.03 – Sources (in Chapter 1 – Principles of Professional Conduct) states: "However, ethical standards and obligations stand apart from the legal sources. They have been established by lawyers as standards by which they will be bound. Some ethical standards and obligations exceed the requirements of law". This is a point which may invite some more thoughts. Mediation is a relatively new area of practice for solicitors and it seems that the related ethical standards are yet to be established for lawyers to be bound. In the circumstances, would it be in the interest of the public and the mediators that the standard be governed by an express reference to a more detailed set of printed ethical code?

Upon completion of the inquiry and investigation, the Solicitors Disciplinary Tribunal shall make such order as it thinks fit, including those under Section 10 of the Legal Practitioners Ordinance, Cap 159. If a solicitor-mediator is to be suspended from practice for a specified period, would it be reasonable for one to expect that the "practice" will only be limited to those work where the solicitor-mediator will act as a mediator? This point is not clearly defined.

Observation

It is observed that there is no unified ethical requirement for mediators under different panels and mediators in different panels are subject to different disciplinary framework and enforcement regimes. In view of the recent development of mediation, should a unified ethical code be introduced and subscribed by all the practicing mediators in Hong Kong? A further question is whether the unified set of ethical code is to be administered by one independent body.

Conclusion

With the establishment of Hong Kong Mediation Accreditation Association Limited ("HKMAAL") in August 2012, it is expected that the accreditation of all mediators in Hong Kong will be subject to the same standard. It is reasonably expected that in the long run, all practicing mediators will be subject to the same set of ethical code, and indeed this is the reason behind the introduction of the Hong Kong Mediation Code. It is suggested that for the sake of the benefit of the public, disciplinary actions in connection with mediators' practice should be administered by a single body and by reference to the same standard as well.

Complaints Handling Mechanism and Disciplinary Framework in Hong Kong (Joint Mediation Helpline Office) and the Regions (The Chartered Institute of Arbitrators)

Mr. Yeung Man Sing [1]

In the course of a mediation process, it may have some misgivings among parties and mediator(s). Parties may sometimes be dissatisfied with the conduct of a mediator and therefore, lodge complaints to an appointing body. A mediation service provider as an appointing body may have established procedures in handling these complaints which may lead to disciplinary proceedings.

In Hong Kong, mediation service providers may have their own accreditation standards for mediators in establishing their own panels of mediators. Some of these service providers are professional bodies. They have their own ethical standard particularly for their members in carrying out their own primary profession, but not specifically on the conduct of a mediator.

In 2010, Hong Kong Mediation Code ("the Code")[2] was promulgated by the Working Group on Mediation of the Department of Justice setting out some guidance, which encourages the mediation service providers to adopt. Most of the professional bodies like the Hong Kong International Arbitration Centre ("HKIAC")-HK Mediation Council and The Chartered Institute of Arbitrator (East Asia Branch) have incorporated such code in their template agreement to mediate for use by their panel mediators.

Joint Mediation Helpline Office Limited

In 2011, Joint Mediation Helpline Office Limited ("JMHO**"**) was jointly founded by the following organizations: Chartered Institute of Arbitrators (East Asia Branch); Hong Kong Bar Association; Hong Kong Institute of Arbitrators; Hong Kong Institute of Architects; Hong Kong Institute of Surveyors; Hong Kong Mediation Centre; HKIAC - Hong Kong Mediation Council; and Law Society of Hong Kong. These organizations are also known as JMHO's participating service providers ("PSP**"**).

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1 Mr. Yeung Man Sing, FHKIS, FRICS, FCIArb Chartered Arbitrator & Accredited Mediator/Adjudicator, is a partner of Li & Partners, solicitors practicing as lawyer in Hong Kong in general commercial disputes with a particular emphasis on construction & engineering arbitration and litigation. He was once a director of Joint Mediation Helpline Office Ltd. and is now a member of the DOJ Accreditation Sub-committee of Mediation. He is currently the Vice-Chairman of HKIAC-Hong Kong Mediation Council and Chairman of the Chartered Institute of Arbitrators (East Asia Branch).

2 http://www.jointmediationhelpline.org.hk/pdf/pdf4.pdf

The objectives of JMHO are to provide assistance on a non-profit making basis to parties seeking to settle disputes by mediation; to promote and advance mediation as a dispute resolution mechanism and provide mediator referral services to parties to a dispute requesting mediation; and to enhance the knowledge and upgrade skills in dispute resolution in and among professionals, businessmen and other users of mediation services, and to promote the effective use of mediation in resolving local and international disputes.

As part of the function of JMHO, it provides a channel to receive complaints against those PSP made by all mediation participants. There is a set of JMHO Participating Service Provider Complaint Procedure ("PSP Complaint Procedure") stipulating how those complaints shall be dealt with by JMHO.

Mediator's Competency

Mediation complaints may well be largely related to the conduct of a mediator including his/her fee charged. During the process of mediation, the conduct of the mediator may have departed from the expectation of a complainant. The level of competency to be expected from a mediator has been set out in the Code as mentioned above. Although the Code has no legislative effect, it is a good guideline for all mediation service providers to adopt.

The Code provides a regulatory framework for conducting mediation setting out certain expected standard of mediators as follows:-

1. acting fairly in dealing with the parties;
2. having no personal interest in settlement agreements;
3. having no bias against the parties;
4. being reasonably available as requested by the parties;
5. ensuring the parties were informed of the mediation process;
6. keeping all information confidential; and
7. having an agreement to mediate signed.

Complaint Procedure

An outline of PSP Complaint Procedure is as follows:-

1. All complaints made to JMHO will be forwarded to the concerned PSP.
2. Upon receipt of a complaint, PSP shall acknowledge receipt of the complaint in writing setting out a deadline for an investigation and provide a point of contact for future enquiries relating to the complaint.
3. The complaint shall be investigated and PSP will aim at producing an initial response within 20 working days upon receipt of the complaint from JMHO. PSP may also write to the complaining parties explaining the reason for the delay and set a new date.

As far as the writer understands from JMHO, it has rarely received complaints since its operation. All misgivings have been handled swiftly by enhancing the communication between the complaining parties and the mediator through the assistance of JMHO.

The Chartered Institute of Arbitrators

The Chartered Institute of Arbitrators (East Asia Branch) is one of the founders of JMHO. It is the only global organization in providing training for arbitrators, mediators and other dispute resolvers. East Asia Branch is the largest branch of the Institute. It has its own code of ethics for neutrals involved in alternative dispute resolution including mediation. It serves not only as a guide but a point of reference for users of the process and promoting public confidence in dispute resolution techniques. The code itself is a reflection of internationally acceptable guidelines.

As said, the usual ground of complaint is always misconduct of a mediator.

Misconduct, as defined in the Byelaws of the Chartered Institute of Arbitrators (CIArb)[3], includes:

i. conduct which is injurious to the good name of CIArb;
ii. a breach of Code of Professional and Ethical Conduct (the "*Code*") for members of CIArb[4]; and
iii. falling significantly below the standard expected of a competent professional person acting in the field of private dispute resolution.

CIArb Neutral's Competency

The *Code* relates to the conduct of the Institute's members when acting or seeking to act as neutrals in alternative dispute resolution processes, wherever conducted, whether or not they have been appointed so to act by the Institute or any officer of the Institute and whether or not the process is conducted under the auspices of the Institute.

The *Code* provides a regulatory framework for conducting alternative dispute process including mediation, setting out certain expected standard of mediators as well:

1. not behaving in a manner of unbecoming to a member of the Institute;
2. maintaining integrity and fairness;
3. disclosing all interests likely to affect the member's independence or impartiality;

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3 "How CIArb Investigates Complaints of Misconduct against its Members" published by the CIArb
4 http://www.ciarb.org/information-and-resources/membership-rules-and-regulations/code-of-conduct/

4. acting only if appropriately qualified or experienced;
5. ensuring the parties are informed of the procedures of the process;
6. communicating with the parties only in a manner appropriate to the process;
7. preparing appropriately for the process;
8. not be influenced by outside pressure or self interest;
9. not unduly delaying the completion of the process; and
10. not disclosing or using any confidential information acquired in the process.

CIArb's Complaint Lodging Procedures
CIArb has published complaint lodging procedures as one of reference guidance.

Under the CIArb guidance, every complaint should be made with full particulars with all relevant information and documentation relied on by the complainants.

Thereafter, each complaint made to CIArb should be forwarded to the relevant member within 28 days from the date of complaint. A member should then make a written response to the complainant via CIArb for comments within 14 days from his/her receipt of the complaint forwarded by CIArb. If there are new points or issues raised by the complainants after receiving the comments made by the relevant member, that member may have a further 14 days to submit his/her comments thereon.

Once the above process is concluded, all the papers shall then be reviewed by CIArb's Professional Conduct Committee ("PCC"). PCC is an independent committee setting up to investigate all complaints received by CIArb.

If PCC finds no prima facie evidence of misconduct, usually no further action will be taken and the complainant and the member will be notified of the decision with brief reasons.

If PCC does find prima facie evidence of misconduct, the complainant will either be referred to a Peer Review Panel set up by CIArb or the Disciplinary Tribunal to hear a charge of misconduct against the mediator.

A Peer Review Panel is set up by CIArb comprising experienced members and qualified members of CIArb[5].

The Disciplinary Tribunal shall consist of no fewer than three persons: a chairperson, a lay person and an experienced member in the same discipline as the member

5 For more information, please refer to paragraph 7 of the Schedule of the Bye-laws of CIArb.

under investigation. The chairperson must either be a person who holds or has held judicial office in the UK, or the equivalent in other jurisdictions, or is a qualified and practising lawyer with a minimum of 10 years' post qualification experience.

Sanctions

Upon investigation, if the Disciplinary Tribunal does find that a charge against the member is proved, it may impose one of the following sanctions:

i. reprimand or warn the member as to his/her future conduct;
ii. suspend the member from membership of CIArb for a period not exceeding twelve months;
iii. in the case of a member having chartered status, to withdraw that status without limit of time or for a specified period;
iv. expel the member from CIArb;
v. make an appropriate order for costs[6].

However, if the charge cannot be proved, the Disciplinary Tribunal may then dismiss the case and the matter will be closed unless CIArb decides to appeal against the Disciplinary Tribunal's decision.

Appeal

The member or CIArb shall be entitled to seek permission to appeal against the decision of the Disciplinary Tribunal.

The members of the Appeals Tribunal shall be drawn from the same panel as those for the Disciplinary Tribunal but having no previous involvement in the case.

The appellant shall serve on CIArb a notice of appeal within 28 days from the date of notice of the decision of the Disciplinary Tribunal.

The Appeals Tribunal shall give permission to appeal if it is of the opinion that the appeal has a reasonable prospect of success.

The decision of the Appeals Tribunal shall be final and binding on the appellant and there will be no order for costs arising from the appeal.

CIArb shall decide whether or not to publish a report of any proceedings taken by CIArb against or in connection with a member, including the result of any appeal.

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6 The order will be made in accordance with paragraph 8.6 of CIArb's Schedule to the Bye-laws of CIArb.

Conclusion

Now in Hong Kong, we have the Mediation Code only serves as a guidance for the mediation community. The newly established single accreditation body, Hong Kong Mediation Accreditation Association Limited may establish rules of ethical conduct and disciplinary mechanism in monitoring the mediators registered in its Lists of mediators. The Code shall be reviewed by the Department of Justice. The government would consider further whether or not there would be a statutory body in governing accreditation and disciplinary matters. We may expect some policy making coming from the government in these respects in the near future.

Current Experience and Challenges of Mediation in Hong Kong with Particular Emphasis on Role of Advisors (Legal or Otherwise) in Mediation and Are People Committed to Resolving Disputes by Mediation

Mr. Registrar Lung Kim Wan [1]

Introduction

The above topics were discussed in the "Mediation First" conference on 12 May 2012 held at the Hong Kong Convention & Exhibition Centre. As requested, I shall endeavour to give more details to my talk. In this article, I shall also add other relevant topics and authorities, which were, due to shortage of time, not covered in the discussion and mentioned in my brief notes and some of the recent authorities are useful to illustrate the topics for discussion.

Mediation is a new subject in Hong Kong in civil litigation. It was not until the Civil Justice Reform that it was introduced to Hong Kong as a serious subject for alternative civil disputes resolution. The Civil Justice Reform commenced on 2 April 2009. But the operative date for mediation under Practice Direction 31 was postponed to 1 January 2010 in order to allow more time on the drafting of Practice Direction 31, which was amended to make it more comprehensive and more practicable. It will be instructive to understand the reasons why the Working Party on Civil Justice Reform had introduced mediation as the alternative disputes resolution.

By Recommendation 138, the Working Party recommended that a scheme should be introduced for the court to provide litigants with better information and support with a view to encouraging greater use of purely voluntary mediation. The Working Party has, in particular, taken into consideration the following factors on mediation:

a. In suitable cases, mediation may result in very substantial savings in costs[2].

b. Mediation can produce flexible and constructive outcome as between the parties which traditional legal remedies cannot offer[3].

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1 Mr. Lung Kim Wan is the Deputy Registrar of the High Court.
2 Paragraph 798 of the Final Report
3 Paragraph 799 of the Final Report

c. Mediation also provides the chance of a swifter resolution of the dispute in conditions of confidentiality and in an atmosphere where the parties channeled towards seeking settlement rather than towards inflicting maximum adversarial damage on each other[4].

The Working Party had also recommended that mediation must be voluntary in the sense that no attempt should be made to force anyone to settle a case. However, the court may be given power to order the parties to appoint a mediator and to proceed with the mediation until it is terminated (usually either by settlement, by the mediator certifying that it has not succeeded or by either party withdrawing); or to direct the parties to appoint a mediator and to engage to some stated degree in the mediation process; or to recommend mediation and to impose costs sanctions if no attempt at mediation occurs[5].

The Court has been industriously adopting the above guiding principles in the cases before it as shown in the cases discussed below.

It would be helpful for members of the profession to keep the above principles in heart and understand the Court's attitudes in the administration of those principles in the cases, which will illustrate the proper approach in giving advice to clients. This will also avoid misunderstanding of Practice Direction 31 and the practice in Court, which has given rise to the malpractice of sham mediation by merely going through the motions only without real intention of seeking settlement for the disputes. It was rumored that sham mediation was done because the Court would not give leave to set the case down for trial without the parties first going through mediation. Investigations had been made and it was found that the rumour was unfounded. Had members of the profession paid attention to the Working Party's guidance on mediation in §4 above, they would not have had such a misconception. I hope that this article will dispel the profession's misconception of the court practice on mediation.

In the authorities below, it can be seen that the Court has attempted to give guidance to members of the legal profession on the proper mindset and attitude in giving legal advice to clients on mediation.

The Court's Approach

A. Voluntary exercise

In *Hak Tung Alfred Tang v. Bloomberg L.P. (a firm) & Ors* HCA198/2010, 16 July 2010 (unreported), the court had stated it clearly that the mediation was a voluntary exercise. At §12:

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4 Paragraph 800 of the Final Report

5 Paragraphs 814 & 819 of the Final Report

"…After all, mediation is a voluntary exercise of the parties. Any party who considers that mediation is not helpful or cannot assist the parties to settle may terminate the mediation at any time. Whether such decision is a reasonable decision or whether such conduct is a sincere and genuine attempt on mediation is for the trial judge to decide at the end of the trial."

B. The Court may advise legal representatives to advise clients on mediation

The Court has power to recommend the legal representatives to advise clients to consider using mediation to resolve their disputes. In fact, before the commencement of the Civil Justice Reform, the Court of Appeal had foreseen the function of mediation and had made guiding remarks in *iRiver Hong Kong Limited v. Thakral Corporation (HK) Limited* CACV252/2007 [2008] 4 HKLRD 1000. At paragraph 98 of the judgment, the Court of Appeal demonstrated the use of mediation and pointed out that the legal advisors had failed to advise their clients on mediation:

"98. Before we leave this case, we wish to observe that this is a typical case where parties should have explored resolution of their disputes by mediation. The total damages are just over $1 million. However, we are told that the total legal costs incurred by the parties, including costs of this appeal, run up to about $4.7 million. Apart from the usual attempts in settlement negotiation conducted by solicitors' correspondence, the parties have not tried other means of alternative dispute resolution. We have not been told whether the solicitors have given advice to their respective clients on the possibility of resolving the matter through mediation. "

To highlight the importance of mediation to the legal advisors, who might have thought that private negotiations might have served the purpose, the Court of Appeal went further to say:

"99. The mere fact that negotiation between solicitors fails to result in a settlement does not mean that the parties would not benefit from mediation conducted by a skilled mediator. As observed by Brooke LJ in Dunnett v Railtrack [2002] 2 All ER 850 at para. 14, "Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve…when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. "

100. In Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002 at para. 11, Dyson LJ said, "The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. "

101. Later in Burchell v Bullard [2005] Build LR 330, Ward LJ said at para. 43, "Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. "

102. In the more recent case of Egan v Motor Services (Bath) [2007] EWCA Cir 1002, Ward LJ made some useful suggestions as regards how a solicitor could proffer advice on mediation to a client effectively. "

The Court of Appeal finally advised members of the legal profession in Hong Kong to bear in mind the above comments and views of the court when they advised their clients:

"103. In Hong Kong, mediation as a means to settle disputes has increasingly been recognised. Those who have tried mediation usually find the process constructive even though not all mediations resulted in full settlement. Sometimes parties were able to narrow down their differences during the course of mediation and come up with a full settlement at a later stage. An example can be found in Chun Wo Construction & Engineering Co Ltd v China Win Engineering Ltd, HCCT 37 of 2006, 12 June 2008.

104. We also have a large number of skilled mediators in Hong Kong who are willing to provide mediation services at reasonable costs.

105. Against such background, it is indeed regrettable that the parties in the present case have not had the good sense of trying to resolve their commercial dispute by a much more cost effective means.

106. The Civil Justice Reform shall come into force in 2009. The new Order 1A sets out the underlying objectives of the rules and Order 1B sets out the power of the court in case management. Parties and their lawyers have a duty to assist the court to further the underlying objectives. They will be well advised to have the above comments on ADR in mind in making attempts to resolve their dispute effectively. "

The above were clear indications from the Court to members of the legal profession on the appropriate approach of giving legal advice to clients on mediation. This Court of Appeal decision was delivered in August, 2008, before the operation of the Civil Justice Reform on 2 April 2009.

C. The Court may take mediation into account when considering costs order

In the post-CJR period, the Court had given more explicit and coercive advice to members of the profession to advise clients on mediation if they were minded to avoid the sanction of costs against them. In *Supply chain & Logistics Technology Limited v. NEC Hong Kong Ltd.* HCA1939/2006 by Lam J. on 29 January 2009 (unreported), the Court held that failure to mediate could be taken into account on the question of costs and proper case management required the court and the parties to consider the most effective mode for the resolution of the disputes and therefore the court had to consider whether it was an appropriate case for mediation when it made the costs order. If the party elected to ignore the court's direction on mediation, he had to give explanation to the court for such decision. At paragraphs 11-13, Lam J. said:

"11. Failure to participate in mediation can be taken into account on the question of costs. The rationale is that the purpose of civil litigation is to resolve dispute between the parties. Proper case management requires the court and the parties to consider what is the most cost effective and satisfactory way to resolve a dispute. In many instances, adversarial litigation is only one of the modes to resolve a dispute and it may not be the best mode. If there is an alternative by which the dispute may be resolved in a more cost effective, timely and satisfactory manner but a party insists on resorting to litigation despite suggestion from the court to explore that alternative, in effect he is adopting a potentially more expensive and time-consuming mode in dealing with the same subject matter that may cause greater attrition to all parties in terms of financial and personal well-being and human relationship, and as such less satisfactory. He may or may not have good reasons for taking such a stance. But before the court suggests the parties to consider mediation, it usually would have examined whether the case is appropriate for mediation. A party who chooses to ignore such suggestion should not be surprised if the court seeks an explanation from him for not making attempts in mediation when it deals with the question of costs.

12. This approach is well in line with English authorities, see Dunnett v Railtrack [2002] 1 WLR 2423 and Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002. In Hong Kong, the pilot schemes on mediation in the High Court Construction and Arbitration List, Sections 168A and 177(f) Companies Ordinance cases and the Lands Tribunal Building Management Cases adopted the same approach.

13. In dealing with costs, it is well established that settlement attempts that have a prospect in satisfactory resolution of the dispute and the rejection of such attempts are relevant considerations because such case management conducts have a direct bearing on the reduction or escalation of the costs of the litigation. As Simon Brown LJ put it in Butcher v Wolfe [1999] 1 FLR 334,

"For the plaintiff to be entitled to recover his costs --- in this or any other litigation --- he must show at least that he has obtained at the hearing something of value which he could

not otherwise have expected to get. Only that justifies his proceeding with the action to trial." "

D. Proper legal advice on mediation

Not only was the Court concerned that clients were not legally advised on mediation, the Court was also concerned with the proper legal advice given by a solicitor to his client. In *Chevalier (Construction) Co. Ltd. v. Take Cheong Engineering Development Ltd.* HCA153/2008 [2011] 2 HKLRD 463, the Court, having considered that it was unreasonable for the defendant not to accept a reasonable offer made by the plaintiff, had even pointed out to the profession that a solicitor was not doing a service to his client if he had not explained comprehensively and professionally all the pros and cons of the litigation to clients before they participate in mediation. At paragraphs 19-20, Lam J. said:

"19. I do not know to what extent the Defendant was driven by the misconceived notion in handling settlement negotiations and participating in the mediation process. But based on what Mr Lai told me at the application for stay, this piece of litigation had imposed serious financial burden not only on the Defendant but also on him personally. With the benefit of hindsight, it is a great pity that he did not accept the March 2010 offer.

20. I again do not know the extent to which the Defendant's solicitor had explained to Mr Lai the costs and risk associated with the litigation and the merits of the claim and the counterclaim. But I must emphasize again the importance of the lawyers explaining comprehensively and professionally all pros and cons of the litigation to their respective clients before the clients participate in a mediation. A solicitor who paints an unrealistic rosy picture for his client would generate unrealistic expectation on the part of the client. At the end of the day, if mediation fails and litigation fails to deliver the expected result, the client would suffer tremendously. Such a solicitor is not doing a service to his client."

The Role Of Advisor (Legal or Otherwise) in Mediation

I shall place emphasis on the legal advisors. Other advisors will play more or less the same role. From the cases above, it can be clearly seen that the Court had placed significant reliance upon the profession to give proper and appropriate professional advice to clients on mediation and settlement, the consequence of which could be serious for clients, to whom the solicitor owned a duty. To prepare a proper mindset for mediation, it may be advisable for members of the profession to pay attention to the authorities as to: (i) the approach as to how to assess the case for the determination whether it is suitable for mediation; (ii) the grounds, which the Court refused to accept as sufficient reasons for not considering or attempting mediation; (iii) the proper approach to adopt mediation in parallel with litigation proceedings; and (iv) the cases, which the Court would accept that mediation was not suitable and no sanction would be imposed upon a party who had failed to attempt mediation. The authorities that follow will throw some light on these issues.

A. The approach to assessment and grounds that the court refused to accept refusing mediation

In *Golden Eagle International (Group) Ltd. v. GR Investment Holdings Ltd.* HCA2032/2007 [2010] 3 HKLRD 273, the defendant had failed to beat the plaintiff's sanctioned offer and the plaintiff asked for costs on indemnity basis. The Court held that the nature of the dispute would determine whether the case was suitable for mediation[6]. In this case the Court had set out the following, which it refused to accept as sufficient reasons to refuse mediation:

a. The defendant's excuse that for commercial reason the defendant had refused to mediate[7].

b. If the strength of the defendant's case was a borderline case, the defendant did not have good reason for refusing mediation[8].

c. Also, a party could not rely on his own unreasonable obdurate attitude to justify a refusal of mediation on the ground that it had no prospect of success[9].

d. Nor did the court accept wide difference between the parties as the reason for refusing mediation[10].

e. The learned judge had left open the option of refusing to mediate on the ground of having a strong case. At paragraph 30, the learned judge said:

"30. In this judgment I wish to leave open the question whether in the light of the above features in Hong Kong a party can rely on having a strong case as the ground for refusing mediation. But it is plain to me that the Defendant's case does not fall within the category of reasonable belief of a strong case identified by Dyson LJ at para. 19 of his judgment,

> *"Some cases are clear-cut. A good example is where a party would have succeeded in an application for summary judgment … Other cases are more borderline. In truly borderline cases, the fact that a party refused to agree to ADR because he thought that he would win should be given little or no weight by the court when considering whether the refusal to agree to ADR was reasonable. Borderline cases are likely to be suitable for ADR unless there are significant countervailing factors which tip the scales the other way. "*

6 Paragraph 26
7 Paragraph 20
8 Paragraph 31
9 Paragraph 35
10 Paragraph 36

In *Pacific Long Distance Telephone v. New World Telecommunications Ltd.* HCA1688/2006 by DHCJ Houghton, SC on 23 May 2012 (unreported), the plaintiff was unsuccessful and was to be ordered to pay costs to the defendant. The plaintiff argued that there should be no order as to costs and one of the reasons being that defendant was unreasonable to have refused mediation. The Court accepted the defendant's belief as to the strength of its position in regard to the matters that were in issue was the relevant factor for refusing mediation, relying upon *Halsey v. Milton Keynes General NHS Trust* [2004] 1 WLR 3002.[11]

Considering the above judgments on the issue whether the Court will accept a party's belief as to the strength of his/her case, it seems apparent that the Court will take into account the strength of the party's case, but it did not simply take the party's subjective view for its determination. The Court will rather take an objective view by reference to the evidence available for its determination, which echoes with §16(c) above.

In *Pacific Long Distance Telephone v. New World Telecommunications Ltd.,* the learned Deputy Judge had also added the following, which the Court refused to accept as sufficient reasons to refuse mediation:

e. Because the parties had made previous unsuccessful attempts to settle the matter, it was thought unlikely that mediation would be of assistance.[12]

f. The defendant's view that an out-of-court settlement would be taken as some sort of admission of liability.[13]

B. Continuing obligation to mediate

As to the proper approach to adopt mediation in parallel with litigation proceedings, the learned Deputy Judge had emphasized on the continuing obligations of parties in *Pacific Long Distance Telephone v. New World Telecommunications Ltd. supra,* said: "18. It appears to me that the position in regard to the mediation is this. The parties both had continuing obligations to seek ways in which the disputes between them could be resolved without the necessity and cost of court litigation at trial. The introduction or amendment of matters in issue as the litigation proceeded increases, not reduces, the importance of considering, or if appropriate re-considering, the appropriateness and availability of methods of alternative dispute resolution…. "

C. Cases where the Court would impose no sanction

The Court, however, had agreed not to impose costs sanction on the party who had failed or refused to attempt mediation in some cases.

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11 Paragraph 12
12 Paragraph 12
13 Paragraph 16

In *The Incorporated Owners of Shatin New Town v. Yeung Kui* CACV 45/2009 by C.A. on 5 February 2010 (unreported), the respondent had failed before the Court of Appeal but he argued that the costs order should be "each party bears its own costs" for the reason that the appellant had refused to mediate. The Court of Appeal had considered the reasons for the appellant's refusal of mediation and held that the appellant had given good reasons for so refusing: that the respondent had delayed the matter; when the respondent proposed mediation, the matter was approaching trial and mediation might further delay it; that it was a matter concerning the interpretation of the Deed of Mutual Covenants and the respondent had turned down the appellant's proposal before.[14] The Court of Appeal ultimately awarded costs to the successful appellant.

In *Oriental Press Group Ltd. & Another v. Fevaworks Solutions Ltd.* HCA2140/2008 by Chung J. on 25 March 2011 (unreported), a defamation case where the plaintiff succeeded, the Court was to consider the costs to the plaintiff. The defendant alleged that the plaintiff had refused to mediate and asked the court to award no costs to it. The Court held that because the legal position of libel on the internet was a novel issue and that the defendant was unlikely to accept the awarded amount, which the Court found that it was reasonable for the plaintiff to refuse mediation[15].

In *Golden Eagle International (Group) Ltd. v. GR Investment Holdings Ltd. supra*, the defendant had failed to beat the plaintiff's sanctioned offer and the plaintiff asked for costs on an indemnity basis. The court did not accept the defendant's excuse of commercial reason to refuse mediation. But the Court accepted that the defendant's belief of the strength of its case might be a legitimate reason for refusing to mediate and having considered that the defendant's case was only borderline case and other factors, the Court ordered the defendant to pay the costs on common fund basis.

In *Pacific Long Distance Telephone v. New World Telecommunications Ltd. supra*, the plaintiff was unsuccessful and was to be ordered to pay costs to the defendant. The plaintiff argued that there should be no order as to costs and one of the reasons being that defendant was unreasonable to have refused mediation. Having considered all the circumstances, the Court held that neither party was at fault for no mediation taking place and it therefore awarded costs to the defendant.

D. The position of an advisor (legal or otherwise) in mediation

I put emphasis on the legal advisors because they are frequently consulted by their clients and, being the trustees, they play a very important role in the process of mediation.

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14 Paragraphs 8 & 9
15 Paragraphs 11 & 12

The primary objective of mediation is settlement at the earliest possible moment. The function of mediation is clearly set out in CEDR[16]:

"Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."

The legal advisors must bear in mind that when giving advice on mediation to clients, they should be clear that they have no conflict of interest in giving the advice. If he/she does not believe mediation is an effective means for dispute resolution or if they consider that they are unable to prioritize client's interest above profit maximization, it is advisable that they should advise clients to seek other advice. There is a Mediation Information Office at the High Court Building, which can render proper advice on mediation for the public free of charge. I suppose the fundamental mindset of a legal advisor is that he/she truly believes that mediation is a useful means, by which the clients may consider making use of for a fast and cheap resolution of their disputes.

The next advice for the legal advisors is that they should not take an adversarial stance in mediation because they will affect their clients. Mediation is a process of bargaining between the parties and they have to adopt a compromising attitude in order to breach their gaps. To take an adversarial stance throughout the mediation process is not conducive to the process.

The third advice for the legal advisors is that they should let clients decide the terms for settlement. After all, they are the ones to decide, not the legal advisors, whose primary duty is to ensure that the parties are having a fair platform for negotiations, taking all the relevant factors, especially the legal factors into consideration before they reach an agreement. The legal advisors should not hijack clients' decision on terms of settlement.

Lastly, I only wish to point out to legal advisors that they must exercise caution when they prepare the settlement agreement for clients. Otherwise, clients may end up with another set of litigation over the disputes in the settlement agreement.

16 Abbreviation of Centre for Effective Dispute Resolution

In *Champion Concord Ltd. & Another v. Lau Koon Foo & Another* FACV16 & 17/2010 delivered on 23 November 2011, the parties had gone through mediation and settled their dispute over a sale and purchase of land by way of a settlement agreement, which contained convoluted terms and unclear definition with the result that the parties then had to commence another litigation on the settlement agreement all the way to the Court of Final Appeal.

Are People Committal to Resolving Disputes By Mediation?

The Judiciary has been keeping statistics on mediation. In its report of the First two years' Implementation of CJR from 2 April 2009 to 31 March 2011 tabled before the Legislative Counsel, it said at page 32 §49 that there was a rising trend for the use of mediation. The Monitoring Committee of CJR headed by the Chief Judge of The High Court had also noted that the Department of Justice had adopted mediation for works-related disputes, with satisfactory results of average 62.5% settlement for the work-related cases for the 2 years. The settlement rate for general claims for the first 6 months was 43.75% settlement. The Legal Aid Department had 66.8% settlement rate for the period of April 2009 to October 2011.

Generally speaking, the report concluded that there had been an increasing awareness among litigating parties that mediation would be one of the means of alternative dispute resolution and it would take more time for the litigating parties to be convinced of the benefit of mediation. The success of mediation hinges upon the mindset of the legal profession and how the legal representatives advise and prepare their clients for mediation. See paragraphs 51 and 52 of the report.

Commitment to Resolving Disputes by Mediation - Role of Lawyers in Mediation

Ms Elaine LIU[1]

"*Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve … But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live.*"[2]

Mediation started to develop in Hong Kong in the 1980s. It becomes popularly used as a means to resolve civil disputes recently, in particular after the Civil Justice Reform of which mediation is an important feature. The efforts of all related parties in promoting the use of mediation in civil dispute resolution as well as the fruitful experience gained by the "users" of mediation resulted in a significant increase in the use of mediation in dispute resolution. Not only once had the Court and the Department of Justice expressed their views on the effectiveness of mediation in resolving disputes.

Some lawyers maintain a skeptical view on mediation. Some hold the view that if they could not successfully bring to a settlement by way of negotiation, it would be highly unlikely that the parties could settle after mediation.

Experiences however showed the contrary. Over 90% of the cases successfully mediated by me had previous unsuccessful settlement negotiations between the parties or through their respective solicitors.

Mediation is different from settlement negotiations between the two camps, whether by the parties themselves or through their lawyers. As identified by the Judges of Appeal in iRiver Hong Kong Ltd v Thakral Corporation (HK) Ltd, "*The mere fact that negotiation between solicitors fails to result in a settlement does not mean that the parties would not benefit from mediation conducted by a skilled mediator.*"[3]

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2 Dunnett v Railtrack (2002) 2 All ER 850, per Lord Justice Brooke. The passage was quoted by the Hong Kong Court of Appeal in the judgment of iRiver Hong Kong Ltd v Thakral Corporation (HK) Ltd [2008] 4 HKLRD 1000

3 iRiver Hong Kong Ltd v Thakral Corporation (HK) Ltd *supra* per Yeung JA

The assistance of a skilled and neutral mediator in mediation in many aspects contributes to the success of a settlement discussion which litigants or their lawyers in their respective positions would be difficult to achieve.

Duty to advise on mediation

It is now an express duty of lawyers to advise clients on mediation[4]. In addition to advising clients how best to fight the case in court, nowadays, litigation lawyers may have to take up the role as mediation advocate at some stage on the road leading to the resolution of the client's dispute.

It starts with giving advice on mediation. Lawyers are now expected to give advice to clients on what is mediation, its nature and process, when shall the parties mediate, who shall be the mediator, the terms of the mediation agreement, what to do to prepare for the mediation, how to work with the mediator, and so on. Lawyers would have to familiarize themselves with mediation and how it works.

Both litigation and mediation are means to resolving dispute, but the approach to be taken in them are fundamentally different. Litigation, for most, is perceived to be targeted at winning the case by beating the opponent down to failure. Parties would advance arguments to show that they are right and the other side is wrong. The positional approach in litigation is however often the poison pill for mediation. Litigants and their legal representatives should avoid carrying with them the mindset adopted in the conduct of litigation into the mediation room, in order to gain the maximum benefit from mediation.

Mediation is defined by the Mediation Ordinance[5] as a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to identify the issues in dispute, explore and generate options, communicate with one another and/or reach an agreement regarding the resolution of the whole, or part of the dispute. The common mode of mediation adopted in Hong Kong, as recognised in the Mediation Ordinance, is facilitative. The participation in mediation remains voluntary although there would be costs implication if a party unreasonably fails to engage in mediation.[6]

Mediation can be conducted at any stage of the dispute. In Egan v Motor Services (Bath) Ltd, Ward LJ commented that "*the best time to mediate is before the litigation*

4 Practice Direction 31, issued on 12 February 2009 and came into effect on 1 January 2010.
5 Section 4 of the Mediation Ordinance, Cap 620, Laws of Hong Kong, effective on 1 January 2013
6 Practice Direction 31, paragraph 5

begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often."[7]

In my experience, generally an appropriate time to commence mediation is after the exchange of pleadings in litigation. The pleadings exchanged defined the issues of the parties' dispute, the claims and/or counterclaims (if any), hence provide an efficacious starting point, as well as a good guiding scope and reference for mediation. It remains at a relatively early stage, much of the litigation costs have not yet been spent, and hence, generally allow more flexibility in negotiation.

It is not infrequent that, notwithstanding the inability to reach a settlement agreement at the mediation, the parties would be able to iron out much of their differences through the process. With these ground works having been done, many parties are able to come to an agreement by continuing the mediation or further negotiation at a later stage[8]. The parties would still be benefited from an early mediation even though it did not bring to a settlement at that stage.

Work with the mediator to get the best result for your client

Mediator is an impartial individual[9] and has the task of assisting the parties in resolving the dispute in mediation. Choice of a skilled and reliable mediator would be the first step to success of mediation. Once a mediator is appointed, the parties and their legal representative should cooperate with the mediator in order to achieve the best result of the mediation for the parties themselves.

The parties and their legal team should work with the mediator cooperatively, and adopt a trusty stance towards the mediator, instead of regarding the mediator as one from the other team and communicating to the mediator with guardedness.

This view was shared by the Court in Alfred Tang v Bloomberg L.P. (a firm) & ors[10] where the Court has expressed that "*parties should take a trusty stance for the mediation and they should have confidence in the mediator, who has no interest in the matter herself. Her primary function is to facilitate the parties to settle their disputes and she has to undertake her duties as a professional mediator.*" The Alfred Tang case was on the issue of what constitute a minimum level of participation under the requirement of Practice Direction 31. The Court's view on the attitude towards a mediator

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7 Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002

8 Chun Wo Construction & Engineering Co Ltd v China Win Engineering Ltd, HCCT 37 of 2006, 12 June 2008

9 Sections 2 and 4(1) of the Mediation Ordinance, effective on 1 January 2013

10 Alfred Tang v Bloomberg L.P. (a firm) & ors, unreported, HCA 198 of 2010, 16 July 2010

should nonetheless apply in general. The mediator was appointed by the parties. If there is any doubt in the mediator, the parties should not appoint him. Once appointed, they shall work together cooperatively to achieve the best result.

I came across many different lawyers in their role as mediation advocates. Many have helpfully assisted their clients and worked with the mediator throughout the mediation with a view to exploring viable settlement options that best serve their clients' interest and needs. There were, from time to time, lawyers worked to disconnect the mediator from their clients during the mediation, adding hurdles and challenges to the mediator. In one of the cases, the lawyer representing one party in mediation has repeatedly come up with all kind of questions and issues at different stages posing hurdles to an almost reached agreement from time to time. After repeated attempts, the client requested for a private session with his own lawyer. When they came back, that party indicated his agreement to settle. I do not intend to speculate the reason for the lawyer's behaviour. He might do so with good intention to protect the interest of his client. It is understandable for lawyer to raise concerns that may be relevant to the client's interests. One should nonetheless balance the fulfillment of all legal niceties with the meeting of the client's real interest and concern, which in most of the cases, go beyond the resolution of the legal issues. Evaluation of the legal issues and merit of the case should be done with the clients prior to the mediation, and as a basis for formulating the BATNA.

Mediators are trained and are equipped with skills to conduct the mediation. Some of these skills, such as the questioning skills and the listening skills are different from the training which lawyers would receive. Mediators are also trained with skills to elicit relevant information for the mediation, structure possible options, explore the viability of the options, deal with emotional obstacles, deal with power imbalances, and so on. The mediators should be able to make use of the skills to identify possible obstacles and propose ways to overcome them. To gain the best result from mediation, the parties and their legal team should enlist the assistance of the mediator, instead of posing impediments to the works of the mediator.

Pre-mediation

Pragmatic and realistic advice on the prospect of litigation and what the clients may have to go through if the case is fought in Court are essential information for the preparation of the mediation. These should include the general merit of the case, the costs that may incur, the time and resources that may require, the risk of litigation, and so on. Armed with advices on these matters, the clients will be better equipped to consider their position in the dispute realistically. This advice should be used as references and part of the factors to be considered by the clients in determining whether and how to resolve the dispute in mediation.

It is always helpful to have pre-mediation conference with the mediator, especially for disputes with complicated issues. The parties and their legal representatives should make good use of this opportunity to establish with the mediator mutual understanding on the disputes as well as the parties' concern. Early establishment of good rapport with the mediator is helpful to the mediation.

The parties, who know the other side and the case better than the mediator, should be advised to alert the mediator in the pre-mediation conference of any special features, including for example, where the other side or any member of the team is likely to have strong emotional reaction. The mediator can then develop in advance the appropriate strategy in the conduct of the mediation.

Participation of the parties in mediation

I always take the view that the parties are the protagonists in mediation. One shall not underestimate the significance of the parties' direct participation in mediation and direct communication with the mediator. A positive environment in which clients may vent, improve communications and develop rapport with the mediator should be encouraged in mediation.

In some of the mediations conducted by me, the lawyers tended to be very protective of their clients and/or were cautious of controlling the communication with the mediator. It is most undesirable for mediation advocate to behave in a way that has the effect of alienating the mediator from the parties. Some lawyers tend to have a close door discussion every time prior to their meeting with the mediator during the mediation. When they meet the mediator, they simply tell her what they want to propose to the other side, thus treating the mediator as a messenger, or one sent to convince the other side to agree to their position. The mediator was not given a chance to be involved in the discussion which led to the views or points that the parties wish to make at that time. The parties and their legal teams were reluctant to explore with the mediator how and why they come up with the proposal. Being handicapped from understanding the parties' real interest and concern, the mediator would not be able to assist the parties in exploring the best plausible options for the parties. The parties would be deprived of the contribution that the mediator would be able to bring to the parties.

Concluding remark

I have witnessed on many occasions the relief and satisfaction of both parties after they have reached an agreement to settle at the end of mediation. With the increasing use of mediation as a means to resolving dispute in civil matters, running parallel with that of the court system, litigation lawyers have an added role in advising and representing clients in mediation to better serve the interest and concerns of their clients. I encourage them to take a positive and proactive attitude in this role.

From Gladiator To Mediator: The Challenges For Lawyers Who Become Mediators

Mr. Gregg Relyea [1] and Mr. Roy Cheng [2]

When they represent clients, advocates may be compared to gladiators doing battle with logic instead of a lance, statutes instead of swords, and rhetoric instead of physical force. Successful litigators routinely engage in clashes of confrontation and competition with other parties, advocates and judges. They are bound by rigid rules of professional responsibility, formal rules of advocacy, and highly technical rules of evidence. The procedural framework surrounding litigation is well-defined and the roles of the parties and judge are deeply rooted in tradition. The pageantry and spectacle of combat is replaced by the formality and majesty of the trial process.

Mediators, by contrast, take part in a dance of a different nature. The rules of engagement in mediation differ fundamentally from those of trial. The formalities of trial do not apply. Strict rules of evidence have no place. Long-term personal and business interests may be afforded equal or greater importance than the facts of the dispute or the applicable law. Emotions are considered to be directly relevant to the dispute. The roles, responsibilities and opportunities of the parties, advocates and neutral third party differ significantly. Specialised communication and negotiation skills and techniques are the primary tools of a mediator--instead of forceful rhetoric and penetrating arguments.

Lawyers who successfully undertake mediation training for the purpose of serving as mediators must be prepared to radically re-define their objectives, their role and their techniques. They must approach mediation training with an open mind and a willingness to learn the distinct differences between the processes of trial and mediation. They must be skilled at working within the framework of traditional rights and remedies and also ready to move beyond it. Lawyer-mediators will learn that mediation is more than a legal negotiation in a different package—mediation differs fundamentally in its procedural structure, terminology, objectives and techniques.

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2 Mr. Roy Cheng is Director of ISE Consultants Limited (mediation) and Founder of the Hong Kong Institute of Mediation.

Mediation trainers, likewise, must be aware of the educational background and professional mindset of lawyers. Trainers must understand the lawyer's perspective and successfully describe the differences in the role, duties and methods of mediators. For example, while the trial process is highly adversarial, the mediation process strikes a different balance encouraging adversaries to act in some ways as collaborators. Instead of looking for one-sided outcomes and opportunities to exploit the opponent's weaknesses, mediators look for and cultivate opportunities for mutual gain by all parties. In trial, the goal is victory, while in mediation, the objective is harmony. In short, mediation trainers must face the challenge of teaching the gladiator to become a mediator.

It is noteworthy that mediation training can be beneficial for lawyers independent of their intent to establish a practice as a mediator. Formal mediation training can serve many purposes: cultivating general awareness of mediation as one alternative process of dispute resolution, preparing a person to serve as a mediator, preparing a person to serve as an advocate in the mediation process, and providing a person with additional skills and methods for dealing with everyday conflict at home, at work, and in the community. The skills and techniques that are part of mediation training can be adapted and transferable to any type of conflict. Lawyers can use them in the transactional arena (drafting contracts, setting salaries and terms of employment, negotiating leases), in litigation (negotiating settlements, resolving discovery disputes, negotiating medical liens, handling client fees and expenses), and law practice management (law firm governance, shareholder disputes, claims, policy-making).

This article will examine the challenges experienced by lawyers who are training to become mediators. Some of these challenges stem from deeply ingrained perspectives associated with legal training and experience. The "legal culture" shapes and informs a lawyer's identity and the ways he or she views conflict. This article will suggest that identifying these perspectives is a crucial step in recognizing, working with, and ultimately broadening the "lawyer's perspective" to include a "mediator's perspective."

1. The duty to represent clients zealously

History and the rules of professional responsibility dictate that a lawyer's duty is toward one side of a dispute or transaction--his or her client. The attorney/client relationship is carefully defined, for once an attorney undertakes representation, he or she must protect and advance their client's interests in a zealous manner. A lawyer is required to put the client's interests ahead of their own. All the information that is generated during litigation is analysed in terms of its potential benefit or harm to the client. Strategic goals are set based upon the client's legal rights. Though the purpose of the adversarial system is justice, the system can also result in tension between parties that may lead to deep-seated antagonism between advocates, their counterparts, and the parties.

A lawyer who is training to become a mediator may consciously or unconsciously transfer the concept of the attorney/client relationship and the duty toward clients to the mediation process. This could take the form of taking up the cause of one party or another by speaking on their behalf, losing the appearance of neutrality by advocating vigorously in support of one or more claims/defences/positions, and making private decisions about the merits of the dispute and favorable outcomes.
By contrast, a mediator does not represent one party or another in a dispute. The mediator does not have a duty of zealous advocacy on behalf of any one participant in the process. To this day, there is no single word that describes the relationship of the mediator to the participants in mediation. Not unlike a judge or an arbitrator, the mediator generally has no duty of representation toward any person who is involved in the mediation process, including named parties, attorneys, witnesses, expert witnesses and others. These 'parties' participate in mediation and the mediator may have identifiable general ethical duties toward them, but the mediator is not answerable directly to any party to the dispute in the same manner as a lawyer.

For lawyers who are training to become mediators, it may be helpful to shift their perspective concerning the identity of the client. Mediators have duties toward the participants and to the process. They protect the integrity of the mediation process through the careful use of techniques that promote a constructive dialogue and negotiation. In a balanced and neutral manner, a mediator explores facts, law, issues and interests to promote mutual understanding and resolution of the dispute. The mediator is a guardian of the mediation process itself rather than any individual party or their interests. If a party were to ask a mediator, 'Whose side are you on?' the Solomonic response might be, 'I am neither for one party nor the other. My job is to assist everyone in figuring out whether there are favorable terms of agreement that can be reached after thoroughly considering the alternatives.'

2. The nature of mediation

Lawyers' training and experience with dispute resolution generally is based upon their understanding of trial and arbitration, two adjudicative processes where the neutral judge/arbitrator controls both the process and outcome of the hearings. Alternatively, many lawyers frequently engage in the differently structured process of negotiation, with varying degrees of tactical and strategic success. In either case, the framework for traditional advocacy practices often consists of formal rules of court and professional responsibility or, alternatively, conventional negotiating tactics.

Adjudicative processes are, by nature, highly adversarial. They are rigidly structured, with pre-hearing conferences, opening statements, plaintiff's case, defendant's case, closing arguments, post-trial issues and possible appeal. The rules of evidence govern and are strictly applied. Information is introduced in the form of examination of witnesses and documents meeting specific evidentiary requirements. The temporal orientation of adjudicative processes where legal issues (versus equitable) are at stake is historical, e.g. Who did what to whom in the past? The focus is on fact-finding

(discovery and rules of exclusion) and fault-finding (examination of conduct, deciding liability). Every manner of human conduct is reduced to dollars. Lawyers must advocate for their clients within this formal framework of traditional rights, remedies and procedures.

Alternatively, negotiation is a process used by many lawyers in an unstructured and spontaneous manner. Some lawyers are unaware that there are well-established negotiating principles and techniques that can be applied in a systematic manner, thereby producing relatively consistent and predictable results. Instead, they may 'shoot from the hip', drawing from a narrow frame of reference in terms of effective negotiating tactics.

Lawyers who are training to become mediators may approach the topic of mediation with an expectation that the mediation process is similar to adjudicative processes like arbitration and trial, which are structured, formal and exclusionary. They may actually feel uncomfortable with different procedures, a lower level of formality, and a high degree of procedural and remedial flexibility, all of which are present in mediation. Conversely, lawyers may believe that mediation is a process where there are few or no rules of practice, so mediation is viewed as a casual, disorganised and sporadically successful process.

The reality is that mediation shares some of the structure of formal adjudicative processes and it also provides parties with flexibility and freedom to negotiate in their best interests. Mediation is a voluntary structured negotiation process, with identifiable procedural stages, where a mediator assists the parties by using specialised communication and negotiation techniques. Mediation has both adversarial and collaborative features. In litigated disputes, a mediator carefully examines the factual background and may also have an evaluative role, analysing liability, costs of litigation, jury appeal of various clients and arguments, risk of losing at trial, potential jury verdict ranges, witness appearance, and alternatives to litigation.

The rules of evidence do not apply during mediation; no examination of witnesses takes place and rules of exclusion do not restrict the information that can be considered. In terms of temporal orientation, the mediation process focuses on the past (historical background of a dispute, actions and conduct of the parties, documents and other related information), present (the parties' immediate circumstances, needs, and concerns), and the future (the parties' long-term personal and business interests, future dealings between the parties, working out terms of agreement that present a stable and durable settlement that is within the ability of the parties to carry out, re-establishing or re-structuring the communication and relationship between parties).

Mediation is neither a fact-finding or fault-finding process; instead, mediation is a problem-solving process, which means that the emphasis is on exploring the

possibility of working out a solution rather than only dwelling on the past and who is to blame. The parties in mediation are not restricted to money damages. They have the freedom to create monetary and/or non-monetary terms of agreement that are creative and non-traditional. Finally, the mediation process, itself, can be flexible procedurally, offering pre-mediation communications between the parties and the mediator, variations in the sequencing of the stages of mediation, sub-caucuses between various participants and interest groups in multi-party cases, location, timing and form.

3. Giving legal advice

A lawyer's stock in trade is rendering sound legal advice and providing good counsel to their clients. The lawyer's specialised formal legal training and experience provides him or her with a frame of reference for analysing and evaluating disputes. Clients ask for legal advice and they expect lawyers to provide it. The rendering of legal advice is a central and inherent part of a lawyer's work, which suggests that lawyers will tend to move into an advice-giving mode when they are confronted with a legal issue, conflict, or claim. When a client asks, 'What should I do?', it is expected that a lawyer will formulate a well-considered response that consists of some variation of the following, 'Based upon my analysis of the facts and the law, it is my considered opinion that you should do... .' It is challenging, to say the least, to refrain from giving advice when that process has been a central part of law practice for a long time.

Mediators do not render legal advice to anyone because they are no one's attorney. Rendering legal advice to any party would be stepping outside the role of a mediator. Rendering legal advice to one party and not another would violate the rule of neutrality and possibly create unfair advantages. Although mediation participants routinely ask for advice concerning legal issues ('Don't you agree that they're at fault?') and transactional issues ('What should my next move be?'), mediators cannot render direct advice and simultaneously stay within their role as mediators. On questions of law, a mediator may be of assistance by independently evaluating an issue and providing their analysis, but they must stop short of advising the parties about future conduct or activities. On questions of negotiation, a mediator can solicit options from the parties and even identify options themselves, so long as they are not couched in terms of what a party 'should do'. For example, in response to a question by a party about their next counter-offer, a mediator may say, 'Based on the history of offers in this case, on the length of time we've been mediating, and on the atmosphere in the other room, I don't think that moving incrementally at this point will generate a counter-offer from the other party. Something more may be necessary to move this negotiation along. If you were going to make another offer that was not a small move, what would you be willing to do?'

4. Thinking inside the box

Typically in adjudicative processes, lawyers confine their analysis to traditional rights and remedies. The framework of traditional rights and remedies is the intellectual 'box' within which lawyers operate. After many years of legal training and experience, lawyers have developed exceptional skill in logical thinking, e.g. analytical, rational, linear, deductive thinking. This skill, however, can be developed to a point where it reduces or virtually eliminates one's ability to think creatively and intuitively.

Lawyers being trained as mediators will experience difficulty thinking in non-traditional ways about possible solutions. It is easy to fall back on traditional remedies, i.e., money. Experience has demonstrated that the more training and experience a lawyer has, the harder it is to do anything except to think logically. Creative thinking may seem to be unacceptably unstructured and vague when a lawyer as mediator is confronted with the question of what terms of agreement might be of value to the parties—other than or in addition to money. If a lawyer/mediator imposes the template of traditional rights and remedies on the parties in mediation, it could drastically limit the options for agreement that may be possible.

A mediator is trained to think logically (when analysing the facts, claims and legal issues) and laterally (when assisting the parties in developing terms of agreement that meet their most important interests). Lateral thinking is a form of thinking that is creative, non-linear, non-traditional and intuitive. Lateral thinking is an intellectual muscle that is used so rarely that it has often atrophied to the point of non-existence in lawyers and other professionals. Lateral thinking is a skill that can be identified and developed, once there is an understanding of what it is and an awareness of its value in the process of generating options for agreement. Mediators are flexible in that they are prepared to work with the parties in creating a traditional money-based agreement or in creating a non-traditional, integrative deal that incorporates a wide range of monetary and/or non-monetary terms.

"Out beyond ideas of wrong doing and right doing,
There is a field,
I'll meet you there.
When the soul lies down in that grass,
Ideas, language, even the words "each other,"
Don't make any sense."
--Jalaluddin Rumi

5. Responsibility for decision-making

Essentially, law practice is a service-oriented business. Lawyers assist people in conflict when the demands involve legal issues, claims and defences. People often self-select to become lawyers because they have an altruistic desire to help others who are in trouble or because they have experienced conflict themselves and they are

aware of the stress and turmoil associated with conflict. Whether their motivation is based upon personal experience or the desire to help others, many lawyers are motivated by a desire to protect others and to serve their interests. Being a client's 'white knight' can be professionally and personally rewarding.

Unfortunately, the desire to help may also coincide or morph into a desire to control or to 'fix' problems for others. Lawyers at times may interpret their duties to include 'running interference' for their clients, even where emotional confrontation may lead to understanding or personal healing. Lawyers may want to 'step in' to protect their clients, even at times where exposing vulnerabilities and discussion of deep personal issues may go to the heart of a conflict. Finally, lawyers may define their work in terms of taking responsibility for developing a final outcome, rather than asking their clients to share some of the responsibility for their conduct, making an effort to understand another person's perspective, or taking responsibility for thinking of possible solutions that truly meet their own unique interests.

A mediator does not assume responsibility for fixing a dispute between parties. Conflict is viewed by mediators as a natural and normal outgrowth of human activity, differing interests, and the placement of differing value on certain things. A mediator does not 'own' the dispute—the parties do. The parties are the people who have to live with the consequences and long-term effects of a mediation process, whether or not the case is settled during mediation. A mediator, accordingly, is mindful of the parties' desire to resolve disputes and 'close the deal', but is also aware of the primary importance of asking and allowing the parties to take responsibility for making their own decisions.

A mediator takes careful steps to ensure that the 'centre' of the process remains the parties by consulting and conferring with them every step along the way. Part of the problem-solving process involves understanding whether the parties are ready to move forward and to let go of the conflict. Another part of the process involves learning about the parties' concerns and interests. Yet another part of the process involves generating options for agreement that meet the individual needs of the particular parties, which necessarily involves reliance on the parties and their own unique understanding of their needs and circumstances. Lawyer-mediators must, themselves, learn to let go of the desire to 'fix' problems for their clients and to allow the clients to find their own solutions through guided dialogues and structured interactions. Mediation presents an entirely different paradigm for resolving disputes that is fluid and flexible, while focusing consistently on the parties as the centre of the process.

"Giving birth and nourishing,
Having without possessing,
Acting with no expectations,

Leading and not trying to control,
This is the supreme virtue."
--Lao Tzu

6. Feelings are irrelevant

When is a party in civil trial allowed to vent their emotions in their own words and without the artificial and highly structured process of direct or cross-examination? When does the judge, jury or arbitrator invite a party to let off steam, to clear the air, or to discuss what is weighing heavily on their minds? Other than testimony that is directly related to general damages, pain and suffering, and emotional distress, when is a party asked how they felt about some past event, how they currently feel about things, and how it might make them feel in the future if they can reach a deal? The Anglo-Saxon system of justice may feature elements that are considered to be 'genius' but it generally does not invite, encourage, or allow the emotional narrative of a case to come out in the form of the parties' own words.

Whether for reasons of efficiency or perceived lack of probative value, a party's emotional state, except insofar as it relates to a specific general damages claim, is generally considered be legally irrelevant and inadmissible in civil trial. Civil litigators historically have advocated for their clients within the narrow confines of remedies for pain and suffering or emotional distress. Lawyers serving as mediators have to broaden their view of the role of emotions in the mediation process. Emotions often fuel negotiation tactics and objectives. Emotions may serve as barriers to communication and negotiation. Human nature is such that emotions play a central role, independent of who is involved in the dispute or the precise nature of the claims. Everyone is affected by emotions, including top elected officials and diplomatic operatives, high-ranking executives and managers, highly educated professionals of all kinds and everyday people. Understanding the role of emotions in conflict and mediation is key to managing the interaction between the parties in a productive way.

Mediators are trained to understand that emotions play a key role in conflict and negotiation. The importance of being able to 'sit with conflict', i.e. to allow the parties to express themselves emotionally without becoming overly agitated, is stressed in mediation training. The mediation process welcomes the expression of emotional issues and invites parties to talk about what is bothering them and how they feel. Several specific communication techniques are geared toward managing difficult conversations, including active listening, reflecting emotions, re-stating, role reversal, re-framing and acknowledgment. A mediator's ability to calmly manage the parties' expression of intense emotions enables the parties to understand the issues more clearly and to find their own path through conflict.

"People do not mirror themselves in running water
Rather, they mirror themselves in still water,

Only that which is still,
Can still the stillness,
In others."
--Lao Tzu

7. The rules are the rules

Lawyers work in a complex web of procedural and substantive rules. They rely upon statutes, regulations and other written rules. They research and cite case law interpreting the common law and written rules. The rules of professional responsibility dictate standards of conduct and practice. In short, lawyers are surrounded by rules and they apply rules on a daily basis in their professional practice. Rules of logic govern legal thinking. The Socratic method of using questions to elicit information is the norm in law schools. With everything that is implied, rules and rule-based behaviour circumscribe every aspect of the practice of law.

Rules may bring a degree of certainty but they also restrict possibilities. Rules may produce some defined standards but they also tend to result in generalised outcomes and remedies instead of individualised agreements. Rules, however arbitrary and ill-defined, may engender feelings of comfort, order and predictability. Working within the rules and also outside traditional boundaries of litigation, remedies and legalistic problem-solving may engender feelings of a loss of structure and loss of direction.

Mediation is structured but flexible. Mediation has well-established rules of facilitation but it is fluid in the manner in which they are applied. Mediation is a dynamic, interactive and multi-dimensional process, which requires constant adjustments and sound judgment by the mediator. For example, the stages of the mediation process provide a template for reference, but they may be varied according to the needs of the parties. In some cases, there will be pre-mediation communications between the parties and the mediator, while in other cases, the mediation may begin with a private caucus instead of a joint session. Mediators may choose to meet with some, but not all, of the parties in a sub-caucus where it may be productive. Likewise, there is flexibility in the way in which specialised communication techniques are used by a mediator. Mediators must continually use their discretion, skill and judgment during a mediation process that is unfolding, changing direction and raising unexpected twists and turns.

Mediators are asked to bring to the table their training in the mediation process as 'process experts'. In addition, they bring to the table their communication and negotiation skills and abilities. They also bring to mediation their subject matter knowledge in particular fields and their general life experiences. Mediation asks that mediators refrain from limiting themselves to strictly traditional money agreements as settlements. They are challenged to be open-minded about the range of possible solutions that may exist for any given conflict. They are asked, in essence, to be flexible, to allow the parties to help determine the direction of the mediation

process, and to allow litigants to find solutions that, while lawful, are unique to their particular circumstances and interests. As a practical matter, mediation takes place in the 'shadow of the law', which means that traditional rights, remedies and norms provide the initial framework for some mediations. However, this does not restrict the mediator from going outside those traditional boundaries if the parties express an interest in doing so.

8. The concept of judging

It has been said that judges are the hardest people to train as mediators, lawyers are the next hardest and the rest of the population is the easiest. The law encourages judges and lawyers to be judgmental about the facts, the law, and the credibility of witnesses and parties. Often, the act of analysing these factors moves into the realm of sitting in judgment of others as people. This type of focused analysis and global judgment is a difficult habit to break.

A lawyer-mediator faces the challenge of listening with an open mind to parties who have already submitted compelling mediation briefs. A lawyer-mediator has to resist the temptation to make early and unfounded judgments about the merits of a claim or defence. Harder still is the task of suspending judgment while the parties make persuasive arguments during mediation and the mediator observes characteristics in parties that would otherwise lead a person to develop personal feelings that favor or disfavor individual parties.

A mediator is asked to inquire about the factual background of a dispute and to entertain the parties' positions on the issues and applicable law—without making public or private judgments. They are asked to treat the parties with equal respect, courtesy and consideration regardless of any personal feelings that may be generated. To the extent possible, mediators are asked to separate their personal feelings about parties from the facts, the law and other circumstances surrounding their claims.
Lawyer-mediators, by virtue of their training and experience, may tend to form early and rigid professional opinions about a dispute and the parties. In mediation, the challenge is to hold in reserve the process of judgment, while analysing the case and facilitating communication between the parties. Evaluation of the elements of a case does not necessarily include a global evaluation or rendering of a judgment. Moreover, the manner in which a professional evaluation is conveyed does not necessarily require that a lawyer-mediator come across as if they are rending a final judgment; instead, an evaluation can be described in terms of possible outcomes and can be the basis for a dialogue with the parties and their attorneys rather than a pronouncement. Mediation is, thus, a process of empowerment, even when the techniques a mediator uses may be invisible to the parties.

"When the Master governs,
The people are hardly aware that he exists.
Next best thing is a leader who is loved.

Next, one who is feared.
The worst is the one who is despised.
If you don't trust people,
you make them untrustworthy.
The Master doesn't talk, he acts.
When his work is done,
The people say, 'Amazing,
We did it, all by ourselves.'"
--Chuang Tzu

Conclusion

Lawyers seeking training as mediators face distinct challenges due to their specialised legal training and experience. To make the transition from counsellor to conciliator, there must be an awareness of the fundamental differences between the mediation process and adjudicative processes, the roles of an advocate and a mediator and the specialised techniques that are used. The challenge for lawyers is to recognise the difference skill set of a mediator, while simultaneously applying their substantial base of knowledge and experience. Understanding the differences in procedural structure, formality and the rules of evidence can help lawyers to find a degree of comfort in the flexibility, creativity and freedoms of mediation. Accepting these differences and being prepared to let go of a lawyer's traditional role can actually broaden a lawyer's base of skills for resolving disputes in the role of a mediator or in their role as an advocate.

For trainers, it is vital to understand the lawyer's perspective and to treat it as an educational starting point. Early in mediation training, there should be a focus on the distinctive nature and characteristics of the mediation process in comparison to adjudicative processes such as arbitration and trial. Problem-solving should be comparatively analysed with fact-finding and fault-finding. Additional focus should be placed on the distinctive role of a mediator compared to the role of an advocate or judge. The neutral/party relationship should be examined and contrasted with the attorney/client relationship, especially insofar as it may involve advice-giving. Critical thinking and analysis should be carefully distinguished from sitting in judgment or imposing decisions.

For training of lawyers as mediators to be effective, emphasis must be given to the fact that the transactional centre of the mediation process is the parties. It is the parties, who, with guidance and counsel from their advocates, have the responsibility and the freedom to control the outcome and to make decisions about favorable terms of agreement. It should be stressed that the mediation process, while structured, is flexible and dynamic. Mediators are expected to apply various specialized communication and negotiation techniques with discretion, good judgment, and responsiveness to the particular circumstances of each case. Role plays, exercises,

interactive activities, and case studies should be developed to help lawyers broaden their perspective to include a mediative view of conflict resolution.

Lawyers bring an added dimension to the mediation of litigated cases, in terms of their experience with the trial process, their knowledge of the substantive law and their practice of working things out with opposing counsel and parties through negotiation. An enhanced understanding of the mediation process coupled with legal training and experience will enable a lawyer to become even more skilled in resolving disputes. Unburdened from the limitations flowing from custom, ceremony and the combative nature of the legal process, lawyers can achieve the transformation from gladiator to mediator.