Culture Change - A Tale of Two Cities and Mandatory Court-Connected Mediation

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Culture Change?
A Tale of Two Cities and Mandatory Court-Connected Mediation

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I. LEGAL PRACTICE AS A BAROMETER OF CHANGE

In the civil justice system, most litigants are represented by counsel. In the area of legal practice—commercial litigation—examined in this study, self-representation is virtually unknown. Instead, litigation is essentially disputing carried out by agents. Jacqueline Nolan-Haley describes lawyers as “the dominant players in the adversary system” and few would disagree. These agents and their professional cultures exert a powerful control over the norms and expectations of civil disputing. At the same time, the lawyer’s role is itself continuously shaped and reshaped by the social and economic interests served by law. As agents for their clients’ interests, lawyers must be responsive to changes in economic structures, political climates, social expectations and disputing cultures. While they must adapt in order to survive, lawyers also play a critical role in legitimizing new ideas and practices, and mediating between these ideas and their clients. As a result, the assimilation, acceptance, rejection or integration by lawyers of the burgeoning array of alternatives to formal adjudication and litigation processes is critical to the impact of civil justice reform and innovation, on both a practical and a political level.

The study which this paper describes focused on the ways in which the practices, strategies and attitudes of commercial litigators have been changed - if at all - by the introduction of a new rule of civil procedure mandating early mediation in the Canadian cities of Toronto and Ottawa. Ontario’s Rule 24.1 requires the parties (both lawyers and their clients) to attend mediation within ninety days of the filing of the statement of defense in a Superior Court action. While Ontario’s Rule is similar in many respects to mandatory court-connected mediation programs in many parts of North America, three features are worthy of note. First, this is an “opt-out” model, requiring application in person to a Master for adjournment or exemption. Second, most mediations will take place before the commencement of discoveries whereas in many U.S. court-connected programs court-connected

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


5. See Marc Galanter, Worlds of Deals: Using Negotiation to Teach About Legal Process, 34 J. Legal Educ. 268 (1984). Throughout this study, the point of comparison is traditional adjudication and conventional litigation (negotiation in the shadow of the law), uninterrupted by either case management or mandatory mediation. Everything else is characterized as alternative. Id.

6. Ontario R. Civ. P. 24.1.09(1), 24.1.11(1)Rule 24.1. This rule is known as the Ontario Mandatory Mediation Program (hereinafter MMP). Similar procedural reforms have been introduced in other provinces. See e.g. The Queens Bench (Mediation) Amendment Act, c.20, SS 1994; Mediation Rules of the Provincial Court, Civil Division for Alberta, 1997, and in numerous US states; Frank E.A. Sander, The Future of ADR, 1 J. Dis. Res. 3 (2000) (reviewing developments in the United States).
mediation does not take place until after discoveries. Finally, the Rule requires that lawyers bring their clients with them to mediation, or face cost penalties. This feature also provoked considerable discussion among study participants.

The introduction of Rule 24.1 was described by the then-Chair of the Ontario Civil Rules Committee as, “the largest single change in civil procedure since the institution of the Rules [of Civil Procedure] in the 1880’s.” Just what the Rule intends to achieve, and why, continues to be a matter of intense debate. For government, the primary objectives are cost savings and a reduction in the court backlog. The potential offered by early mandatory mediation for negotiated settlement can also be understood as enhancing access to justice for disputants either unwilling or unable to finance protracted litigation. Others see the introduction of Rule 24.1 as a fundamental challenge to the adversary model, highlighting the Rule’s requirement of early settlement appraisal and direct client participation in seeking a consensual solution via negotiation. Advocates of restorative (collaborative, relationship-building, or problem-solving) models of dispute resolution regard the introduction of mandatory mediation in Ontario with a mixture of optimism and skepticism. On the one hand, this might be a unique opportunity for “culture change” in civil litigation. On the other, there is concern that the formal adoption of mediation, whether via court-connected programs such as Rule 24.1 or in increasing numbers of private commercial mediations, might lead to the tainting, or perhaps the co-option, of the transformative goals of mediation. Ten years ago, as court-connected mediation was being introduced across the United States, a leading scholar wrote: “[A]n important question that must be confronted is whether forcing ADR to adapt to a legal culture or environment may be counterproductive to the
transformations proponents of ADR would like to see in our disputing practices."\textsuperscript{12}
This question has now come of age in Canada.

This is the first study to ask Canadian lawyers to describe in depth what they really think about mediation and the impact it has had on their litigation practices.\textsuperscript{13} Their responses are rich, reflective and diverse. Many different understandings of mediation goals within litigation are present in the legal profession itself, and this lack of consensus is reflected in the results of this study. Before explaining the methodology of the study, it is useful to first set out its theoretical premises and to relate these to previous research on the legal profession which offer important insights relevant to the development of mandatory court-connected mediation, and thus to the interpretation of data produced by this study. These premises are: the relationship between ideologies of legal practice and changes in the social and economic environment; the dominance of an adversarial model of lawyering; and the variables produced by so-called "local legal culture." 

\textbf{A. Legal practice as a reflection of social institutions and disputing cultures}

Heinz and Laumann characterize the legal profession as an "overdetermined social system,"\textsuperscript{14} arguing that it is uniquely shaped by the changing social institutions of the external world. Along similar lines, Donald Landon describes the profession as "more creature than creator of events and environment."\textsuperscript{15} Changes at both structural and practical levels imply that the delivery of legal services and legal professionalism is uniquely shaped by the social and economic trends of the external world. Moreover, changes in law reflect changing expectations of what lawyers might do for clients. In studying the legal profession we are in effect studying the changes in social institutions, relationships, and expectations that are relevant to law. Adjustments and reorientations in legal practice—whether administrative, procedural, philosophical, or strategic—are at least in part a response to changes in the environment and specifically, in the case of commercial litigation, changes in client demands and needs.

Some of these changes in norms and expectations have the potential to significantly impact the way in which litigation is conducted. Structural adjustments are evident in the introduction into many jurisdictions of mandatory early settlement

\begin{itemize}
  \item \textsuperscript{15} Donald D. Landon, \textit{Country Lawyers: The Impact of Context on Professional Practice}, 5 (Preager 1990).
\end{itemize}
processes—whether mediation, early neutral evaluation, or settlement conferences with a judge—epitomized in Ontario’s Rule 24.1. Parallel developments within the profession itself include the emergence of specialist “settlement counsel,” the establishment of ADR Departments in big litigation firms, and the development of collaborative lawyering networks, where lawyers are retained by their clients exclusively to negotiate, and are barred from litigating. An increasing appetite for early reporting, strategic settlement planning, and early dispute resolution has been noted in relationships between commercial lawyers and their institutional clients (for example financial institutions and insurance companies). Sometimes this is attributed to the increasing influence of in-house counsel who is obliged to account for and justify all litigation expenditures to his or her manager.

In jurisdictions where ADR has become a mandatory (and thereby unavoidable) part of litigation, the local Bar appears to make the necessary adjustments in order to accommodate these new requirements. Richard Abel notes that once new knowledge and skills are recognized as legitimate and important, the profession will buy into what they regard as a significant means of ensuring their continued professional status - dominance even - in the field of dispute resolution. Such accommodation might be cynically understood as an economic investment in the future of profitable legal practice. In some cases it might also be seen as an opportunity to enhance job satisfaction. The data presented in this paper allows for both interpretations. In either case, a broad consensus on issues seen to be of normative significance may be critical to the stability of the profession’s monopoly over their market.

Whatever the motivation, it seems that once change has become inevitable, lawyers will embrace it. If early mandatory mediation is viewed as an inevitable change in legal practice, what type of change does it represent? And what does mediation become once it is incorporated within a traditionally adversarial model of lawyering?

19. See e.g. Bobbi McAdoo, A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota, 25 Hamline L. Rev. 401 (2002); Bobbi McAdoo & Art Hinshaw, The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri, 67 Mo. L. Rev. 473 (2002); Wissler, supra n. 7 (reporting on data from Ohio’s mediation programs).
21. Demonstrated in Canada and the United States by the proliferation of Continuing Legal Education courses on ADR which, albeit often superficial, have become a “must have” for legal practitioners.
A key theoretical premise of this study is that the structure of adjudicative dispute resolution makes an adversarial approach to advocacy functionally efficient, and thereby almost inevitable. The dominant cultural context for lawyering practice assumes win/lose outcomes which are substantially determined by the expertise of those versed in the normative principles of law. Within a zero-sum game where the potential outcome is either winning or losing (as in a trial or via positional negotiations played out in the shadow of a trial), there is clearly only one acceptable outcome for the competent professional: winning. It is an evaluative process in which one or another view is chosen as “trumping” all others. While acknowledging that there is a strong pragmatic component to dispute resolution, in particular that many commercial conflicts simply need a “business solution,” lawyers rapidly assume and assimilate the merit-based arguments that their clients can advance, and are generally comfortable with a positional approach to bargaining and an adversarial mode, whether or not this is also “aggressive” in nature. The principle of “zealous advocacy” enshrined at the heart of professional codes of conduct is thus understood as counsel’s zealous efforts to achieve a “win” for the client. This means that in preparing a case for trial, counsel must collect information that makes the case for his or her client on the basis of asserted rights. This information becomes less valuable if it is shared with opposing counsel. Information or evidence is gathered in order to assert or defend a particular version of events; any other information that is deemed irrelevant is discarded or ignored. Presenting information as evidence means presenting it as “fact,” and requires the denial of any ambiguity, circumstances or context (unless self-serv ing). In a rationalist, zero-sum model, the side with the most complete and well-constructed information edifice looks best placed to carry the day. In this paradigm, information is for winning, not for sharing, and certainly not for enhancing the possible options available to the parties. This understanding of the nature and function of information is inherent to traditional notions of zealous (understood as responsible) advocacy.

Early settlement efforts which include interests-based bargaining in mediation imply not only a different analysis of the conflict itself and its appropriate resolution,

but also a reconceptualization of the traditional role of the lawyer as zealous advocate. As Carrie Menkel-Meadow has written:

The zealous advocate who jealously guards [and does not share] information, who does not reveal adverse facts [and in some cases, adverse law] to the other side, who seeks to maximize gains for his client, may be successful in arbitrations and some forms of mini-trials and summary jury trials. However, the zealous advocate will likely prove a failure in mediation, where creativity, focus on the opposing sides’ interests and a broadening, not a narrowing of issues, may be more valued skills. 29

An adversarial lawyering philosophy also inevitably implicates a particular understanding of lawyer/client relations. The relationship between counsel and client in a predictive bargaining model is one of substantive expert/naif, and this is reflected in assumptions about decision-making, judgment and autonomy. 30 Predictive negotiations focused on legal rules and principles both grow from and reinforce the professional expertise of lawyers. 31 Rosenthal’s classic work on the dynamics of lawyer/client decision-making suggests two models of lawyer-client relations: the “traditional” model in which the client is passive and the lawyer is fairly autonomous, and the “participatory” approach where the client plays a more active role. Rosenthal’s analysis suggests that the passive client, who follows the lawyers’ instructions and is detached from the problem-solving process, operates as the conventional model, and that departures from this norm, such as clients who want to participate actively in anything other than established areas of client input, are seen as aberrant and even disruptive by many lawyers. 32 Of course as experts, lawyers probably expect to exercise control in the relationship, even if they might sometimes encourage some measure of client participation in bargaining. McEwen, Mather and Maiman’s recent study of divorce lawyers in Maine noted that “lawyers have considerable leverage in their relationships with clients that enables them to bring pressure to bear in aligning their clients’ perspectives with their own.” 33

Historically, commercial clients also appear to have chosen to nominate their legal representatives to be both managers and agents in disputing. 34 When costs were lower, they may have been attracted to the idea of a corporate legal department


33. Lynn Mather, Craig A. McEwen, & Richard J. Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* 90 (Oxford U. Press 2001); see generally Id. at 87-110.

34. See Gilson & Mnookin, * supra* n. 2.
with a “hired gun” mentality. However there is plenty of anecdotal evidence, reinforced by this study, that traditional expectations of the lawyer/client relationship are changing for these types of clients. Sophisticated commercial clients, especially repeat players, may generally be less prepared to be passive and more inclined to assert their wishes. The introduction in Ontario of mandatory early mediation requiring the attendance of the client offers a particular challenge to the traditional model of autonomous, lawyer-driven decision-making.

C. The influence of local legal culture

A third area of earlier research that appears relevant to this study relates to the impact of local legal culture on practice norms. Local legal culture is more than simply differences in formal rules or practices, but reflects a “how we do things here” perception in relation to particular rules and practices. These perceptions arise from local expectations and assumptions (for example, an expectation that one will generally be dealing with counsel whom one has previously dealt with; an assumption that the judge will be flexible or inflexible on this issue; shared mores on the urgency of case disposition, etc.). Local legal culture may be important to understanding the dynamics of cultural change within the legal profession wherever there are apparent distinguishable “arenas of professionalism,” including areas of substantive specialism, client base, firm culture, and the culture of the local Bar. More recently, McEwen, Mather and Maiman have developed a broader conceptual description of “communities of practice” which are critical to defining professional norms and values via the mediated influence of collegiality. Membership of any one or more of these multiple worlds, for example one’s firm, the local courts and their procedures, or those with whom one works most frequently and closely, contributes directly to professional development by translating the general and often contradictory professional identities and norms into guiding principles for daily application.

35. See Simon, supra n. 27, at 7-10 (What William Simon believes to be the dominant view, where the lawyer need take no moral responsibility for the outcome of the case as long as he follows his clients' instructions. Simon writes “...(T)he only ethical duty distinctive to the lawyer’s role is loyalty to the client.” Id. at 8.
37. See e.g. Herbert M. Kritzer & Frances Kahn Zemans, Local Legal Culture and the Control of Litigation, 27 Law & Soc'y Rev. 535 (1993) (where a change in the rules of civil procedure making lawyers more accountable for frivolous actions was differentially applied across several jurisdictions); Thomas W. Church, Jr., Examining Local Legal Culture, Am. B. Found. Res. J. 449 (1983) (arguing that there is most apparent local culture and agreement in relation to procedural issues such as the need for trial to dispose of an issue); David R. Sherwood & Mark A. Clarke, Toward an Understanding of Legal Culture, 6 Justice Sys. J. 200 (1981) (arguing that local legal culture can be used to explain differences in case processing timelines and delays and backlogs between different courts).
40. Id. at 61.
This study examined mandatory mediation in two very different local legal cultures. Interviews were conducted with commercial litigators in one very large urban center (Toronto, population 2.2 million) and one medium sized urban center (Ottawa, population 500,000). Of particular relevance then are characteristics which appear to distinguish practice in larger urban settings, where lawyers will occasionally, but infrequently re-encounter one another in professional settings, and practice as a member of a smaller and more cohesive Bar. Landon's research illustrated a number of characteristics that tend to appear in smaller Bars including greater collegiality and greater accountability. In smaller Bars, reputation is affected by day-to-day repeat dealing, and there is potential for multiplex relationships and reciprocity codes, where lawyers will interact with each other and their clients in a variety of roles other than lawyer/client; for example, lawyers and clients may both be members of local Rotary clubs, and local social networks. Smaller Bars may also be more accustomed to informality in their approach to procedural and administrative matters, where insiders operate on the basis of informal understandings. The size of the local Bar will also be reflected in norms of firm size, which may be a very significant factor in firm culture, and may help to explain differences between these two groups of respondents. The prevailing attitudes of individual firms towards mediation also constitute a significant “arena of professionalism” or “community of practice.” Finally, the concept of local legal culture may be helpful in understanding differences in the level of legitimization and acceptance of mediation in the two cities. One manifestation of the extent of change is the extent to which the leadership of the profession is prepared to be supportive of it. In larger commercial firms, local leaders include the partners of the firm itself and the type of approach they promote in relation to dispute resolution; in smaller practice communities, it may mean the leaders of the local Bar association. As will be seen, local leadership takes different forms and adopts different approaches towards mediation in Toronto and in Ottawa.

II. METHODOLOGY

A. Commercial Litigators

Focusing on one sector of the Bar in this study seemed essential in order to screen out at least some of the many potential variables between different areas of litigation practice. We did not expect employment lawyers, for example, to respond in the same way to mandatory mediation as family lawyers or commercial litigators. The research subjects for this study were identified as lawyers whose practice is wholly or primarily in commercial litigation. Commercial litigation is defined here as the representation of corporate and institutional clients who are litigating over breach of contract and other contentious transactional matters. For the purposes of this study, commercial litigation was also defined to include insurance practice

41. See Landon, supra n. 15.
42. A large firm in Ottawa would be more than thirty lawyers, whereas this would be considered mid-size in Toronto. A large firm in Toronto would be closer to 200 lawyers.
43. Lande, supra n. 23, at 195.
where a lawyer works for an institutional defendant insurer. The assumption here was that lawyers representing corporate or institutional clients would have a different experience of mediation than those who generally represent individual litigants. Anecdotally, commercial litigators are often regarded as the most aggressively adversarial sector of the Bar. Less arguable is the fact that commercial litigation dominates civil court lists, and the rapid growth of legal work on behalf of corporate clients is a significant trend across North America. Thus by concentrating on commercial litigators, this study focuses on a rapidly expanding sector of the practicing Bar whose influence is critical to the culture of civil disputing.

The sample was further limited to lawyers who had participated in a minimum of ten mediations, either under the auspices of Ontario’s mandatory mediation program or private commercial mediations. Volunteers were sought via larger law firms and the Canadian Bar Association’s Civil Litigation and ADR Sections. The sample was then drawn with attention to representativeness regarding gender and length of time in practice. The final group of respondents comprised forty commercial litigators, twenty in each center.

B. Interviews

Face-to-face interviews with each subject, lasting between sixty and ninety minutes, were conducted in Ottawa between September and December 2000, and in Toronto between September 2000 and February 2001. An elicitive style was adopted in order to discover as much as possible about the impact of mediation on these litigators’ practice management, strategic behaviors and attitudes. The interviewer encouraged reflexivity using a general facilitative approach, employing where appropriate communicative techniques such as summarizing, probing, open-ended questions, focusing, identifying and clarifying context changes, encouraging storytelling, and exploring narrative linkages. These interviews were not regarded as a neutral, fact-gathering process. Instead, they were conceived of as a project for producing meaning, a dialogue between interviewer and respondent which actively constructs meaning from experiences of mediation, rather than adopting a closed or a semi-structured questioning format. It was further assumed that the perceptions of respondents would be critically affected by their learned behaviors and cultural patterns, including for example the cultural norms of commercial litigation, the culture of the firm in which they practiced, and their legal education. We assumed that the contexts within which each respondent experienced mediation would vary.

44. The Heinz, Nelson and Laumann study of Chicago lawyers, conducted in 1975 and again in 1995, showed that the corporate sector of practice (both litigation and non-contentious work) grew from 54% of respondent lawyers time in 1975 to 61% in 1995. See supra n. 14.
45. Around 20% of the practicing population in Ontario are in their first five years of practice; approximately 20% have practiced for 6-10 years; approximately 30% for ten-twenty years; and 30% for more than twenty years. Federation of Law Societies, Statistics of Law Societies <http://www.flsc.ca/en/lawSocieties/statisticsLinks.asp> (accessed Aug. 15, 2001). There is no data that establishes how many women practice as commercial litigators, but it is clear that their numbers, relative to their male colleagues, are very small. By including five women in each of the sample groups of twenty, we probably erred towards the over-representation of women, but wanted to ensure that their voice was a part of the data.
tremendously, as would individual experiences of mediation. We were interested, therefore, in both the described consequences of exposure to mediation on commercial litigation practice, and also in how our respondents were assimilating, framing and organizing their experiences.

The interviews were structured around fourteen prompt questions developed following considerable discussion among the research collaborators (see Appendix A). These questions reflected a set of preliminary hypotheses about the critical role played by lawyers in shaping values and perceptions about civil disputing, and the ways in which an alternative paradigm of dispute resolution might alter the assumptions, values, and practices of litigation. Each interview was audiotaped in order to produce a complete transcript. The subjects’ anonymity was protected, with each tape and transcript identified only by base data (gender, year of call, number of mediation experiences), a center locator (Ottawa or Toronto), and a number (1-20).

III. A RANGE OF PRACTICE PARADIGMS: FIVE “IDEAL TYPES”

A critical preliminary question for the design of this study was whether the introduction of mandatory mediation assumed or implied any single and coherent model of dispute resolution, which was in effect a substitute paradigm for the traditional approach to commercial litigation. At the outset of the project, this question seemed premature. Moreover, it was evident that there were a wide range of views on the goals and objectives of mediation, as has been noted above. Whatever the strength of the various perspectives and their proponents, there appeared to be no orthodoxy or consensus about the purpose or impact of either Rule 24.1 in particular, or commercial mediation in general. In truth, policy-makers may not really care which philosophical rationale for mediation becomes dominant, as long as their goal of more efficient and earlier settlement is achieved. It may be that the only common reference point is the traditional litigation process, although this too has many variations (for example, the case management of some cases; the use of mandatory settlement conferences; simplified rules procedures for smaller cases, and so on). It may be that all that can be said about a new model of dispute resolution in the context of Rule 24.1 is that it interjects a new procedural step, requiring disputants to attempt mediation at an early stage in the litigation. What is most important is how litigators respond and adapt to this new procedural step, including how they use the mediation process and how they understand the types of resolution, which may be possible in mediation. What actually goes on inside mediation and individual experiences of mediation is highly variable and many different mediation styles are practiced, such as predictive, problem-solving, evaluative, and facilitative. There are many debates in the literature about what

48. McEwen, Pursuing Problem-Solving, supra n. 31.
constitutes real mediation, and many value-based arguments about which paradigm is better. This study does not engage in these debates. Instead it attempts to assess the real impact of mediation on commercial litigation practice, and as a result uncovers an eclectic range of styles and experiences of mediation. The central questions were what differences, if any, does mediation make to traditional norms of adversarial lawyering, and how are commercial litigators making sense of mediation within their own ideologies of practice?

The variations in practice paradigms which emerged from this study may be too complex to be simplified in the form of typologies, but the following five Ideal Types offer one means of analyzing the diversity of experiences and views represented by the forty respondents. It is important to note that these five attitude streams represent Ideal Types—that is, they describe a set of attitudes and values towards mediation and adjudication rather than actual individuals. Using Weber's original notion of Ideal Types, these are offered not as a sketch of an actual person or persons, but rather as an imaginary representation of the essential characteristics of a particular phenomenon. This analysis aims to illuminate reality by distinguishing between these phenomena (here different reactions and responses to mediation), and in the process to clarify the dimensions of each. Many interviews demonstrate features of more than one type, as few lawyers are committed to only one perspective, and their views are often affected and changed by particular experiences. Many respondents appeared to align themselves with more than one of these attitudes during the course of a single conversation, without clear reasons for the shift. This suggests pervasive ambiguity, which may in turn reflect the relatively superficial and unproblematic conceptualizations of mediation held by many commercial litigators.

A brief description of each of the five Ideal Types follows.

A. The Pragmatist

The Pragmatist is generally positive about mediation, seeing it as a useful opportunity for exploring settlement in many, although not all, cases, and as making practical sense in light of the extraordinary legal costs, which are becoming the norm. The Pragmatist sees his clients embracing the idea of mediation for the same reasons, and this further consolidates his practical orientation towards mediation. He has always been very pragmatic about settlement—if a matter is going to settle, which it generally will, then why not get it done as quickly as possible at minimal expense? The Pragmatist talks about his experiences of mediation in a way that suggests that his practice has not significantly changed as a result. He does not think he is doing anything very different because now he simply applies his negotiation skills to mediation. The Pragmatist does acknowledge that mediation sometimes, but only

51. It is also important to realize that the word “ideal” as Weber used it referred only to the conceptual nature of the types and did not suggest in any way the other, now more common, sense of “ideal”: as a desirable or even perfect type of something. Max Weber, The Protestant Ethic and the Spirit of Capitalism (Talcott Parsons trans., London, G. Allen & Unwin, Ltd. 1930).

52. Infra Part VIII.

53. The Ideal Types are described here as males, not to exclude females but as a reflection of the reality of the commercial litigation Bar which is comprised significantly of men.
occasionally, produces significant results that come as something of a surprise, and in particular he recognizes the impact of more actively including some clients at least in the negotiation itself. This next lawyer acknowledged that mediation does take away some of the lawyer’s traditional control of the negotiation process, but otherwise his response to questions about difference suggests that he sees mediation not so much as a different process than as a new, earlier process. This quote also captures the essence of the Pragmatic view that mediation is primarily a response to increasing client scrutiny of legal costs.

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

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

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

Mediation doesn’t mean you have to settle... We just have to remember that it’s our clients who tell us what to do.

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

Pragmatists were much in evidence in both cities, but especially in Toronto where the Pragmatic approach was generally the most positive view expressed towards mediation. Pragmatist orientations were widely shared by Ottawa counsel,

54. For example, "I have to say I've had very, very few where there has been what you can truly call a win-win situation...I have to say, unfortunately, that most of the mediations that I've been involved with have not had that win-win aspect." Toronto-16: text units 348, 351.
55. Toronto-18: text unit 15.
56. Toronto-16: text units 95-98.
57. Ottawa-8: text units 280-283.
although many Ottawa lawyers were willing to go further in their personal commitment to mediation, often articulating the perspective of the True Believer.

B. The True Believer

The True Believer has made a strong personal commitment to the usefulness of the mediation process, which goes further than simply reorienting their practice strategies to new client expectations and requirements. The True Believer speaks about mediation in terms that suggest that it has had a significant impact on his attitudes towards practice, clients and conflict. He may even use quasi-religious metaphors like converted or transformed to describe this process of personal and professional change. He sees mediation as having a transformative effect on relationships, outcomes and on the role of the advocacy itself which goes beyond an instrumental use of the process. One True Believer described mediation as "a completely different form of adversary process." Another, in comparing mediation to traditional settlement negotiations, asserted that "[M]y role has significantly changed. All of those things are done quite differently at the mediation."

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

Almost all of the Ottawa counsel in this study described strategic behaviors and articulated attitudes consistent with the True Believer perspective, and often maintained this consistently throughout their interview. In Toronto, this view was glimpsed occasionally in up to one third of interviews, but was usually overlaid with Pragmatic or even Instrumentalist sentiments. This is the first hint of the contrast that gradually emerges from a comparison of prevailing attitudes in the two cities.

C. The Instrumentalist

In sharp contrast, the Instrumentalist regards mediation and mediators as a process or a tool to be captured and used to advance the clients' mostly unchanged

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58. Toronto-5: text unit 107 ("I got religion"); Toronto-20: text unit 608 ('I think you'll find that I'm a person who has now converted and I admit to being a believer in mediation.").
59. Lande, supra n. 23.
60. Toronto-5: text units 202-203.
61. Toronto-20: text units 186-190.
62. Ottawa-8: text unit 190.
63. See infra VII(A).
64. The same disparity in attitudes was noted by the formal evaluators of the Ontario Mandatory Mediation Program. See R. Hann, C. Barr, and Associates, Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1) Final Report - The First 23 Months (Queen's Printer 2001) (hereinafter "Hann et al., Evaluation"); infra Part VII(C) discussion.
adversarial goals.\textsuperscript{65} This lawyer has assimilated mediation as a procedural tool to be efficiently utilized or alternatively avoided or neutralized by showing up but not engaging. Favorite instrumental strategies include using mediation to reduce the expectations of the other side, or as a fishing expedition to obtain early discovery. He does not see any particular role for a client in mediation unless heavily orchestrated by himself. He will likely have had little experience of any style of mediation other than a predictive, evaluative approach. He will move flexibly, with little effort and no apparent discomfort between an adversarial role and a more conciliatory role, regarding the second as a game rather than a genuine change in orientation. Nonetheless, he is sometimes taken aback at what emerges from mediation, and in particular, acknowledges its usefulness for some clients as a cathartic process. These experiences are not, however, integrated in any way into practice norms but acknowledged in passing as a separate phenomenon:

Mediation is the perfect opportunity for the fishing expedition, which prior to this was not available to counsel.\textsuperscript{66}

You can tie everyone up and keep them further away from getting their dispute resolved through . . . a mediation process than anything else.\textsuperscript{67}

There were many examples of Instrumentalist strategies and attitudes among Toronto counsel. Ottawa counsel seemed to regard Instrumentalist tactics and strategies as bad faith; instead many lawyers spoke of the importance of taking mediation seriously and not using it to play games with the other side. Moreover, Ottawa lawyers often referred disparagingly to the tendency of Toronto lawyers to adopt this approach.

\textit{D. The Dismisser}

The Dismisser regards mediation as a new fad, which presents little difference to the traditional model of negotiation towards settlement, and therefore presents no special challenges to the role of counsel. Dismissers are fond of pointing out that lawyers have always negotiated at a time at which they feel that it is in the client's best interests, and most cases have always settled (which demonstrates that lawyers must be good negotiators).

[L]ook, we're big people and we can settle the darn thing, what do we need a third party and why do our clients have to be there.\textsuperscript{68}

The only substantive and important difference the Dismisser acknowledges as a result of mandatory mediation is that some aspects of file preparation occur earlier,

\textsuperscript{65} This is Dean Pruitt's notion of an attitudinal structuring tactic (for example a tactical apology) in which the goal of the tactic is fundamentally competitive, not co-operative. Dean G. Pruitt, \textit{Negotiation Behavior} 80 (Academic Press 1982).
\textsuperscript{66} Ottawa-I: text units 167-168.
\textsuperscript{67} Toronto-3: text unit 127.
\textsuperscript{68} Ottawa-12: text units 83-83.
and timelines are now set and enforced by the court. The Dismisser generally resents these new pressures, seeing them as an intrusion into counsel's autonomy and control. Faced with this requirement, the Dismisser complies by simply going through the motions.69

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

There were no signs of the Dismisser perspective in Ottawa. The closest were a couple of expressions of antipathy towards the current enthusiasm for judge-driven case management. None of the Ottawa counsel in the sample suggested that mediation was a passing fad. On the contrary, many asserted that it should be made a permanent feature of civil litigation.70 In Toronto, the Dismisser perspective was also fairly uncommon, but did surface in a number of places in interviews with counsel who generally held quite negative views about mediation.

E. The Oppositionist

Whereas the Dismisser's resistance to mediation, especially mandatory mediation, is somewhat passive-negative, the Oppositionist is much more vocal about the dangers and pitfalls of a shift towards consensus-building as an alternative to adjudication. The Oppositionist sees the mediation process and the role of the lawyer within that process as a distortion of the proper role and professional responsibility of counsel. The lawyer's central and most authentic role is to manage their clients' conflicts, understood as a winner-takes-all game, and win. The Oppositionist is comfortable in this role and experiences no role dissonance or discomfort. He sees conflict as ugly but inevitable, and the adjudicative system has been developed to recognize these realities. He does not believe that mediation is anything other than a front for government inefficiencies and a means to clear court backlogs. At the same time, he considers the movement towards ADR, especially where it is touchy-feely, as threatening the integrity of counsel's advocacy role. He sees mediators as bogus, manipulative and unskilled - yet at the same time he feels that mediation is a risky place for himself and his clients, since it is a place where he is not fully in control.71

69. Compare Toronto-6: text units 233-235 with Lande, supra n. 23, at 223 (describing non-believers going through the motions).

70. The interviews took place before a final decision was made on the permanency of rule 24.1 in Ontario. See Evaluation Committee of the Ontario Civil Rules Committee, Report of the Evaluation Committee for the Mandatory Mediation Rule Pilot Project (March 12, 2001) (the final decision regarding rule 24.1).

71. "Mediation tends to focus people's energies and they get there and if you get into a mediation that's longer than a half a day, people get really focused on the task of settling as opposed to deciding if I really should. They just get so caught up in the process of settling that they forget the greater context of it, so people will suggest things that maybe they can't prove or just throw out ideas or lies that they know they can't prove in an effort to get to the end of the settlement." See e.g. Ottawa-7: text unit 93;
[I]t's easier to settle out a case than press on principle, so then you have a watered down legal system... you'll find mediation is going to be the way to go, but we'll have a watered down legal system.\textsuperscript{72}

So you'll find mediation is going to be the way to go, but we have a watered down legal system. Our system was built on the adversarial process and that will die, and that's great, if that's what people want, but I'm not sure that's going to be the best system in the end of day. The best system should be getting the best results through some sense of adversarial process with experienced lawyers, so at the end of the day clients can feel that they got the right result, as opposed to a manufactured result that no-one's crazy about.\textsuperscript{73}

The very small number of interviews expressing strong Oppositionist sentiments were confined to the Toronto group.

\textit{F. Characteristics of Ideal Types}

These five Ideal Types are referred to throughout this paper in order to illustrate the most distinctive aspects of counsel's approaches to mediation. Since they have been developed directly from the data, they represent the self-understanding of the respondents themselves. It may be important to bear in mind that the Ideal Types do not differentiate between attitudes towards mandatory and private commercial mediation. In Toronto, counsel's opinions about mediation—including, most significantly, how much weight was attached to preparing for and participating in a mediation session—was affected by whether it was a Rule 24.1 mediation or a voluntary process. In these cases counsel would likely sound much more positive and engaged in private mediation than in early mandatory mediation. This is reflected somewhat in the differentiation between Pragmatists and True Believers. The latter are open to try mediation in almost any circumstances, whereas a Pragmatist would be more likely to be committed to using mediation in circumstances where counsel is in control of when and how the process occurs.

The Ideal Types were constructed around a series of critical factors, which seemed to be significant in how our respondents understood and analyzed mediation. These include: what, if any, differences counsel sees between traditional lawyer-to-lawyer negotiation and mediation, and especially what impact the role of the mediator has on dispute resolution processes and outcomes; how the lawyer understands the nature of his relationship with his client and the client's role in dispute resolution; his personal conception of his professional role (including any role tension or dissonance experienced in mediation); the extent of attention and effort he gives to finding outcomes beyond the purely legal-adjudicative; and his preference for a particular mediator style (reflective of the understood purpose of the mediation process). An assumption built into the construction of the Ideal Types is that there is a logical relationship between how each of these factors is handled by

\textsuperscript{72} Toronto-7: text units 288-290. \textit{See infra} Part V(A) for further discussion.
\textsuperscript{73} Toronto-2: text units 354 & 375.
\textsuperscript{73} Toronto-6: text units 375-380.
any one Ideal Type. For example, counsel who believe that clients have a critical role to play in mediation are more likely to be searching for business outcomes beyond litigation. To the extent that many interviews reflect more than one attitude stream, this assumption appears either unfounded, or more likely, premature.

It has already been noted that holding one attitude does not necessarily exclude holding another. Most respondents make comments which suggest at least two, and maybe more, of the Ideal Type orientations during the course of their interview. Sometimes they do this within the same sentence. As another lawyer put it, “In mediation, one goal in my mind is to settle. Another is to smoke the other side out.” This makes it all the more important to emphasize that in this use of Ideal Types, few, if any, of the respondents in this study fell clearly and consistently into one Type throughout their interview. Instead, there appears to be significant improvisation taking place as counsel struggles to explain and rationalize his use of mediation, and some testing of different attitudes and viewpoints. More often, one finds (as in the example below) snatches of a Pragmatic orientation, glimpses of the Instrumentalist perspective, and perhaps a few lines of musing which sounds like a True Believer, all within one interview. One respondent made the following three statements, and repeated similar ideas a number of times at different points in the interview:

The first job in the mediation is to intimidate the other side.75

[M]ediation has changed the way I practice law; it changes the way I look at things; it offers me the opportunity to look at different perspectives in a way that wouldn’t have occurred to me had I been on either one-to-one negotiations with the lawyers on the other side, because usually we’re walking to the same world views.76

Why would you want to spend an extra year dealing with me and my legal bills when you can have certainty today? In my experience, most clients would rather have certainty than uncertainty.77

IV. HOW LAWYERS USE MEDIATION

A central question for the study was how lawyers used the opportunity (or, under Rule 24.1, the requirement) to mediate. A premise here is that mediation is not a monolithic process, but can take an infinite number of different shapes and forms depending upon the ways that the parties use it.78 In coding the interview transcripts, categories were created which reflected the uses of mediation that

74. Instrumentalist, True Believer or both? Toronto-8: text units 215-216.
75. Toronto-1: text unit 9.
76. Toronto-1: text unit 150.
77. Toronto-1: text units 201-202.
78. For an empirical study with this conclusion see McEwen, supra n. 18, at 3 n. 10 (citing McEwen et al, Bring in the Lawyers, supra n. 13, at 1354; Menkel-Meadow, Pursing Settlement, supra n. 12, at 13); see generally Craig A. McEwen, Toward a Program-Based ADR Research Agenda, 15 Negot. J. 325 (1999) (describing the implications of this for research planning).
seemed most important to the respondents, and which thus appeared to be most significant to both their actual conduct in mediation, and their understanding of how to use the mediation process. The categories developed consist of a range of lawyer strategies, plans, practices, and reflections on the underlying purposes of mediation.

A. Pre-mediation practices

Counsel’s willingness and ability to conscientiously prepare for mediation, including preparing their client to participate, is a critical factor in legitimizing the mediation process, and appears to correlate to the potential usefulness of the mediation session itself. In addition, it appeared likely that the fact that most cases in the Ontario mandatory mediation program come to mediation before discoveries have commenced would make a significant difference as to how lawyers understood how they should, and could, prepare for these events. We speculated therefore, that the timing of mediation in Ontario would have real potential for challenging the part played in settlement by sophisticated “theories of the case” and verified factual evidence, neither of which are likely to be on hand at the time of mediation.

Lawyers in the sample were asked to describe what they did to prepare for mediation. The most prevalent theme was that files needed far more front-end loading (early research and assessment) as a result of mandatory mediation. This may mean that somewhat different standards are set for the appraisal of information. For example:

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

Interviewer: Without information that you'd otherwise use?
Interviewee: That's right.
There was widespread consensus on this point, which came up frequently. Comparing mandatory mediation with cases that proceeded by the traditional route, one Toronto lawyer commented that "[i]n the non-mandatory mediation cases you just barrel ahead and ultimately you get to discovery, but there's nothing to force you to actually learn your case and have a theory about it in hand in a really informed way." The only exception to this were those lawyers who candidly stated that they did not put time into preparing for mediation where settlement did not seem to be a realistic possibility (characteristic of a Dismissive or sometimes a Pragmatic approach). There are numerous implications of additional up-front work on litigation file management. These include the impact on billing practices, client roles, and file management strategies, as well as the potential for systemic changes in the way lawyers think about essential information before commencing dialogue over settlement. These questions are explored further below in Part 6.

1. Documentary Disclosure

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

I really do believe that mandatory mediation does create a forum for earlier disclosure, and in cases where really your pivotal documentation is really one or two facts, and where there's not a lot of money involved, and where the story is clear from the outset, I think that mandatory mediation and disclosure at that stage is a win/win for everyone. 83

The Ottawa Bar appears to have a more established culture of documentary disclosure and exchange prior to mediation than Toronto. 84 In Toronto, practices seem to be more variable and likely to reflect individual attitudes towards the value of mediation. A few Toronto counsel told us that they have developed their own modus operandi for documentary exchange before mediation (beyond what the Rule requires) as a practical effort to maximize the utility of the mediation. However, as one experienced Toronto litigator commented, "Do I feel uncomfortable giving the other side everything very early on? It depends on the circumstances. Do I want

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82. Toronto-11: text unit 425.
83. Ottawa-8: text units 289-290.
84. See e.g. Ottawa-20: text unit 76. Serious preparation and willingness to disclose and exchange information is often exemplified in the use of the mediation brief in Ottawa. See e.g., Ottawa-11: text unit 57, Ottawa-19: text unit 158 & Ottawa-20: text units 114-116. Note that the preparation of a mediation brief (a vehicle for the exchange of information) seemed to play a more significant role in Ottawa than in Toronto - mentioned in a total of fifty-three text units, the expression mediation brief came up forty-three times in Ottawa interviews and just ten times in Toronto interviews.
to start off by saying, 'here are all of my documents, let's talk settlement?' Generally no.\(^{85}\) And in the same vein, "You can go into mediation as someone who wants to play their cards close to the chest and only let out the information you want to let out. That's very similar to the trial role—you don't have to let your hair down just because you're in mediation."\(^{86}\)

The requirement of Rule 24.1 that cases be mediated within ninety days of the filing of the first statement of defense means that usually the date for mediation comes up before discovery has been scheduled.\(^{87}\) Practices in relation to documentary disclosure and exchange tended to relate to counsel’s views about the appropriateness of using mediation before the discovery process has either commenced or concluded. Many Toronto counsel expressed the view that mediation is a waste of time at this early stage, especially in larger and more complex commercial cases.\(^{88}\) One lawyer, who was generally very positive about mediation, made the following comment regarding the critical variables in assessing the usefulness of early mediation:

It has been my experience that negotiating or mediating early is useful but it's only meaningful if the clients have a fairly level playing field in terms of information - and if there isn't a level playing field then almost certainly there's a level of distrust, and it's been my experience that I just can't often convince a client that it's in their best interest to settle because they are convinced that there's more information out there. And I can't tell them that there isn't.\(^{89}\)

2. Adjournment of Date of Mediation

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

What is happening now I find, more and more often, is I attend the mandatory mediation only to have it last a very short period of time but, entering into an agreement with the other side that says look, we both understand the benefits of mediation, let's go through discoveries, let's

\(^{85}\) Toronto-18: text units 313-314.

\(^{86}\) Toronto-9: text units 453-454.

\(^{87}\) Supra n. 80.

\(^{88}\) See Hann et al., Evaluation, supra n. 64, at 53. There is noticeable divergence between the views of Toronto and Ottawa lawyers on this point. The government evaluation of Rule 24.1 found that 81% of Ottawa counsel, compared with 54% of Toronto lawyers, believed that the commencement of discoveries before mediation would have had a negative impact on the usefulness of mediation. Nonetheless, only 5% of Toronto lawyers involved in that study were prepared to say that they thought that discoveries should routinely take place before mediation. This low figure may simply reflect resignation to the early scheduling of mediation as a cost-saving principle in Ontario.

\(^{89}\) Toronto-17: text units 60-63.
exchange our documents and then let's agree that within one month after that we will go to mediation. I'm doing that very, very regularly.  

It appears to be much more straightforward to obtain an adjournment of mediation in Ottawa as permission is routinely granted to delay mediation until after discoveries. Evidently many Ottawa counsel now routinely seek such an order, or alternatively agree with the other side to hold off filing a statement of defense (which triggers the timing of referral into mediation) in order to organize discoveries. This practice led one Ottawa lawyer to comment that “you're kind of back into that old put-it-off-until-it-really-needs-to-be-done,” suggesting that the entrenchment of mediation in Ottawa may now be leading the Bar back to the earlier norm of negotiation post-discovery. It would be instructive to track the extent to which discoveries take place before or during mediation in Ottawa over the next few years.

**B. Goals for the mediation process**

1. **Direct Discussions Between Disputants**

The transcripts were analyzed to discover what psychological, procedural and substantive goals the respondents articulated for the mediation session itself (as opposed to the place of mediation in a larger strategic plan for the course of the litigation, or in relation to an end goal for the dispute). Much of the mediation literature emphasizes the usefulness of mediation as a means of actually rebuilding or repairing an existing relationship. Among our respondents, actual relationship restoration came up infrequently, although there was often an acknowledgment that mediation enabled business clients to have face-to-face discussions that might ultimately enable future relationships. Instead, far greater emphasis was given by counsel to the emotional and psychological dimensions of a face-to-face mediation session as a single experience. Many lawyers spoke of the usefulness of mediation as an opportunity for clients to “vent,” “table thump,” or “purge” strong feelings of anger, with several describing mediation as “a cathartic process.” At the same time, some counsel recognized the importance of the less emotionally involved party (for example, an insurer) in acknowledging these strong feelings in terms such as, “[P]lease understand that this is where we are coming from.” The same lawyer said that he advised his defendant clients that they must “relate to them (the other side) on the level that they are relating to you,” and that it was critical, in his experience, “that my client speak to the insured to make them understand that they’re human and...
that they’re not this cold callous name on a letter continually telling them no.\textsuperscript{98} Generally, the sentiment of the following quote was echoed by a large number of respondents:

The presence of the clients in the rooms looking at each other...makes a huge difference in terms of settlement.\textsuperscript{99}

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

[Y]ou go and you realize this is what this is all about . . . it’s all about an apology or an acceptance of why somebody did something the way they did it . . . it’s astounding.\textsuperscript{100}

2. Reality Check

Another process goal for mediation which was frequently cited was the usefulness of the mediation process in providing a “reality check”—either for their client, or the other side, or perhaps both parties.\textsuperscript{101} This was sometimes referred to as a way in which clients were persuaded to try mediation. For example: “I think a lot of employers are . . . happy to have somebody talk some sense into the plaintiff.”\textsuperscript{102} In some cases, reality-checking was clearly related to the emotional and psychological impact of sitting across the table from the other side, and listening to what they had to say, perhaps understanding that they felt strongly about their position also, or having the practical limitations of the remedy sought (for example, the other side’s limited ability to pay an award of damages) exposed. For example:

A lot of the times the negotiating is as much with your own client as with the other side, so mandatory mediation would bring the client into the process—they would have to participate in it and often times the dynamics of

\textsuperscript{98} Ottawa-13 : text unit 246; See e.g. Toronto-19 : text unit 111 (Similarly in employment disputes, another litigator emphasized the importance of the plaintiff seeing a real person in mediation and not simply imagining a “faceless corporation.”).

\textsuperscript{99} Ottawa-8 : text units 209.


\textsuperscript{101} A similar result has been found in other studies of civil court mediation. See Donna Sienstra et al., Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established under the Civil Justice Reform Act of 1990 249 (1997).

\textsuperscript{102} Toronto-19 : text unit 120.
mediation will change how people behave once they start hearing the reality of their case from other people. You notice a difference. 103

"Reality checking" was also sometimes related to a preference for evaluative mediation. 104 For example:

Having an objective third party and especially someone with a stature of a retired judge or a competent lawyer in the industry helps a lot to make the client see reality and make the client therefore appreciate that he is being reasonable in settling. 105

3. Secondary Benefits

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

But short of that (settlement), if they've learned some new information that they're now going to be able to use, if they've managed to narrow the process, or if they've managed to agree on other aspects of the process, then those are all possible outcomes that are worthwhile. 106

For those adopting a Pragmatic approach, these secondary purposes appear as the "consolation prize" following genuine but unsuccessful efforts to settle. In other cases, counsel appears to be motivated less by a desire to settle and more by a desire to use the mediation process to gain an advantage (the Instrumentalist). Another set of process goals relate to the instrumental, though some would say manipulative, use of the mediation process, where settlement is clearly neither the primary nor the anticipated objective. There is ample evidence that lawyers are using the mediation process in a variety of strategically instrumental ways. Unsurprisingly, this seems to be most prevalent where a strict timetable is imposed under Rule 24.1. Most common of these instrumental strategies was the use of the mediation process to "smoke the other side out," 107 or "gain leverage for later on," 108 where there was little or no intention to settle in mediation. For example:

103. Toronto-12 : text units 440-442.
105. Toronto-9 : text unit 218.
106. Toronto-19 : text unit 274.
108. Toronto-8 : text unit 88.
This (mediation) is a perfect opportunity for the fishing expedition, which prior to this was not available to counsel. Another lawyer mentioned that a further advantage (presumably for his own side’s declarations and responses) was that statements made in mediation were not sworn under oath.

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

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

Another tactic used to disguise intent was to “present what appears to be the most superficially important issues; sometimes they’re the real issues but often they’re not.” Yet another way described to us of knowingly using the process to counsel’s advantage is to “capture” the mediator, and to use him or her to “educate” the other side on the weakness of their case. All these instrumental uses of the mediation were referred to frequently by Toronto litigators, but significantly less often by those in the Ottawa sample. Ottawa lawyers tended to generally disparage the use made of mediation by Toronto counsel.

Many lawyers in Toronto—where mandatory mediation was applied to a random 25% selection of eligible civil filings during the research period—also told us about what we have called their “filing games.” These are strategies to avoid being selected for mandatory mediation, or once selected, to withdraw the case and refile in the hope of escaping selection a second time. These “games” include: having

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110. Toronto-7 : text unit 297.
111. Toronto-3 : text units 121-127.
112. Toronto-2 : text unit 63.
114. See Ottawa-4 : text units 119-124; Ottawa-5 : text units 147-151.
clerks take multiple files to the court counter in order to ensure which is assigned to mediation, and which is not; filing outside the jurisdiction (for example in Milton or Newmarket) so that Rule 24.1 does not apply; amending pleadings after selection for case management in order that the matter is refiled under a new case file number; and the defendant agreeing with the other side not to file a defense so that selection is not triggered. These filing games (other than going outside the jurisdiction, which was not mentioned by any Ottawa counsel) are not possible in Ottawa, where 100% of files are case managed and sent to mandatory mediation. One further tactic talked about by Toronto lawyers to deal with reluctance to go to mandatory mediation was also mentioned in Ottawa, the so-called “twenty minute mediation,” where counsel agrees to show up, and thus satisfy their obligation under the Rule, but with no preparation and leave after twenty minutes or so.115

In summary, the most frequently identified process goal for mediation was the potential psychological and emotional benefit of direct discussion between the disputants. Related to this was a regular reference to the usefulness of mediation for reality-checking, whether this was by listening to the mediator, counsel for the other side, or hearing from the other disputant. Just as prevalent, however, were comments that reflect the instrumental use of the mediation process, rather than the achievement of any discrete settlement goals.

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

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

1. Business Solutions

The most consistently articulated outcome goal was the achievement of a business solution that would offer a commercially viable end to the dispute, without the accumulation of excessive legal fees. In theory, these types of outcomes are possible in any negotiated settlement. As one counsel put it, “[S]ettlement allows you to divide the baby into eight parts and to do all kinds of wonderful things.”116 The types of business outcomes that were specifically mentioned as the result of mediation included: the continuation of a commercial relationship; a new commercial relationship such as trade partners or a joint venture; the completion of a (disputed) sale and purchase agreement; access on preferred terms to a new supplier; agreement to a forbearance period; consent to judgment for a lesser sum;
agreement to vacate to avoid eviction proceedings; settlements structured to maximize tax advantages for the parties. One lawyer described a case which settled because she was able to discover exactly what the plaintiff wanted to do with the money she was claiming (purchase a laundromat), and having researched the costs of laundromats in the area, was able to present an acceptable offer.\textsuperscript{117} While many respondents said that they did not see these types of creative outcomes arise regularly in mediation, most acknowledged that they did occur from time to time, and many had illustrative stories on this point. A number commented that these types of creative outcomes sometimes took them by surprise, especially when they were new to mediation. One said that every mediation "offers an element of surprise to me."\textsuperscript{118} Another lawyer made a bemused reference to "these often bizarre situations where the parties walk away and carry on in business."\textsuperscript{119}

Many counsel recognized that these types of solutions required that their commercial clients participate directly in mediation. One said "\[t\]he clients take much more of an active role because they understand their business better than I do. I understand it the least."\textsuperscript{120} Some reflected on the reasons why commercial parties favored these types of "quick and dirty" solutions to a trial outcome, emphasizing in particular the obvious desire to avoid legal costs but also the need for finality; the loss of profitable time that litigation represents for senior business executives; and also some impatience on the part of business people for the convoluted ways of the law. Deals between business people often seemed to be much simpler and straightforward than anything the litigation lawyer could offer.

I mean, you have to have like a 27 page settlement with all the ye'old and releases and stuff, with all that language that you know no one understands, because you're afraid that the guy is going to try to pull a fast one because they're not happy, they've been forced to sign a deal. Whereas business people who do it voluntarily can do it in four paragraphs in that agreement.\textsuperscript{121}

While the greatest emphasis was placed on the generation of workable business solutions—unsurprising given that the sample group is comprised of commercial litigators with primarily corporate or institutional clients—other types of outcome or end goals described by respondents included: the preservation of goodwill; restoring credibility in the eyes of clients (especially important for insurers and financial institutions); ending a "nuisance" matter; and avoiding future appeals. A number mentioned the importance that an apology, an expression of regret, or some form of affirmation or reaffirmation made both to the process of settlement and the outcome that then was possible.\textsuperscript{122} As one put it:

\begin{itemize}
  \item \textsuperscript{117} Toronto-20 : text units 130-133.
  \item \textsuperscript{118} Toronto-17 : text unit 136.
  \item \textsuperscript{119} Ottawa-6 : text units 140-141.
  \item \textsuperscript{120} Ottawa-7 : text unit 102-103.
  \item \textsuperscript{121} Ottawa-1 : text units 148-149.
  \item \textsuperscript{122} Supra n. 100.
\end{itemize}
There are a lot of things you can do within the context of a consensual mediation that a court can't. Things that relate to business issues between the parties - and sometimes silly things, that one party wants the other party to say or write or do, that just wouldn't play any role in a trial outcome.\textsuperscript{123}

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

Both of them can end it that day. No letters going back and forth, that you receive five days after you sent something to some other lawyer, then the other lawyer goes to somebody else and gets back two weeks after... On that day, this whole thing can be over with. That day you don't have to talk to your lawyer anymore if you're the client. That day you can easily walk out of there with this problem over.\textsuperscript{124}

In summary, the data provides plenty of testimony that outcomes beyond litigation, especially those that reflect business realities, are being achieved in these mediations. What is less clear is how much more creativity and flexibility is uniquely encouraged or enhanced by mediation, compared with traditional lawyer-to-lawyer negotiations. Certainly almost all counsel interviewed saw the presence of an effective third party as making a positive difference to the settlement process, if not to its actual outcomes.\textsuperscript{125} Furthermore, many of the comments that relate to business outcomes also refer to the role of clients in developing these solutions. This suggests that clients are the source of many of the ideas and solutions that come out of mediation, and that mediation is in effect the facilitation of negotiation between business clients. Not all counsel, however, are yet fully comfortable with the direct involvement of their business clients in mediation.

\textbf{D. Client role and involvement}

The Ontario program requires clients to attend mediation with their lawyers, or face cost penalties.\textsuperscript{126} While there is some anecdotal data to suggest that sometimes mediators are reluctant to act as enforcers of this provision, the requirement appears to be generally observed. However, there is wide diversity in the roles lawyers envision for their clients in mediation. Many made the point that the nature and extent of client involvement in any file would reflect individual circumstances; for example, is the client a repeat player, a manager on a tight budget, a personal litigant, or a businessperson or corporate representative? Is the file complex or relatively simple? Beyond these circumstantial variables, we wanted to discover more about the ways in which our respondents understood and made sense of their shared responsibilities with their clients, including the larger question of "ownership" of the dispute within the context of mediation. In order to get to these

\textsuperscript{123} Toronto-4 : text units 131-132.
\textsuperscript{124} Ottawa-4 : text units 179-18.
\textsuperscript{125} These comments are described in more detail at Part V.
\textsuperscript{126} Supra n. 8.
issues, respondents were asked to describe in some detail the ways in which they worked with clients in preparation for and during mediation, and to explain their perception of the impact of this role on both the dynamics of mediation and settlement, and the professional relationship between lawyer and client.

Greater client control via direct participation in negotiations has often been cited as a primary attribute of the mediation process. However, what empirical evidence exists suggests that this may be more of a theory than a reality. For example, McAdoo and Hinshaw found that less than one-third of their respondents saw greater client control as an effect of mediation. The 1995 evaluation of the earlier Ontario mandatory mediation program found little difference in their perceived degree of control and active participation between clients who participated in mediation and those in the control group, i.e. those who were proceeding or had proceeded to trial along a conventional litigation track. More recently, Roselle Wissler noted that the norm of mediation sessions in the Ohio courts is that lawyers still do most of the talking.

In these interviews there was frequent acknowledgment that mandatory mediation, because it usually took place before discovery, altered the relative positions and the roles of both lawyer and client. Counsel was obliged to rely more on what their clients could tell them, both in terms of what might be relevant to a legal appraisal, and relevant business information, than they might at a later investigative stage. For example:

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

And in making a legal appraisal:

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

128. McAdoo & Hinshaw, supra n. 19.
129. Macfarlane, supra n. 79 at 44-45 (63% of mediation clients and 73% of control group clients stated that they felt "very much a participant" in their case. 58% of clients in the mediation group and 47% of clients in the control group stated that their lawyer was "in charge" of the dispute resolution process. Of course, these figures may reflect lack of knowledge upon which to draw meaningful comparisons between mediation and traditional litigation, and low originating expectations of participation.).
130. Wissler, supra n. 7, at 658 ("...(A)orneys spent more time talking than the parties in 63% of the cases, the parties and attorneys spent about the same amount of time talking in 31% of cases, and the parties spent more time talking in 6% of the cases.").
131. Ottawa-6: text units 77-81.
Interviewer: Does this change the balance of the relationship?

Interviewee: It does, and it changes the dynamic, I think, in the sense that it is a reliance thing and I sort of feel like I have to rely or rather trust the client's instinct. But they're engaged more in the process because of that. They have to be the ones driving the numbers and the negotiation because I really have very little to say at that point, other than what I have put in the pleadings.¹³²

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

With mandatory mediation they understand how to settle things, they understand how to negotiate, they understand how to negotiate contracts, they understand more about the ongoing relationship than I do—so instead of just hiring a general to fight the battle for them, which is all litigation is, war by other means—they know how to deal and negotiate a relationship and that's really what you're negotiating. . . . In that context, they almost run the mediation and maybe I'll need to be the actor and they don't want to say a thing, but they tell me what they want overall, they tell me their bottom lines and all that and they really participate in a big way in the mandatory mediation.¹³³

When a business solution is sought, it may be important to have not only the business decision-makers present, but also those individuals who understand the specific details of the dispute. One lawyer described the contribution to the negotiation made by clients as "the intangibles that a lawyer can't bring. Like what was said at a particular meeting when the deal was done, or what everybody's perceptions were of what was going to transpire. So that you can sort of retrace the chain of events that lead to the dispute, and see where everybody's expectations have fallen short, not just the claimants' expectations."¹³⁴

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

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

¹³². Toronto-4 : text units 47-48
¹³³. Ottawa-1: text units 80-87.
¹³⁴. Ottawa-20 : text units 142-143.
do when you do the rights-based work, and I'll contact you regarding your discoveries. 135

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

They never actually get to see the defendant; they just got papers from the lawyers. Now suddenly they see that person that they can imagine in the stand giving evidence against them and that has a real impact. They don't have to talk legalese or anything like that, they just talk about whatever it is that the case is about, and I find that they can often be their best advocate on their own behalf at the mediation. 136

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

[M]andatory mediation would bring the client into the process - they would have to participate in it and often times the dynamics of mediation will change how people behave once they start hearing the reality of their case from other people. I don't think that it was coincidence that two of the defendants brought their clients and the third one just had their client on the telephone, and the one on the telephone was the one who was holding out because his client wasn't there participating in the dynamic and appreciating the risks of proceeding to trial, whereas the other two were there and can see it more readily and they are saying, we'd better settle. 137

Another lawyer commented:

I can think of at least two or three commercial disputes that were personality conflicts and hurt feelings played a very pivotal role, even though at the end of the day it was about money, and mediation allowed the parties not only to meet face to face and go through a mediation but also go right into a settlement and everything, that there would be a letter of apology delivered, that kind of thing. 138

This same lawyer also noted the importance of the client feeling like they had some control over the process. 139 For these reasons it seemed obvious to many

136. Ottawa-4 : text units 84-84.
137. Toronto-12 : text units 437-449. see e.g. Ottawa-19 : text units 388-390.
138. Toronto-17 : text units 135-137.
lawyers that clients should participate actively in mediation, and for many, especially the more experienced Ottawa group, this was a critical element if mediation was to work: "I actually believe that if a mediation is going to be effective that the client has to talk."140 The effort to exclude clients was regarded by some counsel as entirely counter-productive, for example:

You can see some lawyers come in and they don't let the clients talk, they read the brief, they dominate the discussion, they're trying to push the mediator. And when that happens I go okay, we're not going anywhere, fine. . . . I think it's too bad generally because it robs the process of much of its practical value when you do that, because it controls the understanding of the clients too heavily. 141

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

For example, if my client has a particularly sympathetic case I will let my client put it, particularly if there is a personal element to it. If, for example, there were a personal injury. Here's what happened to me, here's the physical pain I've lived with. I can't tell that, the client has to tell it, but, most cases it's business, it's not personal, so I can tell it.142

Some of the fears expressed by lawyers about having their clients participate relate directly to concerns over confidentiality. While mediation discussions are not directly admissible into evidence, lawyers recognize that information divulged cannot be "put back in the bag," and that mediation may reveal important directions for discovery. Typical is the comment, "You don't want the client to blurt something out—even though the mediation itself is without prejudice, any knowledge you gain from it you can use later."143 A smaller group appears more sanguine about this risk. Again, this may reflect their deeper attitudes towards mediation as much as any formal assessment of risk, as seen in the following comment:

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

140. Ottawa-8: text unit 106; See e.g. Jean R. Stemlight, Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting, 14 Ohio St. J. on Disp. Res. 269, 343-344 (1999) (Professor Stemlight makes the important point that mediation allows clients to assess one another's stories directly, as well as their lawyers.).
142. Toronto-9: text units 232-238.
143. Toronto-9: text unit 248.
worthwhile if the object is to settle this. Somebody's got to give something.\textsuperscript{144}

Some lawyers expressed serious misgivings about "client control" in mediation. There are also signs of ambivalence too; for example, the same lawyer who advocated for direct client participation above also spoke of simply instructing those clients who didn't want to "be involved" in what to do and say in mediation.\textsuperscript{145} Inevitably, mediation in the context of litigation means that counsel also has to be prepared for a possible trial. The following anecdote illustrates this dilemma.

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

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

Interviewee: He was opening up a whole can of worms - so I just kicked him and he stopped. It's what you have to do sometimes.\textsuperscript{146}

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

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

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

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

\textsuperscript{144} Toronto-18: text units 109-113.
\textsuperscript{145} Ottawa-10: text units 102-103.
\textsuperscript{146} Toronto-7: text units 147-159.
Interviewee: Absolutely.\textsuperscript{147}

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

They (clients) feel that they’re smart enough to know when they want to settle. The lawyer they have confidence in will do their best to either go to court or settle. They don’t need another person now telling them when to settle, they just think it’s an added expense that’s not necessary.\textsuperscript{148}

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

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

Interviewee: Not much. All the client wants to do ... let me back up and I’ll tell you. First of all, the clients are generally not too keen to go to mediation, they generally perceive it’s a waste of time and it’s the fault of the lawyer, sometimes, but I even find that lawyers are dying to settle. They can’t get their clients there because they think it’s a day where they just have to give away the store, that’s their perception. It’s not a perception they’re going to get a good result that day - it’s how much I have to give away. So they don’t like that, they don’t like anyone telling them they have to give away unless they have to. So I haven’t found many clients who really want to go to mediation.\textsuperscript{149}

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

Well if you're not taking a case to mediation the client has... put their case in your hands and says, this is your field, you just basically do what you think is right and get me the results I expect. Frankly, that's the only way you can really handle litigation based cases. Clients ...run the rest of their lives, they want you to run the litigation—and you say, have a nice day.¹⁵⁰

This conventional vision of file management is clearly challenged by the direct involvement of clients in the mediation process, whether or not counsel welcomes this development. Just how the various roles delineated by lawyers for their clients in mediation have affected such a conventional understanding of counsels’ working partnership with their clients, and as a consequence, the parameters of their own professional role, is discussed further at Section 6 (II).

E. The Uses of Mediation: A Summary

One might hypothesize a relationship between the four aspects or uses of mediation described in this section; that is, between how lawyers understand the process of mediation, how they see mediation as part of an overall strategy in litigation, how they prepare and plan for mediation, and how they choose to involve their clients. One might anticipate that how counsel conceptualizes and translates into practice each one of these four strategic dimensions of mediation would be somewhat congruent or at least compatible with their perspective on the other three. For example, one would not expect a lawyer who sees mediation as a cathartic process in which clients confront one another to instruct her client to say nothing in mediation and not let her take charge. Likewise, one would not expect a lawyer who regards mediation primarily as a hurdle to leap over to take considerable time preparing his own submissions and arguments in mediation.

Certainly any relationship between these four aspects of the use of mediation will be mediated by context—who the client is, what their goals are, what is at stake, what remedies are available and so on. These considerations may also change over the life of a litigation file. However for most lawyers, it appears that the possible conceptual and practical links between, for example, pre-mediation practices and client role, or process goals and long term settlement goals, are not made consciously. Only occasionally did counsel appear to have thought about consistent and logical relationships among apparently related elements of planning for the mediation of a given case; for example, relating the involvement of clients in the negotiation with a preferred mediator style and a particular outcome being sought. In many interviews, there is some apparent inconsistency and perhaps indecisiveness regarding these aspects of mediation usage. This pervasive feeling of ambiguity suggests that many lawyers hold a relatively unsophisticated, incomplete, and unproblematic conceptualization of mediation. This appears to generally bear out

¹⁵⁰ Ottawa-1: text units 76-78.
Zariski’s argument that “professional norms favoring ADR are not yet backed up by consistent explanations of why, when, and where it should be used.” 151

This also suggests, as noted earlier, that there is no clear or uniform paradigm shift taking place here, but instead many diverse and discrete reactions to the phenomenon of mediation. The ways in which counsel talk about mediation and the apparent incongruity that often appears between their choices in the four strategic dimensions (pre-mediation practices, goals for the mediation process, overall goals, and client involvement) indicates that many counsel are proceeding on a fairly ad hoc basis, based on their instincts about what each case requires, rather than consciously connecting these different elements of their use of mediation. There may be some emerging orthodoxies of procedure and process, such as who gets selected as a mediator and what information is exchanged before mediation. However, there are as yet no established normative or conceptual pathways through the range of practice choices that are available over the use of the process, outcome goals, preparation, and client involvement for court-related mediation, whether mandatory or private. This means that within any one interview, one lawyer may talk about the importance of client venting in a particular mediation he attended, but also his own wish to keep his or her client quiet if present at mediation; or the usefulness of mediation as a “fishing expedition,” but also surprise at an outcome in one mediation in which a strong future business relationship was forged; or a settlement outcome that was not expected going into mediation, but certainty over anticipating generally when mediation would or would not be useful. This finding further bears out the observation made earlier that relatively few of the lawyers in our sample could be said to represent, in a pure and consistent sense, just one of the five profile types suggested above. Instead they may reflect several “Types” in the ways they talk about how they use mediation.

One exception to the lack of recognizable strategic and conceptual “links” in the data is that lawyers who indicate that they have identified important psychological and emotional benefits from mediation are more likely to speak to the importance of having clients participate actively and directly in the mediation. Some of these respondents also describe, in tentative language that suggests that they are still reflecting and actively processing this, a dynamic which occurs when clients communicate in mediation. They suggest that the dynamic created by face-to-face communication is a significant factor in settlement—this may confound a rational, legal model for predicting settlement. For example, one lawyer noted the very different reactions of clients who are present at mediation and can speak directly to the other side, and those participating by telephone. 152 Another notes that “the clients have to come together, it creates the outcome.” 153 This data suggests that there is a relationship between how counsel understands what may happen in mediation and how they then conceptualize, or reconceptualize, the role of the client. This must in turn lead them to reconsider their own role. 154

151. Zariski, supra n. 13. For a more extended discussion, see infra Part VII(C).
152. Toronto-12: text units 437-449; see supra n. 37.
153. Ottawa-8: text unit 218 (emphasis added).
154. See infra Part VII(A) for further discussion.
Generally, the norms of mediation usage are both more settled and more accepting of the use of mediation in Ottawa than they are in Toronto. This is especially apparent in relation to the instrumental uses of the mediation process, which seem to be far more prevalent in Toronto than in Ottawa. Ottawa counsel were also more likely to talk about a positive active role that they had seen the client taking in mediation, and to suggest a deeper sense of comfort with this. This contrast between prevailing views at the two sites recurs throughout the data, and will be discussed in more detail at Section 7(III).

V. EVALUATIONS OF MEDIATION AND MEDIATORS

A. What Litigators Say About Mediation

Generally positive comments about mediation were coded throughout the transcripts, and these can be grouped into several categories. The first relates to the impetus mediation provides for early case appraisal and settlement discussion. A number of respondents, especially among the Ottawa sample, made the point that mandatory mediation gets over the reluctance, on the part of both clients and counsel, to talk about settlement and to communicate settlement offers. As one put it, "[M]andatory mediation earns its wings from me right at the start because it gets over that hurdle." Another remarked that "they (his commercial clients) want an excuse to settle and if you have mandatory mediation it gives them a reason to continue talking." Many also commented that mediation, especially mandatory mediation, imposed a discipline on both sides to get the case ready for serious negotiations, which was generally welcomed. Some of these lawyers commented that the front-end loading of work on a file that early mediation demands makes sense both for larger institutional clients who do not want reserves tied up with protracted litigation, and for smaller commercial clients who need fast, cost-effective solutions. One lawyer pointed out that this was work "that you would have to do in any event to prepare for discovery, or certainly to prepare for a pre-trial. So it's not wasted time or wasted money for the client." Another remarked that the impact of Rule 24.1 was to "change peoples' habits... in the right direction... making them practice in a better way." Key to this assessment is counsel's view on the appropriate timing of mediation, especially when imposed via Rule 24.1. Positive attitudes towards mandatory mediation were consistently linked to the potential for some flexibility in the timing of the first mediation session. This is discussed further below.

Another cluster of positive evaluative comments reflect a recognition that even where mediation does not result in settlement, it may have other secondary benefits, including the exchange of information and the informal assessment of the credibility of each side's case. Some of those reporting this benefit may have intentionally constructed mediation as a "fishing expedition" rather than a genuine effort at

155. Ottawa-I: text unit 34.
157. Toronto-17: text unit 65.
158. Ottawa-2: text units 43 & 49.
settlement (an Instrumentalist approach). Others may have participated in good faith but recognized other constructive consequences in the event of a failure to negotiate a resolution (a Pragmatic approach). Whatever motivation is construed, a number of counsel, especially in the Ottawa sample, talked about their willingness to see mediation as a constructive and useful exchange, regardless of whether settlement resulted either at that time, or subsequently. As one put it, "[I]f nothing else, you’ve got to have saved time because . . . everyone walks away afterwards (from the mediation), and they know exactly what the issue is for this case." In addition, the importance of including the clients directly in bargaining—providing them an opportunity for a face-to-face discussion, and possibly some reality-checking—came up frequently as a reason to go early to mediation, even if full settlement at this stage might be premature.

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

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

A number of lawyers, especially in the Toronto sample, felt that the requirement that mediation under Rule 24.1 take place so early in the life of a file sometimes rendered it useless for settlement purposes, leaving them with only instrumental reasons for using the process. One lawyer described his conceptualization of settlement as something that was incremental, not tied to any one event, and only rarely could occur early in the life of the file. Instead, settlement evolved over time as trust and disclosure developed. Many Toronto counsel appeared to accept the principle of mediation but wanted to control when it took place. As one would expect, the most common explanation advanced for why mediation before discovery was premature was that there is an insufficient basis on which to assess the best chances of settlement. Counsel described needing information they did not yet have: "[y]ou do not want to go in cold, just based on the pleadings." Counsel also described needing an opportunity to "digest" information before they could meaningfully negotiate. If this information was not available to them, they were simply "going through the motions," and would not invest in any significant way in the mediation process by, for example, selecting a mediator of their choice (instead allowing a mediator to be simply assigned) or doing any significant preparation for the mediation session.

159. Ottawa-13: text units 544-545.
160. The impact of client participation in mediation is discussed more fully at Part IV(D).
162. A similar result emerged from the Hann et al., Evaluation, supra n. 64, & 3.9.
164. Toronto 12: text unit 270.
As a practical matter, the problem of being obliged to attend mediation before counsel feel “ready” is obviated in Ottawa by the willingness of the Ottawa Case Management Master to be flexible in adjourning mediation until after discoveries. This approach by the Ottawa Master appears to be highly significant in reducing resentment towards being obliged to mediate before discoveries, and appears to be a critical element of Ottawa’s “local legal culture” in relation to mandatory mediation. In Toronto, counsel complained that the cost and effort of seeking an adjournment meant that it was more cost-effective to do a “20 minute mediation.”

Another distinction which may be important here is between lawyers with commercial clients—those with greatest mediation experience often felt that mediation could usefully take place as early as possible—and those serving personal injury clients, whose concerns relate to the stable calculation of damages, and who therefore frequently wanted to wait until this amount could be definitively assessed.

An additional factor may be how counsel understands the relationship between information collection and final outcomes, and his deeper attitudes towards the collection and analysis of information as part of an overall litigation strategy. Aside from criticism about the timing of mandatory mediation, a number of negative comments suggested concerns about the changing nature of the role of the lawyer as advocate. These concerns were expressed in a number of different ways and at different levels of interest. One is a fear that the profession is losing a key skill—trial advocacy—as fewer and fewer cases go to trial. In addition, one lawyer suggested that the use of mediation may reduce lawyer’s negotiation skills, as they become “over-dependent” on the intervention of a mediator to develop a negotiated solution. Others confess that trial work is more exciting and interesting: “I mean, being in court is a lot of fun, but otherwise it’s a pretty boring job.” At a deeper level, concern about the professional role is reflected in negative comments about the substitution of informalism for a rights-based, adjudicative model. For example:

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

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

165. For further discussion, see supra Part IV(B).
167. See Toronto-14: text unit 224; Toronto-10: text unit 474.
170. Toronto-6: text units 357, 375.
Interviewer: Do you see trying cases as the key way to resolve disputes?

Interviewee: It's a very important way which the system tried mightily to take away from us . . . [B]y having things like mandatory mediation.\textsuperscript{171}

This approach can be equated with the Oppositionist, and to a lesser extent the Dismissers perspectives described earlier. In this view the adversarial model and a trial advocacy approach to running litigation is characterized as the practical, real-world approach to dispute resolution, which is contrasted with the "softie" style of mediation, "the lovey dovey approach to the world,"\textsuperscript{172} and other efforts at early settlement. Lawyers who like mediation are described as "gun shy."\textsuperscript{173} Another lawyer remarked that "It's easier to mediate, let's face it, than take a risk. Most people aren't risk-takers. Going to court is a risk."\textsuperscript{174}

Within this framework of values, taking risks is the "path of the warrior" (one lawyer described the role of the lawyer as "manager of the war")\textsuperscript{175} rather than a possibly ineffectual or inappropriate use of client funds. Also according to this view, holding out, engaging in extensive discovery, bringing motions, or other acts of guerilla warfare represents the best course for a good outcome. This is an interesting juxtaposition, especially in the light of the many comments that were made (some by these same lawyers) about the importance of reconciling the real world and often urgent concerns of commercial clients with the litigation system. One lawyer even ascribed what he described as his "softie" orientation to his business background, completing this intriguing series of conceptual connections.\textsuperscript{176} Early settlement opportunities are derided as "unrealistic" by those who would urge clients to "hold out" for a better outcome, but on what basis? For example, how rational or pragmatic is it to expend $474,000 advancing, and $270,000 defending, a case that eventually resolved out-of-court for within $10,000 of an original offer to settle made within two weeks of the commencement of the lawsuit.\textsuperscript{177} Nonetheless these comments are a reminder that some Toronto litigators continue to understand a

\textsuperscript{171}. Toronto-13: text units 179-183.
\textsuperscript{172}. Toronto-8: text unit 226.
\textsuperscript{173}. Toronto-6: text unit 324.
\textsuperscript{174}. Toronto-3: text units 370-393.
\textsuperscript{175}. Toronto-2: text unit 134. Note that this respondent used the word "war" eleven times in the course of a 45-minute interview.
\textsuperscript{176}. Ottawa-7: text units 231-233. One possible explanation for the relationship drawn here between a business background and being "soft" (in the sense of looking for negotiated settlements) is the antipathy felt by many experienced business people towards a fixed and potentially constraining system of precedent or rules (such as the legal system). In John Lande's study of in-house counsel, one remarked "As I look back at my business career, I have an antipathy for precedent at times because I find it constraining in terms of the ability to break new ground. So I don't necessarily always look for 'Well, how was it done before? Or what did some previous court decide? Or what did some previous regulatory body conclude on this?' as opposed to 'Give me the facts and circumstances today and where we want to go in the future. Try to define a problem or the opportunity in terms of the visions of the future as opposed to the precedent in the past.'" John Lande, \textit{Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions}, 3 Harv. Negot. L. Rev. 1, 18-19 (1998).
\textsuperscript{177}. This was the breakdown of expenditures by the time settlement was reached in a highly publicized defamation suit involving a federal politician (Stockwell Day, the-then leader of the Reform Party), Globe & Mail, January 21, 2001.
"tough" or even warlike approach to be the perspective of the "real world," despite exponentially rising legal costs. This may no longer be congruent with their clients' changing attitudes towards unrestrained legal bills.\(^\text{178}\)

This group also regards both the court (in its supervisory capacity) and the mediator as threats to their professional autonomy to make judgments about the right way to run the file. For example:

They (clients) feel that they're smart enough to know when they want to settle. The lawyer they have confidence in will do their best to either go to court or settle. They don't need another person now telling them when to settle, they just think it's an added expense that's not necessary. . . . I always consider settlement options at various stages of litigation . . . no Rule has to tell me when to do it.\(^\text{179}\)

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

kick[s] me squarely in the pocket book, or not me because I have clients that want to fight those big numbers, but . . . if you're being entirely selfish, just looking at the lawyer's interest, then why do I want this.\(^\text{180}\)

Another lawyer spoke of what he calls "innate fear" that mediation will "reduce their business."\(^\text{181}\) The same lawyer (Toronto-5) who suggested that possibly 97% of what lawyers did was "wasted" followed up this comment by musing about the one-hundred boxes of litigation material currently crowding his office. Thinking aloud, he then asked the rhetorical question "But how am I am going to pay for the one-hundred boxes?"\(^\text{182}\)

While it seems inevitable that if mediation saves clients money, it will reduce legal fees in relation to any one file, some lawyers do not accept that mediation will save clients money at all; several in both cities describe mediation as adding "unnecessary" extra costs for the client.\(^\text{183}\)

\(^{178}\) See infra Part VI(A) for further discussion.

\(^{179}\) Toronto-6: text units 163-164, 192.

\(^{180}\) Toronto-5: text units 43-44.

\(^{181}\) Ottawa-4: text unit 244. Craig McEwen's study of in-house counsel found little evidence that fear over lower billings was driving antipathy towards mediation. See McEwen, supra n. 18. This may be partly explained by a reluctance to confess to this fear. Id. As one of our interviewees put it, "it's not brotherhood." Toronto-5: text unit 40.

\(^{182}\) Toronto-5: text unit 39.

\(^{183}\) In her 1982 study of personal injuries negotiation in the United Kingdom, Hazel Genn considered the question of how far the desire to drive up costs conflicted with the wish to push for settlement. She concluded that: "The general uncertainty which pervaded the whole area of personal injury litigation in relation to liability and quantum . . . creates perfect conditions for the explicit or implicit justification of almost any strategy." Hazel Genn, Hard Bargaining: Out of Court Settlement
B. What Litigators Say About Mediators

Oppositionists, and to a lesser extent Dismissers, whose comments about mediation are generally negative, are likely to denigrate mediators as unskilled and ineffectual. This is expressed partly as a pervasive skepticism about mediator qualifications. Some believe that mediators invent or overblow their qualifications and experience. Others question the extent of screening that takes place before a person is added to the mandatory mediation roster. There were particular concerns over non-lawyer mediators, with one lawyer remarking, “they (the clients) are not going to talk to someone who doesn’t have a practice, and neither am I.”¹⁸⁴ Several others suggested that mediators were persons who had failed in legal practice. It is worth noting that numerous lawyers, including those who were generally positive about mediation, said that they were unhappy with the standard and quality of mediation training, and many made the comment that simply taking a training program did not necessarily make someone a good mediator. A smaller group made the point repeatedly that they did not “need” mediators to settle disputes, as counsel did this all the time anyway. This sentiment may contribute to a feeling among this group that mediators are the 21st century version of the shaman, trafficking in bogus goods. One compared mediators to life insurance salesmen, “who will explain to you why you really need life insurance and give you projections of what’s helpful to you, and you spend a lot of time trying to sort out the numbers and you realize, it’s not that good.”¹⁸⁵ The same lawyer also asserted that “[P]art of what . . . mediators are trained to do is to lie. This is to get parties who are giving something up feel they’re gaining something or the other party is losing a lot more than they are, to make them feel better—that’s part of the training process.”¹⁸⁶ Others make reference, albeit in somewhat less hostile terms, to mediator “manipulation.” Still others complain about mediators being transparent in their desire to effect settlement, at any cost, and laboring unnecessarily the “obvious” points about the costs and uncertainty of continuing with litigation.

The strongest invective against mediators seemed to be out of proportion to the dismissive or oppositionist sentiments that these lawyers were articulating. Some comments were so angry and harsh that they suggested a real sense of threat or danger inherent in mediation. This may be related to the feeling that mediation is “risky” because it is unpredictable and difficult to control.¹⁸⁷ Certainly some lawyers, generally Dismissers and Oppositionists, saw mediation itself as a risky place because of the loosening of counsel’s control over the process.¹⁸⁸

For the most negative group, mediation appears to be seen as relatively “safe” when it is evaluative (emphasizing the known, that is, anticipated legal outcomes) and especially “risky” when it is facilitative (emphasizing the unknown, that is, other

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¹⁸⁴. Toronto-6: text unit 96; Toronto-11: text units 438-442.
¹⁸⁵. Toronto-2: text unit 91.
¹⁸⁶. Id. at text units 74-75.
¹⁸⁷. One of the project collaborators, Professor Jennifer Schulz, has suggested that the reaction to mediation as at once both “silly” and “unsafe” is reminiscent of stereotypical gendered responses to women as "emotional", "unpredictable", and "silly" but also implying some measure of fear and threat.
¹⁸⁸. See Ottawa-7: text unit 93; Toronto-14: text unit 230.
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factors in settlement besides legal evaluations). This feels like something of a paradox—how certain and therefore safe is the legal opinion of the mediator? Nonetheless this group has a clear preference for authoritative, credible, and evaluative mediators, who are both willing and able to offer legal evaluations, because they structure the discourse in a way familiar and comfortable to counsel.\(^{189}\)

Outside the most stridently Oppositionist group, however, there is a strong preference for evaluative mediators throughout the entire Toronto sample.\(^{190}\) Only one respondent in this group stated that he preferred non-lawyer mediators.\(^{191}\)

Virtually every other Toronto lawyer, no matter what their overall approach to mediation, made it clear that they would almost always prefer a lawyer-mediator who could offer at least the potential of an expert opinion of the law, even if they were sometimes facilitative. This relates directly to understanding a primary purpose of mediation to be a way “to determine the worthiness of your case. That . . . only happens with mediators who are prepared to give you an evaluative assessment of your case.”\(^{192}\)

Adopting a Pragmatic approach, some counsel reason that clients need to hear from a credible person, “I think you’re going to win or I think you’re going to lose,”\(^{193}\) and that this is sometimes necessary in order to overcome the clients’ inflated expectations, “so that it brings it home to the client that it’s not just the lawyer being pessimistic but some objective third party says that’s a real issue.”\(^{194}\) Some put it in stronger terms: “they [the judge-evaluator] read the riot act to the client and it helps bring them on board.”\(^{195}\) The lawyer above also made the more reflective observation that an evaluative mediator could provide a client with crucial reassurance that settlement was a reasonable course:

The client tentatively thinks that they are being unreasonable when they settle, they think they are giving in. What they need is the reinforcement to believe that they are being reasonable in a settlement.\(^{196}\)

While the preference for evaluative mediators was strong, especially in Toronto, a few interesting alternate views were expressed. Several lawyers remarked that there often seemed little point in counsel rehearsing their (previously stated) rights-based arguments in mediation. Several commented that there were alternative perspectives on the value of an evaluative mediator, particularly in the context of the legal education system and the role of the judiciary. Some lawyers also noted that the preference for evaluative mediators was often influenced by the specific dynamics of the case, with some cases requiring a facilitative approach to effectively manage the negotiation process.

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189. Toronto-9: text unit 410 ("They get to the ‘merits,’ where ‘merits’ are understood to be legal merits"). Further to this point, Professor Archie Zariski asks "how often are [the words] 'legal merits' amongst lawyers' codewords for 'that may be true but you can't prove it in court?'" E-mail from Archie Zariski, Professor, to Julie Macfarlane (June 15, 2001).

190. This same preference for evaluative mediators, who by definition must be legally trained, has been noted in other studies. See for example, McAdoo & Hinshaw’s study of the Missouri Bar finding that 87% of their lawyer respondents saw the ability to “value a case” as the most important skill of a mediator; 83% thought that all mediators should be litigators and 73% thought that all mediators should be lawyers. See McAdoo & Hinshaw, supra n. 19.


192. Toronto-1: text unit 70.

193. Toronto-2: text unit 111.


195. Toronto-1: text unit 62.

196. Toronto-9: text units 219-220.
a legal evaluation would be the most effective way to resolve a case, their experience had convinced them otherwise. For example, one lawyer remarked:

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

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

[Y]ou're not going to settle unless you can come up with a principled basis to settle . . . unlike when I'm into an out-and-out third party resolution of a dispute, [where] I won't admit weakness and while the process is that you'll let the third party find your weakness, . . . in a mediation you will always give on some weakness that will then be the basis for your principled basis for settlement. So we went in to the mediation saying we'll take responsibility . . . on this percentage basis. We will justify that percentage basis through this rigorous analysis of this background. We have an expert here who will justify that rigorous analysis of that percentage split of the primary causes of the economic damage and that is our principled basis of settlement. Mediator, if you cannot present another [different] principled basis to us that is appropriate for settlement or if the other party cannot give us a principled basis that we can relate to, then there is no point in talking.

The "principles" referred to here seem to be broader than legal principles per se. Furthermore, the limits of a legal evaluation as they are described above suggests that a facility with problem-solving is necessary for an effective mediator to go beyond predictive evaluative approach. A number of lawyers complained that the tendency of evaluative mediators, and in particular former judges, was to bang heads and then suggest that the parties "split the difference." This approach was resented and regarded as ineffectual as well as unprincipled. One counsel declared that "mediators who are simply trying to split the difference are useless." It appears that when the traditional (legal) basis for a principled settlement is not accepted by the parties, some evaluative mediators, who lack authority to impose this judgment, are unable to find an alternate principled basis for settlement (for example, the

197. Toronto-12 : text units 356-360.
200. Several counsel remarked that they had sufficient legal experience to reach as credible an evaluation as the judge anyway.
201. Toronto-8 : text unit 106.
discussion and adoption of “realistic” and “fair” commercial conventions or standards). A number of lawyers observed that while ex-judges could offer expertise and authority, they were often ineffectual at facilitating dialogue and effecting compromise.²⁰²

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

The mediator does not actually condone that (the settlement), but there is a sense especially when you use a well respected mediator that it’s got to be at least reasonable, otherwise it wouldn’t have resolved and the mediator wouldn’t have perhaps pushed this point or pushed that point.²⁰³

There is also a sense that lawyers are looking for greater flexibility in moving between rights-based and interests-based approaches than practicing mediators currently provide (generally, the Pragmatist’s perspective). A number of lawyers who were generally positive about mediation and saw value in a facilitative model also remarked that it was exasperating to be confronted by a mediator who had a quasi-religious attachment to one or the other approach. These counsel would like to be able to call on an evaluative mediator if they believe that the situation makes this an effective approach.²⁰⁴ On the other hand, a somewhat smaller group who were most comfortable with an evaluative and predictive model recognized that in certain cases, an interests-based model would address important needs (examples given included parties with strong personal issues) or simply deflect attention from weaknesses in the case (for example, where a disputant had a poor legal case). Furthermore, a number of lawyers expressing a clear preference for evaluative mediators also referred to the importance of the mediator being able to "connect with the parties" in an acknowledgment that evaluative ability was not always sufficient in itself to produce a settlement.²⁰⁵

Unremarkably, lawyers who are generally positive and supportive of mediation also tended to be more likely to make comments about the skillfulness of mediators that they had observed (although they all had "horror stories" to tell as well). However, the range of reasons and levels at which they supported the use of mediation is reflected in the range of assessments of just what makes for a good mediator. One cluster of comments centered around the usefulness and skill of mediators in managing a process for negotiations, with reference in particular to

²⁰². Toronto-14: text units 139-141; Ottawa-11: text units 408-411; Toronto-11: text unit 354.
²⁰³. Toronto-10: text unit 401.
²⁰⁴. Rule 24.1 is silent on the issue of evaluation by mediators, which is generally interpreted to mean that an evaluative approach is not approved or supported. See Ontario R. Civ. P. 24.1. Rule 24.1.02 describes “the nature of mediation” as “a third party facilitating communication between the parties to a dispute . . . .” See Ontario R. Civ. P. 24.1.02. However, anecdotal evidence, including what our respondents in this study told us, is that evaluation takes place very frequently in mediations under the Rule. The Hann et al., Evaluation noted that in Toronto, seven mediators conducted 28% of the mediations (despite the fact that more than 250 names are on the Toronto mediation roster). Hann et al., supra n. 64. It has been widely reported that each of these seven is a lawyer.
²⁰⁵. Ottawa-14: text unit 114.
moving the parties in and out of caucus (and between private and joint discussions) at the appropriate time; discouraging the lawyers on each side from posturing; making an initial game plan for the mediation; and keeping the process moving along in order to establish a sense of momentum. Many lawyers commented that they wanted a proactive mediator who would participate actively in the discussions and exert some control over the process. Others emphasized the importance of the mediator enhancing the constructive communication between the parties, in particular communicating each side's perspective to the other side. One commented that the best mediator he knew was a person who could "internalize their point of view" in an authentic manner, save face for both clients and lawyers, gain the trust and credibility of the parties, and provide "moral suasion." One lawyer described this dynamic "like having a marriage counselor almost. You have the mediator to help you communicate to somebody." A third cluster of comments regarding the skills of the best mediators related to their effectiveness in generating creative outcomes, in particular outcomes that counsel may not have otherwise come up with. One lawyer commented that this is because a good mediator can get behind the presenting issues and "find out what's really bothering the sides." Others remarked on the ability of a mediator to enable counsel and clients to "think outside the box" of conventional legal or business solutions. Another indicated "a skillful mediator, legally trained or otherwise, can help pull the lawyers out of that locked-in world view and look at it another way."

VI. SYSTEMIC CHANGES IN PRACTICE

The preceding sections have attempted to set out the range and diversity of responses to our questions about how lawyers use, and understand the use of, mediation. This next section tries to synthesize some of the major themes arising from the data, indicating systemic changes in practice which may carry implications for a deeper disputing culture. Clifford Geertz argues that in order to understand the cultural context of behaviors and attitudes, one must be aware of the important relationship between the norms of practice—what he terms the "material elements" of culture—and the meaning that actors ascribe to these. Geertz describes the meanings given to both new and established practices as the "immaterial elements" of a practice culture. Moreover, the range of meanings given to a particular action or practice may be quite diverse, as they are in this study. Some of the changes in litigation practice to accommodate mandatory mediation in civil matters may appear, on face value, to be little more than functional adjustments. These include getting

206. See Toronto-19: text units 84-85.
207. Toronto-3: text unit 289.
211. Toronto-18: text unit 213.
212. Toronto-1: text unit 151.
213. See Zariski, supra n. 13, at 2 (discussing this distinction); Clifford Geertz, Thick Description: Toward an Interpretive Theory of Culture in C. Geertz, The Interpretation of Cultures; Selected Essays 3 (Basic Books 1973) (discussing relationship between material and immaterial elements of culture).
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ready to negotiate earlier than usual, briefing the client on how to participate in mediation, etc. On a functional level, there are also more apparent similarities than differences in how counsel responds to mediation. However, if one explores what Geertz calls "the piled-up structures of inference and implication" that are present in the meaning given to even the most mundane adjustments in practice routines,214 these may reflect significant shifts in thinking, depending on how the actors are understanding and making sense of their actions.

Geertz argues that changes in actual practices become especially noteworthy where they appear to have an impact on notions of role and identity. In inviting our respondents to reflect on their role and how, if at all, it is impacted by mediation, we were looking "to uncover the conceptual structures that inform our subjects' acts, the 'said' of social discourse" from inside the culture of commercial litigation.215 From this data it is possible to not only identify the changes that appear to have occurred in litigation practice, but also the various explanations presented for these changes by our research subjects. It is in this discussion that one might look for answers to the question: is mediation making any "real differences" to the broader disputing culture of the profession itself?

In analyzing the transcripts for indications of systemic change, it once again becomes apparent that there are significant differences between the two sample groups in Ottawa and Toronto. The strong differentiation between the acceptance of mediation in the two Bars is reflected in all aspects of the change data reported and analyzed below.

A. File Management

Before 1990 we all worked towards, you just aimed for the pre-trial and you didn't really think about settling before then. You may think about settling at the pre-trial but, you kind of liked to get to the trial. Unless it was a good case to settle. So that meant that you could go two, three years with a file and you never once directed your mind to what is the value of this and what could I settle it for.216

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

214. Id. at 7.
215. Id. at 27.
216. Toronto-20: text units 416-418 (emphasis added).
mediation and serious settlement discussions sooner than might otherwise be the case. One Ottawa lawyer described this as follows:

The file is front end loaded, and costs increased expeditiously to the client in the short term... long term I think that ultimate savings occurs because you're front end loading... that's more expensive in the short term but what happens is, your chances of succeeding and settling the file are greater and the settlement occurs in a faster time period.217

There are also signs that anticipation of early mandatory mediation is having a secondary impact on other management aspects of litigation practice. For example, some counsel in both Ottawa and Toronto indicated that in order to avoid the appointment of a mediator, they now planned for settlement discussions, often by teleconference, even before the date set for mandatory mediation. Another consequence noted by some Ottawa counsel is a trend towards fewer early procedural steps such as the filing of counter-claims and the bringing of motions, with these activities sometimes superseded by mediation. What many Ottawa counsel described as the “pick-it-up factor” (based on the number of occasions that lawyers are required to complete tasks within a case management regime) appears to be leading to earlier and more intensive efforts to settle.

The net impact is that more files are settling faster as they are no longer filed away and largely inactive for months on end. As one lawyer reflected somewhat ruefully:

We don't have these nice files sitting on our chair and on our floors which we always know we can work on them when you have a slow week, or something. All of a sudden you have to do all of this, all at once, and you think--unless you have a tremendous volume of work - what's going to happen in a month or two months.218

In Ottawa, litigators told us that they generally have fewer, more active, files.

We looked at the turn over of the files under the old system as being approximately a five year turn over, which allowed me to maintain a file load of about 400 files. The new turnover we believe we should looking a 12-15 month turn over, from the start to getting to trial. Which as a result of that turn over, we have had to make a dramatic change in how we practice. Because you can no longer handle 400 files... the senior litigators can handle somewhere between 75-100 files depending how specialized they may be, or how you need them to quantum in this type of issue. Junior lawyers handle no more than 20 files.219
The significance of this change is understood by our respondents in a number of different ways. The most widely noted implication of course relates to the economics of legal practice. One Ottawa lawyer described the billing system in his mid-size practice as changing from "billing from inventory" to "billing from results." This is a significant economic adjustment for many practices, and it is occurring in Toronto also. One Toronto counsel commented, "[a] lot of firms live off of those big files that . . . go on for years, they're in discovery for months—and the reality is that those cases have become rarer." He went on to add:

"At times, you see a file that was going to keep you into discovery for three months and it just got settled on very good terms for the client and you kind of go, 'wait a minute, is that the wildest thing I ever did?' I think there's a certain tone of that, especially among senior partners that go, 'wait a minute.' Then there's a tension there. You can't deny that there's tension there."

Some Toronto litigators speculated that they might need to increase file volumes in order to protect themselves against a negative economic impact. Interestingly, in Ottawa where case management is most extensive and has been longer, this does not appear to be borne out by experience. Ottawa lawyers seemed unconcerned about this and some volunteered the opinion that lawyers could profitably handle fewer cases at one time, because of the remuneration associated with front end loading and early settlement.

Aside from the economic implications, some lawyers described attitudinal and strategic adjustments as a result of changes in file management. Rule 24.1 requires work towards settlement to be undertaken much earlier in the process. It seems likely that many clients will regard this as a positive development. Changing file management practices may also be prompting some counsel to re-evaluate the appropriate timing of settlement discussions and as a result, the relationship between settlement and conventional approaches to both theory development and fact-gathering. These lawyers said that Rule 24.1 had altered their expectation that serious settlement negotiations could not take place until after discovery or even at the stage of pre-trial. This may mean that these counsel are at least more open now than they have been previously to the possibility of earlier settlement.

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220. Ottawa-7: text units 266-268.
221. Toronto-16: text units 451-452.
222. Toronto-16: text units 470-473.
223. See e.g. Toronto-17: text unit 183.
224. Hann et al., Evaluation, supra n. 64 asked clients to respond to the following question: "One of the merits of mandatory mediation was that it required parties and their counsel to begin negotiations earlier than would otherwise have been the case." 73% of Ottawa litigants and 60% of those commencing their actions in Toronto said that they agreed with this statement - although 25% of Toronto clients replied that they "didn't know", suggesting some ambivalence that may be explained as (1) a reflection of their counsel's attitude towards early mediation; (2) a rejection of the assumption that they would not have begun bargaining this early anyway; or (3) significant hesitation about the value of early negotiation. See ¶ 3.9.
225. Professor Bobbi McAdoo's study of the impact of Minnesota's Rule 114 - a "mandatory consideration" rule which requires counsel to formally consider the possibility of ADR and allows judges to impose a requirement of ADR in some cases - on civil litigation practice suggests similar shifts in the ways some lawyers approach the question of how much information is necessary before opening.
adjudicative model, and the dominance of a complementary adversarial style of lawyering, assumes that the function of information and fact-gathering is to strengthen rights-based arguments (and conversely to repudiate those of the other side). However, information deemed pertinent to this end may, or may not, be relevant and useful in the negotiation of a pragmatic solution. Most of our respondents indicated that in the absence of early mediation they adopted a fairly conventional and adversarial analysis of the need for information gathering and legal research before engaging in serious negotiations. However, some of these (and in particular those more experienced with mediation), said that they now found themselves questioning these assumptions. Some noted that at least some of the information which they assumed to be essential to the initiation of serious settlement discussions might, in fact, not be relevant to the type of solution that could and sometimes did emerge from these very early negotiations. One characterized counsel’s preoccupation as “an almost fetishistic obsession with knowing everything about a file before you can say anything about it.” Another made this remarkably frank comment:

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

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

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

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

settlement negotiations. Although in contrast to Rule 24.1, Minnesota’s Rule 114 (Minn. Gen. R. Prac. 114 (1994)) does not require, or apparently encourage, mediation to take place before discoveries, nonetheless some lawyers reported that they now considered settlement negotiations before discoveries. “I think lawyers have gotten much better about not taking a lot of unnecessary discovery. I think we (now) make conscious decisions on what we call a plan of action.” Others suggested that Rule 114 had speeded up the discovery process, with counsel trying to complete this before mediation. See McAdoo supra n. 19, 35-37.

228. Toronto-1 : text unit 249.
B. Changes in client roles and relationships

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

You basically call the shots when the client entrusts their case to you. A good litigator runs the show. The clients always say, do you want to do... It's kind of like a director of a play, and when you're in court the biggest CEO is a witness, and he's in your world—and you... direct this play to hopefully a good result at the end of the day in front of a judge.\(^229\)

Although there is real diversity in the approaches taken towards the participation of clients in the mediation process,\(^230\) there is widespread acknowledgment among lawyers that the assumption that the litigator will be simply left to run the file is now changing. In part, this shift is economically motivated; changes in corporate and institutional attitudes towards the financing of protracted litigation are, of course, a response to the high costs incurred. Many lawyers whose clients are primarily institutions and corporations (for example, banks and insurers) spoke of changes in reporting requirements. One commented: "[g]one are the days when insurers want 25 page reporting letters. They don't want that anymore. They want liability assessment, damages assessment, coverage assessment, if coverage is an issue, recommendations, and what can we settle this for and when."\(^231\) Another important factor is the growing number of in-house counsel and their role in managing litigation. In-house counsel are oriented towards the overall business efficiency of their organization in a way that outside litigators are not.\(^232\) Many litigators described having to work closely with in-house counsel in a manner that limits their accustomed autonomy and makes them more accountable for any decisions that extend the length and cost of litigation.

Naturally enough, institutional clients have always wanted efficient results.

In a more traditional approach, the institutional client generally still pushed to have the matter moved quickly. They didn't push it towards a mediation, they pushed it towards having the case run through the system more quickly. So they would be on us to make sure we had our discovery early, got it through and down to a pretrial early and stuff like that... they wanted driven through the system so you got down to some point where the case settles.\(^233\)

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

\(^{229}\) Toronto-6: Text unit 213.
\(^{230}\) See supra Part IV(D).
\(^{231}\) Ottawa-14: text units 80-82.
\(^{232}\) See supra n. 18, at 27.
\(^{233}\) Ottawa-4: text units 28-30.
[C]ounsel who practiced for many years under the old style, where of course they took instructions and didn’t think without instructions . . . but I think that they had a stronger sense of their lead role . . . of their role in making all decisions on how a case should be managed.

Interviewer: Rather than sharing those decisions with the client?

Interviewee: Rather than getting the client as involved as they are involved under mandatory mediation.234

The inclusion of clients in mediation represents a reassertion of control by commercial clients over problem-solving. Increasing awareness of ADR in the business community may also be changing the assumption of commercial clients that litigation is the “business tough” default approach to conflict resolution.235 One litigator reflected “I’ve noticed a few of my commercial clients recently, the old ‘just fight-at-all-costs and don’t look at it [the legal bill], don’t even think about an approach’ [i.e. opening negotiations] just don’t seem to exist anymore.”236 There is an important sense in which the types of outcomes typically captured by mediation—agreeing on a pragmatic monetary resolution to a conflict, perhaps preserving the business relationship and getting back to doing business—do not appear radical in a commercial context, but highly congruent with client needs and goals. Here the “real world” of client needs fits with a settlement orientation.237

For the Pragmatist, the need of clients to avoid costly trials provides a complete explanation and rationalization for changes in practice behaviors:

When I came out of Law School all I wanted to do was trials. . . . I wanted to be involved in the battle and the fray. But it became very clear to me within three or four years of practice that the people who were sitting across my desk from me didn’t want a trial. I mean, if they had to have a trial, then so be it. The vast majority came in with a problem, and they needed the problem solved, and if they could have the problem solved tomorrow, or if they could have the problem solved three years later at a much greater expense, but they got the same net result, they go through all this process—if I were to put the two options to them, I know that 100% of them would say, get it for me tomorrow. Once I realized that, I realized that that’s my role, to get them what they need as quickly as they possibly could get it.238

The real assessment up front is what is the client’s business goal. Does the client need litigation and in the practice we do, where we are typically the defendant's counsel and typically on for insurance companies, the answer is usually no. The client rarely needs litigation. The client typically wants to

235. See Lande, Failing Faith, supra n. 176, at 18-19 (suggesting that executive toughness is no longer equated with being highly litigious).
237. See supra Part V(A) and infra Part VII(B) for discussion addressing strange affinities.
238. Ottawa-15: text units 91-93.
resolve some business problems, the sooner the better, and so that you're always looking for not how do I get to court to get a great result, but how do I get my client out as quickly and cheaply as possible.\textsuperscript{239}

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

When I started practicing back in the mid 60's there was a terrible arrogance in our profession. We thought all clients were not necessarily idiots but didn't know what was best for them, and the client had no idea what was going on in the legal system. People are 100\% more sophisticated now, know what goes on in the system generally, and are much more conscious of where their buck is going than they used to be.\textsuperscript{240}

A younger lawyer made the point that expectations about client control had changed in the past twenty years, and commented that unlike his senior colleagues, he had never developed an expectation that he would run the show without significant input from his client.\textsuperscript{241} Some of the lawyers in our sample explicitly relate this change to an evolution of the lawyer's professional role and identity. One senior Toronto lawyer describes this as "[a]way from the gunslinger and more towards the client's agent as the years have gone by."\textsuperscript{242}

These changing ideologies of disputing—whether economic, philosophical, or pragmatic or a combination of all three—are forcing adjustments within practice. The legal profession cannot afford to be out of step with these developments. Its legitimacy (especially its monopoly status) depends significantly on its ability to develop requisite expertise to meet these new client expectations. At present, commercial clients expect at minimum that counsel will be able to provide them with information and advice on non-adjudicative dispute resolution options and services. Our data suggests that raised expectations about the effective strategic use of ADR processes, design knowledge skills for discrete processes, and excellent mediation/negotiation behaviors are just around the corner.

\textbf{C. Changes in settlement strategies and behaviors}

I think there has been an increasing acceptance of our role being dispute resolution rather than masters of the adversary system. I think there has been an increasing willingness and acceptance of alternative dispute resolution mechanisms as being a integral part of the process.\textsuperscript{243}

\textsuperscript{239} Toronto-9 : text units 18-22.
\textsuperscript{240} Ottawa-5 : text units 85-87.
\textsuperscript{241} Ottawa-11 : text units 216-228.
\textsuperscript{242} Toronto-18 : text unit 120.
\textsuperscript{243} Toronto-14 : text units 236-237.
There is a widespread recognition that legal practice in general and civil litigation in particular has been significantly altered by the barrier of legal costs. Being litigious and adversarial in the context of a suit in 2002 is likely to be vastly more time-consuming and expensive than bringing a case to trial 30 years ago.\textsuperscript{244} This change is well illustrated in the following quote:

I used to think my role as a lawyer was to go take cases to trial and win. And I think that because I was called in 1979 in the area I practiced in that's what the first sort of ten years in my existence was like. I did lots and lots of jury trials and we took every case to trial that we could and that's what I felt was my duty. And I loved it. It's cases that become more complex and it's larger sums of money are at stake with the increasing costs of litigation. My role now appears to be as a settler.\textsuperscript{245}

There is much less unanimity over whether as a consequence lawyers have developed new and different settlement strategies, particularly in relation to mediation. Some respondents at both sites described changes in their settlement strategies and behaviors as limited to the requirement that they prepare more up front in order to be ready sooner for mediation.\textsuperscript{246} Typically, counsel who saw nothing really new about mediation (the "Dismissers") and those who were opposed to mediation (the "Oppositionists") were unlikely to identify any real changes in the ways they thought about and strategized around the prospects of settlement in any given case. Some individuals who tended to these views did acknowledge that the outcome of mediation was sometimes surprisingly good, but had not, apparently, changed their bargaining approach as a result. A small group of generally mediation-positive respondents, mostly Toronto lawyers, did not think that any new skills were required for mediation, aside from perhaps some functional and often highly instrumental new skills—for example, showing a friendly and helpful front in mediation.\textsuperscript{247} Instead, these lawyers saw the mediation process simply as an extension of the traditional role of the lawyer to responsibly pursue settlement, understanding what they did in mediation, aside from the procedural dimension, to be little different to what they had always done in negotiation. One lawyer compared mediation with a conventional approach to settlement that would have been more common in an earlier era, when the time taken to reach trial was far shorter and less costly than today:

I don't see the analysis or the dynamic that goes on in mediation as being anything different than would have gone on 20-30 years ago. Probably after discoveries and often shortly before trial. What makes it (mediation) more successful is that if you do it early, you don't have a lot of complicating factors that will arrive in the course of litigation—costs, animosity, positioning. All those things that happen as litigation goes on haven't

\textsuperscript{244} See \textit{e.g.} Ottawa-10: text units 59-65.
\textsuperscript{245} Toronto-20: text units 176-182.
\textsuperscript{246} See supra Part VI(A) for further discussion.
\textsuperscript{247} See \textit{e.g.} Toronto-7: text units 186-187.
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happened yet. So they are not obstacles that you have to overcome in what you do.248

In contrast, lawyers who appeared to be more engaged in the mediation process, whether as Pragmatists, Instrumentalists, or True Believers, had much more to say about the impact of mandatory mediation on their settlement strategies. Some of these behaviors suggest fundamental changes in how these lawyers think about conflict and appropriate ways to find resolution, if for no other reason than continued exposure to consensus-building processes. For example:

Less and less do I find that I have to take positions that are very black and white and simply advocate that position and put blinders on and go straight ahead and say there's an offer, take it or leave it—and may be that's partly caused by repetitively being put in a room with a bunch of people and a mediator and sitting down to try and work out solutions to the problems.249

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

You don't worry about the other side as much at a trial because they're the other side. When you're working towards a consensus—then it matters.250

Two other lawyers elaborated this same point further:

I call it the new lawyering role. You do have to be in tune to the other side's interests. You start thinking about what their interests are, and what they really need out of this mediation and a lot of times it's just that, to understand or for them or your client just to see the other side and hear their side of story and see what's driving them and their personality.251

250. Toronto-14: Text units 184-185.
Probably the biggest change I made was really thinking about . . . the opposing party's profile and really making an effort to put myself in his/her shoes . . . I do that principally as I strategize the case. 252

Three other issues arose with some regularity as examples of changes in settlement behaviors. One was an increasing emphasis on the explicit development of strategy, and strategy that considered the whole process of litigation rather than evolved step-by-procedural step. Several Ottawa lawyers told us that they now sat down as a team at the beginning of work on a file and made a strategic plan for mediation, negotiation, discovery, and so on. 253 This highlighted the need for coordinated teamwork in planning, for example, between the corporate and the litigation departments inside a single firm, or between lawyers and other professionals involved in the case. A number of Ottawa lawyers also commented on the way that mediation had resulted in the development of stronger and better personal and professional relationships with other lawyers. 254 While this emphasis on overall strategic planning was more apparent in Ottawa, a number of Toronto counsel also spoke about the shift in focus away from procedural preparation and towards settlement strategies, in light of early mandatory mediation. As this counsel put it, "[m]y practice is more and more on the phone talking about strategy. Less and less do I ever mention the words civil procedure." 255 When asked about their discussions with colleagues generally over mediation, Ottawa lawyers readily acknowledged that they often talked about strategies in and for mediation. In contrast, Toronto lawyers seemed to talk less about mediation and when they did, this was generally limited to comparing notes on mediators in order to avoid individuals seen as incompetent or ineffectual. 256

Some lawyers described discrete new skills that they were learning and which they felt made the role of mediation advocate quite distinct from their more traditional negotiator role. Most of these counsel were in the Ottawa sample, although the following quote comes from a senior Toronto litigator:

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255. Toronto-9: text unit 303.
256. Although it should be recognized that generally Toronto counsel seemed to have less well established patterns of informal professional dialogue, perhaps it is a reflection of the relative absence of cohesion and repeated relationships within this particular legal community. See infra Part VII(C).
So my role has significantly changed and now I don't think a litigator can be a litigator without also being a . . . person who has advocacy skills relevant to conducting the process of mediation. . . . [H]ow do you do an opening statement? How do you identify issues? How do you know to prepare yourself into what issues you want to give up? What issues do you want to hold on to? How do you best present your client's case? All of those things are done quite differently at the mediation because the adversarial process to a large extent has been dropped. . . . [N]ow instead of coming in as an aggressive advocate saying I'm going to take you to court, you've got to come somewhat conciliatory because you are there to settle. 257

Many of the particular skills and tools identified in this statement, and also in the comments of other counsel, relate directly to the need for a closer analysis of the other side's interests. Other skills talked about by counsel include adopting a conciliatory manner and tone; an ability to build rapport with the other side; matching the mediator to the case; displaying a confidence and openness; thinking "outside the box" of conventional, legal solutions in developing creative problem-solving skills, 258 and related to this, an increased knowledge and awareness of business context.

It was noticeable how many generally pro-mediation lawyers were at pains to emphasize that this was "[s]till advocacy. It's just another arrow in the quiver of advocacy." 259 This use of language reflects an unresolved tension over how "zealous advocacy" can be reconciled with consensus-building. 260 Another reflected that lawyers may only be just beginning to become aware of what makes for a skillful mediation advocate. "I don't think people really know what makes a good lawyer for the client in a mediation. We're starting to understand what makes a good mediator. But, I'm still at a loss as to what role I really play. . . . Maybe that will develop over the next five or ten years." 261 This underscores the point that many lawyers now believe there to be discrete and different skills involved in mediation advocacy, and that this is not simply a matter of reproducing traditional positional bargaining skills.

**D. Changes in attitudes towards the use of mediation**

Data collected at both sites reveals a rising level of acceptance of commercial mediation generally and for many lawyers, a significant reduction in their personal skepticism towards the utility of mediation. Some lawyers put this change down to the mandatory mediation program and being "forced" to use mediation. Interestingly, acknowledgment that there has been a general shift in attitudes towards

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257. Toronto-20 : text units 186-190 (emphasis added).
258. E.g. Ottawa-16 : text unit 125.
259. Ottawa-15 : text units 245 and 255.
260. See Macfarlane, Changing Culture of Legal Practice, supra n. 24 (discussing a model of "new advocacy").
mediation is reflected fairly strongly in the Toronto sample\textsuperscript{262} despite the fact that there is also clear evidence of both the instrumental use of mediation and some continuing resistance to mediation among this group. The most striking evidence of changes in attitudes, both personally and systemically, is found in the Ottawa sample, and is underlined by the number of Ottawa counsel who volunteered their opinion that the Toronto Bar had not accepted the use of mediation at the same level as the Ottawa Bar. One Ottawa counsel commented that "[c]ertainly in Toronto there isn't the acceptance [of the underlying philosophy of the Rule] and there's still the ambush mentality."\textsuperscript{263}

Almost all the Ottawa lawyers described how they had witnessed significant changes in attitudes towards mediation, both individually and throughout the local legal community. When Ottawa counsel reflected on the changes they had seen in the five years since mandatory mediation was first introduced into the Ottawa-Carleton region, they usually described the initial resistance and cynicism as one might an amusing historical anecdote and almost always at arms-length (suggesting that they did not go along with such cynicism at the time, as it was their colleagues who were the skeptics and not them). The following lawyer was more frank than many in acknowledging his own concerns, and the reasons for them:

Interviewer: Do you remember when mandatory mediation was starting, do you remember what peoples' reactions were?

Interviewee: They were in a panic. They thought it was ridiculous.

Interviewer: And do you remember what you thought?

Interviewee: Yes, I thought it was ridiculous because I didn't know anything about it.\textsuperscript{264}

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

\textsuperscript{262} See e.g. Toronto-11, text units 453-455, 561-567; Toronto-14, text units 236-238; Toronto-17, text unit 182.
\textsuperscript{263} Ottawa-5 : text unit 485.
\textsuperscript{264} Ottawa-16 : text units 316-318.
It completely caught me off guard at first. The first few mediations, I hadn't had any mediation training. My only training was the general attitude in the profession that this is a lot of horse crap and I had settlements hit me between the eyes and I couldn't believe my clients sold out on me the way they did. I was concerned that I had a serious client control problem. 265

The same lawyer went on to describe his comfort now with involving clients very actively in the mediation process. Other respondents described in some detail their transition from skeptic to "believer." Here is one such story:

[W]hen mediation first came in 1990 I couldn't believe it. What a load of rubbish. What do I need a mediator in there to do when I can sit down and talk to the lawyer? . . . You couldn't have persuaded me of that in 1991, 1992, 1993. I thought it was ridiculous. I couldn't see any benefit to it. I couldn't see that it would resolve anything. It wasn't that I was concerned that my files were going to get closed down. It was more of a concern that I was just wasting my time and money. So I wasn't interested in doing any of that stuff and then I got forced into doing these things and I got pregnant, my son was born in 1991 and everybody was starting to do these mediations and I thought, I don't know what I'm doing, so while I was pregnant I thought I will take this time to go and do a mediator's course. So I went and did a five day course and learned how to be a mediator and thought, wow you know this has its own little advocacy skill set and it's kind of fun, it's different, it's not quite like doing a case, but if it's going to be coming here I might as well make the best use about it. Figure out what I can do. And now I'm a believer and I accept that mediation is a good thing. I think you'll find that I'm a person who has now converted and I admit to being a believer in mediation. 266

VII. RECONCILING MEDIATION WITHIN THE CULTURE OF COMMERCIAL LITIGATION

A. At a Personal Level: the "Ideal Types" and Their Experiences of Role Dissonance

Counsel who participate regularly in mediation confront a number of challenges to their traditional adversarial role. Even on a purely mechanical level, the process is different to that of most traditional settlement negotiations as it includes a non-judicial third party in a non-authoritative role, takes place face-to-face rather than by correspondence, and directly involves clients in some capacity. 267 Furthermore, at least in the case of mediations under Rule 24.1, mediation occurs significantly earlier than discussions over settlement would generally commence. At a conceptual level, the consensus-building orientation of mediation, the development of an appropriately

266. Toronto-20: text units 590-608.
267. On the well-documented characteristics of traditional lawyer-to-lawyer negotiations, see e.g. Clarke, et al. supra n. 11.
settlement-friendly style of advocacy, and the business-driven outcomes sought by many commercial clients seem likely to raise some role tensions for the traditional litigator, and may foreshadow significant changes in both professional identity and personal meanings. A good example that implicates both practice and principle is disclosure practices. Whereas problem-solving mediation and negotiation require some exchange of information to be effective, there is a strong bias against revealing one's cards or disclosing any sign of weakness of adversarial ethics. As well as internal role conflict ("what is my role here, to fight for the last cent or to facilitate settlement?")", there is also the potential for role conflict produced by external factors and expectations ("I prefer going to trial, early settlement does not make sense for my business.")

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

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

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

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

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

Interviewee: Basically complying with the rules. Minimal compliance
because I don't think it's going to help me settle any better and it's just more
money spent. . . . I just find it's a headache for counsel who have busy
practices and it doesn't make it a case that's going to settle any easier than any
other case I've had. 275

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

Interviewee: It doesn't at all, it just, you just fit the mediation in. Usually it's
a useless, time consuming step because I'd have settled the case if it was
ready to go at the time of the mandatory mediation was called for. 276

Other Dismissers effectively neutralize the use of mediation by understanding
it as a process whose efficacy is hostage to their cooperation. By retaining the
centrality and primacy of their role, any potential conflict between the lawyers’s
traditional negotiation role and mediation is eliminated. For example,

We decided the lawyers could settle this easier. So every two months, one
time I took them to Canoe upstairs for drinks, they take me and we try and
settle, we're getting close, we're now extremely close but we're not there yet
and the mediation day, everyone acknowledged, was a waste of time. 277

Others appear to be comfortable integrating the mediation process and more
conventional “litigation.” 278 For example, the Pragmatist does not experience any
particular sense of role conflict because both his clients’ interests, and therefore his

277. Toronto-6: text units 136-137.
278. See Galanter, supra n. 5.
own interests, are in settlement. Those adopting a Pragmatic approach to mediation have probably already integrated some business norms and practices into their negotiating strategy, and are accustomed to settling most cases. Having set his benchmark by his clients' stated needs, the Pragmatist is flexible in his perspective on the appropriate role he should play in any one case. If it best meets his clients' needs to negotiate or mediate, he will do that (and has always done that); if it calls for bringing a motion, he will do that. This attitude is illustrated in the following exchange:

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

Interviewee: No, because mediation doesn’t mean you have to settle. If mediation was requiring you to settle that would be one thing. We just have to remember that it's our clients that tell us what to do. 279

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

I do get surprised in mediation, but it's seldom surprise about the process. The surprise is more in the sense of what they (the client) are prepared and willing to do to get towards a resolution. That's where I'm surprised and that surprise tends to be their changing their bargaining position or settlement strategy. 280

Many Pragmatists gave examples of such situations which led to what they considered to be ethical dilemmas around settlement. Numerous situations were described in which the lawyer felt that the client could have done better, but eventually bowed to his or her wishes. A good example is the following story:

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

279. Ottawa-8 : text units 280-283 (emphasis added).
cents on the dollar.” I have found it difficult at times to take off the advocate hat and be sensitive to the client’s business objectives.281

The Instrumentalist sees this dilemma as more fundamental than the adjustment of realistic expectations between counsel and client which must take place in every file, however processed. Instead the Instrumentalist, already far more skeptical and detached than the Pragmatist about the benefits of mediation, experiences a contradiction between the settlement norms of mediation and the goals of litigation. In response, some of these lawyers told us that they often “play-act” in mediation, in order to seduce both the third party and the other side into believing that they are genuine about settlement, when in reality they are using the mediation process in an instrumental way to advance adversarial goals. The Instrumentalist moves with little apparent discomfort between an adversarial role and a more conciliatory role, and regards “switching hats” (or behaviors, or strategies) as something that lawyers often have to do. We were given many frank examples of this by our Instrumentalist-inclined respondents.

At mediation you’re going to see Miss Helpful. I’m going to be the most helpful, cheerful, flight attendant type person you’ve ever seen—but if that mediation fails, then we’ll just go for the jugular.282

You have to have a different mind set. It’s almost like I drop down into that mind set for the mediation—and then come out of that mind set when I’m back into the rest of the judicial system.283

So I tend to be fairly non-aggressive. If I get in a courtroom I’m quite different.
I think people all of a sudden see a different person, but that’s just the nature of the business.284

While most of these lawyers did not feel uncomfortable about making this switch, some did admit to more conflicted feelings about the appropriateness of playing what one counsel described as a “two-faced” role.285 For example,

Interviewer: And are you comfortable with that role switch?

Interviewee: [I]t feels kind of slimy doing it, just from an ethical point of view. It feels slimy, it’s a complete act and usually the clients on the other side are so naive as to buy into the act and from an ethical point of view that doesn’t feel that great, but it’s what we do.286

281. Toronto-17: text units 106-114.
283. Ottawa-4: text units 100-102.
284. Ottawa-15: text units 82-83 (emphasis added).
285. Toronto-4: text unit 75.
286. Toronto-7: text units 194-197.
The Instrumentalists' efforts to intentionally "subvert" the process implies a recognition of the divergence of values and roles between mediation and litigation as otherwise there would be nothing to subvert. This stands in contrast to the Pragmatists' view.

However those lawyers who experience the most tension between their role in mediation and as traditional litigators are those with the strongest views on mediation, either positive or negative, and the most to say generally on the question of professional identity. First, those who express Oppositionist sentiment tend to have firm and forthright views about the importance of strong advocacy values, which they see as potentially undermined by mediation.

The right philosophy is that we're going to have disputes, and conducting serious disputes is going to cost a lot of money and the trick is to get me before a judge as fast as possible, and have a decision. Mediation is not the solution. The whole mind set is different. 288

So you'll find mediation is going to be the way to go, but we have a watered down legal system. Our system was built on the adversarial process and that will die. I'm not sure that's going to be the best system at the end of day. The best system should be getting the best results through some sense of adversarial process with experienced lawyers, so at the end of the day clients can feel that they got the right result, as opposed to a manufactured result that no one's crazy about. 289

The role of the "manager of war" in an adversary model is so clear and so fixed for those expressing Oppositionist sentiments that settlement discussions are not welcomed.

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

Interviewee: Very badly!

Interviewer: What would you say to the client?

Interviewee: I would say to the client, if you're interested in settlement, you go and talk to the other side about it. I'm very bad at it, my job is to manage a war, not to manage a peace. 290

However, it is the True Believers who experience the most significant feeling of tension between their adversarial and their settlement roles. Unsurprisingly, those

287. E.g. Toronto-2, 6, 11 and 14.
lawyers who expressed most commitment to the use of mediation tended also to be the most reflective about the impact of mediation on their own legal practice and for the practice of law in general. A number of counsel commented on the ways in which mediation offered a quite different analysis of the causes and consequences of conflict than what traditional litigation offered. For example:

[A]s lawyers or as litigation lawyers or advocacy lawyers, maybe we're all getting cynical and all we think of is in terms of people wanting either money, or the equivalent of money or related to money, saving money, whatever. You go to a mediation, and it's all about an apology or an acceptance of why somebody did something the way they did it. That happens and it's astounding. 291

Several of those who identified themselves as True Believers remarked on the inadequacy of their law school education in preparing them to take on this type of role. 292 Some reflected that the sense of role tension they experienced might be diminished among the younger generation of lawyers for whom settlement processes were familiar and almost normative. 293 A number of lawyers who were supportive of the use of mediation also pointed out the tension between settlement and the economics of legal practice. One remarked, “I’m an advocate, but I’m not blindly adversarial. I’m constantly putting myself out of business and it’s a difficult thing to do.” 294 Others, while readily acknowledging the differences that mediation makes to their practice strategies, continue to work at integrating these norms into traditional values and vocabulary about advocacy and representation. For example:

I see a completely different form of adversary process. You call it a mediation that we're working together to come up with a deal, but we're still adversaries - I'm still trying to get the best possible deal I can. 295

It certainly requires a different mind set but one of the things you have to learn is that you can do a mediation without compromising your adversarial position—that's one of the things you try and do. 296

It is interesting to speculate what long-term impact this experience of role tension may have on those members of the Bar who are increasingly committed to the use of early mediation. Pressure on “core” components of professional role, and role conflicts, often presage systemic change. 297 Can the two roles of fighter and settler be reconciled? One of the most significant indices of the “culture change”

292. E.g. Ottawa-15 : text unit 93; Ottawa-16 : text unit 134.
293. One lawyer commented that the older generation “...weren’t trained to negotiate. They were trained to fight.” Ottawa-14 : text unit 172. See e.g. Ottawa-11 : text units 470-480; Toronto-14 : text unit 243; Toronto-19 : text units 339-340.
295. Toronto-5 : text units 202-203.
296. Toronto-14 : text 249.
297. Geertz, supra n. 213.
affected by mandatory mediation may be how the next generation of litigators resolves the tension between the goals and strategies of the traditional "pitbull," and those of the consensus-seeker.

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

A key challenge for this study was to understand better the mutual impact of mandatory mediation and the traditional adjudicative process. There has been much speculation about the potential of mediation to challenge or diminish the adversarial cultural of litigation, but an equally strong case is sometimes made that court-connected mediation will inevitably become co-opted or assimilated into the dominant model.²⁹⁸

Whatever form mediation takes, there are some important differences between the assumptions of mediation and those of adjudication. A core assumption of mediation is that the particular facts of a conflict are often symptoms of an underlying dispute which is primarily over interests or resources, rather than values, and therefore a negotiated compromise is possible.²⁹⁹ The core assumption of the adjudicative model is that conflicts are, or can always be structured as, normative, requiring a determinative moral/legal outcome by a third party.³⁰⁰ While the differing assumptions of these two approaches to conflict resolution need not be understood as incompatible or impossible to integrate, any marriage or merger between them will inevitably change the character of each. Depending on how we understand their mutual impact, the character of both mediation and traditional adjudication may be changing ("convergence"), or one may be changing at the expense of the other ("assimilation"). A third possibility is that there will be no mutual impact and the simplistic summary of fundamental differences offered above will remain accurate ("divergence"). Fourthly, one might hypothesize that the mutual influence of the two models could create a new paradigm of dispute resolution which replaces both mediation and adjudication ("transformation").

In examining our data to assess what evidence there might be to support any one of these four hypothetical outcomes, it is important to remember that these two models of dispute resolution under scrutiny in this study are not interacting at arm-length. Rather, mediation is being inserted (via Rule 24.1) into an established dispute resolution process that is already headed towards trial. In the cases described by the lawyers in this study, mediation (whether private or court-connected) and

²⁹⁹. For a classic exposition, see Vilhelm Aubert, Competition and Dissensus: Two Types of Conflict and Conflict Resolution, 7 J. of Confl. Res. 26 (1963).
³⁰⁰. For a comparison of some core assumptions of the adjudicative and consensus-building models of dispute resolution, see Julie Macfarlane, The Mediation Alternative, Rethinking Disputes: The Mediation Alternative 8-18 (Emond Montgomery 1997); Julie Macfarlane, Conflict Analysis, Dispute Resolution Reading and Case Studies 45-57 (Emond Montgomery 1999).
adjudication are intertwined and are being used simultaneously by the parties to resolve their dispute.\textsuperscript{301}

The most common outcome where an established culture meets a marginal or less powerful one is the assimilation of the latter by the dominant tradition. The hypothesis here is that adjudication will simply swallow, subvert, or assimilate the different goals of the mediation process, and turn it into a traditional exercise in positional bargaining. This may include deriding mediation as "touchy-feely" or out of touch with the "real world." There seems to be evidence of assimilation in the apparent dominance in court-connected mediation of highly evaluative mediators. These are often retired judges, memorably described by James Alfini as the "hashers, bashers and trashers"\textsuperscript{302}—whose often pressured approach focuses on the legal merits of the dispute. Many of the respondents in this study expressed a clear preference for this type of mediation.\textsuperscript{303} Another assimilative use of mediation seen in this study is the instrumental use of mandatory mediation as an early and cheap discovery process. A slightly different, but perhaps similarly motivated, assimilative response to mediation is to neutralize its impact by not taking it seriously or preparing in a way that makes the process unlikely to be effective (characteristic of the Dismissers). Instrumentalist and Dismissive approaches actively assimilate the transformative values of mediation—such as relationship-restoration and conflict reorientation—within dominant adversarial norms, allowing mediation to have little if any impact on those norms, either practically or conceptually. Even those who embrace mediation sometimes recognize the temptation of a return to familiar habits. For example, there are some signs in Ottawa of a return to the norm of only exploring settlement after discovery—what one Ottawa lawyer described as "that old put-it-off-until-it-really-needs-to-be-done approach,"\textsuperscript{304} which might also be seen as an example of assimilation.

Nancy Welsh argues that there is significant evidence of the assimilation of mediation into a model of adversarial litigation practice. She writes that “[c]ourt-connected mediation of non-family civil cases is developing an uncanny resemblance to the judicially-hosted settlement conference,” hallmarks of which are lack of direct client involvement and a focus on the legal arguments and their relative merits.\textsuperscript{305} Without direct or systematic observations, it is difficult to know how accurate a description this might be of commercial mediations in Ontario although it certainly meshes with some of the descriptions given by our respondents. Moreover, while

\textsuperscript{301.} The answer to the question of mutual impact may also depend on whether one defines mediation as mandatory mediation, or private commercial mediation. This study has focused on the use and impact of mandatory mediation via Rule 24.1 in Ontario, but many of the respondents spoke about their parallel experiences in private commercial mediation also. It is not possible to draw separate conclusions from this data on any difference between the impact of private commercial mediation, as distinct from mandatory mediation.


\textsuperscript{303.} See supra Part V(B) for further discussion.

\textsuperscript{304.} Ottawa-14: text unit 67. See supra Part IV(A).

\textsuperscript{305.} Nancy A. Welsh, \textit{The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?}, 6 Harv. Negot. L. Rev. 1, 25 (2001). Welsh argues that this is the price that has been paid for the legitimacy bought with the institutionalization of mediation within the court system.
lawyers in Toronto and Ottawa expressed a strong preference for evaluative mediators, it is less clear that they see the function of these mediators as simply running a judicial-style settlement conference. Rather, many comments suggested that lawyers wanted the mediator to have a legal evaluation in their back pocket if all other efforts at settlement fail. Flexibility of approach (hardly a hallmark of judicial settlement conferences) was also seen as important. Most challenging, perhaps, to the Welsh thesis is the considerable evidence in this study that some counsel recognize the importance of clients participating directly in mediation, although it is fair to say that the lawyer usually sees himself as firmly in the driver’s seat. Are mediations where the lawyers are the primary participants, but share planning and negotiating with their clients, evidence of assimilation by the adversarial model? This depends on what mediation values we understand to be compromised in this circumstance, and the role counsel should play in mediation. However, this study suggests that something more diverse, complex, and subtle than “simple” assimilation is occurring in Ontario. When different cultures of conflict resolution encounter one another within the same space— as mediation and adjudication-bound litigation now do in the civil justice system—it seems likely that some natural convergence will occur. “Convergence” here is intended to describe mutual influence that falls short of the creation of a new substitute paradigm. The convergence of different cultures might be compared to a chemical combination, where the essential properties of each separate process or culture are changed as a result. If convergence is occurring, one would expect each culture of conflict resolution to take on some of the ideas, values, and practices of the other. There are a number of ways in which this study suggests some convergence between the structure and actions of mediation and traditional litigation. Mediation practice in the context of civil litigation is inevitably affected by a parallel process of fact-finding and theory-building towards adjudication, and one would expect the “shadow of the law” to be more significant as a result in the ensuing negotiations. Some obvious examples of ways in which mediation practices have adapted to the court-connected context include the mandatory nature of referral into mediation, the formalizing of rules on exchange of information prior to mediation (here documents), and the widespread use of evaluative mediators. On the other side, litigation practices and strategies are also being affected by mediation. Many lawyers talked about the change in climate around proposing settlement discussions, as a result of the requirement of mediation. For example,

306. See supra Part V(B), especially 50-51.
307. See supra Part VI(B) for further discussion.
308. For example, Ellen Gordon reports that in observed mediations, the minority of clients who did play “active roles” were “supporting rather than starring players.” Supra n. 298, at 383.
309. For example, as process manager. See Sternlight, supra n. 140, at 348-354.
310. I am grateful to my colleague Paul Emond for his discussion of the potential of convergence and divergence.
311. Thomas Kuhn’s concept of “paradigm shift” means the actual replacement or substitution of the old with a new paradigm - that is not what is contemplated here. See supra n. 47.
312. Thanks to my colleague Ellen Travis for this metaphor.
314. Rule 24.1.10
I think what mediation has done is made it easier to try and negotiate a settlement or discuss settlement without doing so from a point of view or giving the perception that you’re doing so because you’re worried about your case, or it comes from a point of weakness because you can just say everybody does it, so you want to do it.315

Early mediation directly challenges the entrenched assumption that settlement negotiations should not be contemplated until after discovery.316 Front-end loading of files is one response to this.317 Rule 24.1 also upsets the conventional assumption that clients shall not participate directly in negotiation.318 A number of counsel talked at length about mediation outcomes, critical to resolution, which they would not have otherwise contemplated, such as apologies and acknowledgments.319 A number also described developing new advocacy skills for the mediation which they saw as making new and distinctive demands on their expertise.320 Finally, the descriptions of personal “conversion” offered by some of the True Believers highlights how for some lawyers exposure to mediation has transformed their approach to professional service.321

Convergence between mediation practice and litigation practice is both more apparent to an outside observer, and internally more widely recognized, in Ottawa than in Toronto. One might speculate about the extent and authenticity of convergence in both cities. For example, one might view the development of the modern welfare state as the consequence of the influence of principles of Marxism and collectivism on industrial capitalism; or a minimally costly measure to defuse opposition and stabilize the control of the corporate classes.322 In the same way, the moderate (in Toronto) and widespread (in Ottawa) acceptance of mediation as a legitimate dispute resolution process might be seen as a sign of the influence of principles of consensus-building on the culture of litigation. It may also be simply a fashionable “front” for what is essentially the same rights-based model, manipulated to advantage by the Instrumentalists or the Dismissers or at best, embraced for business reasons by the Pragmatists. Certainly the phenomenon of convergence may produce some strange affinities. Here there appears to be a coincidence of interests between private market capitalism, and informal and confidential mediation processes for commercial disputes.323 The positive attitude

315. Toronto-14 : text units 87-87.
316. See supra Part VI(A).
317. Id.
318. See supra Part VI(B) for further discussion.
319. See supra Part IV(B) & (C) for further discussion.
320. See supra Part VI(C) for further discussion.
321. See supra Part VI(D).
323. The relationship of business thinking - business values, conventions, and practices - to commercial litigation might be seen as a possible parallel for the integration of mediation and adjudication models in dispute resolution. Many respondents had already thoroughly integrated business thinking into their litigation practice, so that their approach to a commercial file went beyond a legal analysis to consider practical business interests and solutions, and regarded the business expertise and experience of the client as integral to problem-solving.
adopted by many business lawyers towards mediation, especially those with greatest experience of mediation, can be explained by the apparent compatibility of private business solutions developed in mediation with business corporate needs. What many would see as a vehicle for social and personal transformation (mediation and consensus-building), may in fact double handily as a means to produce private, unregulated, efficient, and highly pragmatic business solutions for corporations.\textsuperscript{324} One respondent went further in reformulating the relationship of law and business issues in the context of mediation as follows:

Quite often . . . this is more of a business decision than a legal decision . . . [A]t mediation it's a business decision really, taking into account the legal parameters.\textsuperscript{325}

Forcing the co-existence of mediation and adjudication within a mandatory program of court-connected mediation may also create divergence, rather than convergence. Divergence would mean that the different approaches and understandings of conflict held by counsel who are originally “pro-” and “anti-” mediation are reinforced and become further entrenched with little or no enhanced mutual understanding. Some evidence of divergence can be seen in this study in the different responses within the profession to the growth of mediation, and most dramatically in the gap between the True Believers on one hand, and the Oppositionists (and to a lesser extent, the Dismissers) on the other. Signs of divergence are most noticeable where resistance to mediation is greatest. The rhetoric of “faith” in mediation serves to heighten the impression of divergence (between the “believers” and the “non-believers”). The potential for two separate legal practice tracks, one oriented to settlement and the other to litigation, can also be seen in the emergence of specialist settlement-only counsel,\textsuperscript{326} the establishment of ADR boutiques and ADR departments inside larger firms, and the development of collaborative lawyering networks, where lawyers are retained by their clients exclusively to negotiate, and are barred from litigation.\textsuperscript{327}

At the start of this section it was hypothesized that the consequence of prolonged exposure to another different and challenging approach to conflict resolution may ultimately lead to the creation of a new paradigm. Going beyond mutual influence, “transformation” would be the result of fundamental changes in the internal norms of each approach which would render each unrecognizable in its original form. An authentic and comprehensive integration of the values and practices of mediation and traditional litigation would offer a new paradigm of dispute resolution practice, with widely accepted norms and practice values. While some interviews, especially in Ottawa, offer suggestive evidence of systemic changes

\textsuperscript{324} This raises questions about the inherent value of convergence, whatever form it takes, which are outside the scope of this paper. For example, is private commercial mediation at odds with the public rights culture of adjudication? Should commercial interests have the means to avoid their legal responsibilities? Is a lawyer-dominated model of mediation necessarily a good or a bad thing?

\textsuperscript{325} Ottawa-19 : text units 217 & 344.

\textsuperscript{326} Coyne, supra n. 16.

\textsuperscript{327} See for example supra n. 17; Julie Macfarlane, \textit{Collaborative Lawyering - or - Settlement-Only - Counsel: Implications for the Delivery of Legal Services and the Practice of Law} (forthcoming).
in aspects of litigation practice and behaviors, the emergence of a new and substitute paradigm for dispute resolution is not supported by the data. What one respondent described as "the new lawyering role" is far from normative for most civil litigators. However, there are signs that existing paradigms are under pressure both structurally (for example the timing imposed by case management and mandatory mediation) and conceptually (seen in the descriptions of "two hats" role conflict and dissonance amongst some litigators). The introduction of early mediation processes into commercial litigation, where advocates have been trained to adopt strategic behaviors which are highly competitive and adversarial, seems likely over time to impact the core identity of the leading players, both personal and professional.

In summary, while our interviews in Toronto with commercial litigators identify some evidence of assimilation, and hence erosion, of the informalism and potentially transformative impact of mediation within a conventional adversarial system, there are also signs (particularly in Ottawa) of convergence or mutual influence. As well, the hardening of positions on support for or opposition to mediation, and the hinted emergence of mediation or settlement "specialists," suggests that some divergence is also taking place. The following quote captures the idea that all three consequences might be occurring simultaneously, with none yet the clear outcome of the co-existence of mediation and adjudication.

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

C. Some Important Variables

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

The first of these variables is the pilot site itself, Ottawa or Toronto, and the respective local legal culture. It has been apparent throughout this paper that there is a much stronger and more consistent recognition among Ottawa litigators of the impact of mandatory mediation on their practice than among their Toronto colleagues. Ottawa lawyers tended to offer many more concrete observations and ideas than their Toronto colleagues about the ways in which their practice has adjusted or changed to reflect the demands of mediation. Their analysis of change...
and its impact on practice seemed generally to be more reflective and introspective, and the ideas they suggested more complex and sophisticated. Almost all the Ottawa lawyers we spoke with had plainly already thought about the questions we put to them. Some had discussed these issues with colleagues, and this showed in the depth of many of their answers. In Toronto, many counsel seemed to be considering these questions for the first time.

Not only were Ottawa lawyers generally much more positive about mediation than their compatriots in Toronto, they were often quite critical of the adversarial spirit that, they asserted, Toronto counsel often demonstrated around mediation. These differences in mediation culture are especially apparent in relation to instrumental uses of the mediation process, which seem to be much more prevalent in Toronto than in Ottawa. Conventions on documentary exchange and the use of comprehensive mediation briefs also appear more established in Ottawa than in Toronto. Ottawa counsel were also more likely to talk about a positive, active role that they see their clients taking in mediation, and to suggest a deeper sense of comfort with this. Almost every one of the twenty respondents in the Ottawa sample were “True Believers” at some level, even if this was often mixed in with a heavy dose of Pragmatism. In Toronto, “True Believers” were much less in evidence (around a third of the Toronto sample expressed these sentiments at moments, but not unambiguously) and those who were genuinely committed to the use of mediation generally retained an instrumental approach to representation tactics in mediation which more closely resembled traditional advocacy norms. In other words, being a “True Believer” in Toronto may carry somewhat different implications then being a “True Believer” in Ottawa, with the more ambiguous and sometimes cynical approach of the Torontonians indicative of some wider cultural differences between the two cities.

Curiously enough, the rate of settlement achieved through mediation is very comparable in the two cities (and even closer when cases proceeding under the simplified rules are excluded; Toronto does not offer mandatory mediation for such cases). The Hann Evaluation found that 41% of mediations in Ottawa and 38% of Toronto mediations reported full settlement within 7 days of the mediation session. In fact, when partial reported settlements are added in, the overall rate of resolution following mediation in Toronto is actually higher, being 59% compared with 54% in Ottawa. Yet the Hann Evaluation also observed the same disparity that we did between lawyers’ views in Toronto and Ottawa, commenting that in contrast to Toronto, “mandatory mediation is an article of faith in Ottawa, as part of the fabric of litigation.” What variables might account for this?

One potential variable which can probably be eliminated at the outset is caseload difference. The Ottawa caseload is not substantively different than that of the Toronto General Division. The Hann Evaluation established that the mix of case types coming through the mandatory mediation program does not differ widely

331. Hann et al., Evaluation, supra n. 64. The form that mediators were asked to complete for the evaluators asked them to say if the matter had to their knowledge settled within seven days of the mediation (this was the evaluators’ benchmark), or if it did not settle (in full or in part).

332. Id. at ¶ 5.2.1 and 5.2.3. Note that the figures for partial settlement refer to settlement of “one or more issues.” Such assessments may be quite subjective and unreliable.

333. Id. at ¶ 3.10.
between Ottawa and Toronto, and that, for example, the relative numbers of contract, negligence, collection and malpractice cases within the whole case management caseload were similar in the two cities. Of far greater significance is that Toronto is a much larger city and has a population four times that of Ottawa. The Toronto Bar is more than four times larger than Ottawa, probably as a result of the large amount of international and national corporate work based on Bay Street. These demographics go a long way in explaining why the Ottawa Bar feels more cohesive, has stronger patterns of recurring and reciprocal professional relationships, and why Toronto lawyers often think of themselves as working more or less alone, in an environment in which many competing interests—types of legal practice, styles of practice, professional mores—fight for space. This difference between the two sites is not necessarily predictive of how either Bar might respond to major system change such as the introduction of mandatory mediation, but would suggest that one might expect the response to be more consistent and unified (perhaps in a shorter period of time) in the smaller center than in the larger and more diverse city.

A more persuasive explanation for the differences between the two sites is the differential application of mandatory mediation in Ottawa and Toronto. Mandatory mediation and case management has been used for all civil cases filed in Ottawa-Carleton since 1997, whereas in Toronto the present case management level is just 25% (this is planned to rise to 100% on July 1, 2001). This means that in Ottawa there has been no alternative to proceeding under Rule 24.1 for the past four years, whereas in Toronto it is possible to escape mandatory mediation altogether or simply to refile. As a consequence of having no choice but to use mediation, it may be that Ottawa litigators are motivated to invest in making mediation work in a way that their Toronto colleagues are not. At the same time, the aspect of coercion under Rule 24.1 is reduced in Ottawa by the apparent flexibility and willingness of the Ottawa Master to allow adjournments of mediation until after discoveries. The same dispensation appears to be much less accessible in Toronto, and this contributes to a general sense of resentment about the mandatory mediation program.

The differences we have noted may also reflect different stages of the legitimization of mediation in the two cities. A critical element of changing attitudes towards the use of mediation by litigators is the credibility imparted to the process by the support of professional leaders. Practically every one of the lawyers in the Ottawa sample made unprompted remarks about the exceptional leadership role played by Justice James Chadwick and Master Robert Beaudoin in building support for mandatory mediation in Ottawa. In Toronto there are some professional leaders committed to mediation, but these are fewer and less powerful than their compatriots.

334. Id. at Figure 2.3.
335. In a search on the electronic directory of the Law Society of Upper Canada, the professional body for practicing lawyers in Ontario, 2,995 lawyers were listed as Ottawa-based and 14,110 as practicing in Toronto (www.lsuc.on.ca accessed 31.07.02).
336. 100% mandatory mediation began in Ottawa in 1997 with the introduction of Practice Direction O.R. (Ref) by Mr Justice Chadwick. It was replaced with Rule 24.1 in 1999.
337. For further information see <www.attorneygeneral.jus.gov.on.ca>.
338. See supra Part IV(A) for further discussion.
339. I am grateful to Ellen Travis for this point.
340. See supra Part VI(A) for further discussion.
in Ottawa. This is reflected in peer group norms in Toronto. It is still not fashionable for top-flight Toronto litigators to be vocally supportive of mediation, and certainly not of the mandatory mediation program. In contrast, the widespread acceptance of mediation under Rule 24.1 in Ottawa is such that lawyers wish to be seen to be supportive of such a positively regarded development. The following statement is highly evocative of Mather, McEwen, and Maiman’s notion of a “community of practice” that can legitimate, unify, and subsequently sustain a particular set of norms and practice.341

Good lawyers, in this town, understand what mediation’s about. . . . I think that’s what is accepted in the system, so lawyers have made the change.342

The questions about mediation that were on the minds of Toronto counsel were also markedly different than their Ottawa colleagues. Toronto counsel pondered aloud about the usefulness of mediation, its potential to run up additional costs and whether mediation could be shown to be settling more cases faster. These are typical of the types of questions that users pose when a new process or procedure is introduced; their emphasis is on efficacy and improving on past performance. In a so-called pre-legitimacy stage, skeptics ask “does this improve on the existing process/system, and if so how?”343 These questions did not arise in discussions with Ottawa counsel, who appear to assume the worth of mediation in providing a more accessible and less expensive process for clients. At a later stage of legitimacy, attention shifts to making the new process or system work better. Since it is now assumed to brings benefits, the focus instead becomes how to maximize these benefits. The Ottawa Bar appears to be at a stage of legitimization where mediation is assumed to be “a good thing,” rather than requiring mediation to “prove itself.” Instead, most counsel are focused on how to use mediation effectively to serve their clients’ needs and how to improve their own levels of skill and comfort within the mediation process. This investment in new knowledge and skills is rationally calculated to increase profits, as well as conform to local professional norms.

What then is the role of mediation experience in the use of and attitudes towards mediation? John Lande’s work suggests that what he describes as “faith” in mediation344 increases with exposure to the process.345 A study of Indiana lawyers also reached the conclusion that favorable attitudes towards civil mediation are significantly correlated with volume of mediation experience.346 This hypothesis appears to be borne out by the following remark made by an initially sceptical Toronto lawyer:

341. Mather et al., supra n. 33.
342. Ottawa-5: text units 452 & 471.
344. Lande, supra n. 23, at 171-176.
345. Id. at 199.
I think it's fair to say that my experience with mediation has improved every time and I suspect it will continue to improve for a while.\textsuperscript{347}

Across the sample group as a whole, this study found some evidence to suggest that attitudes towards mediation become more positive as a result of deepening experience and familiarity with the process. The Ottawa sample was generally much more experienced than the Toronto group. All but four of the lawyers in the Ottawa sample had had experience of 30 or more mediations (and in some cases as many as 200 mediations), whereas in Toronto only five lawyers in the sample had had 30 or more experiences of either mandatory or private commercial mediation. The more positive and reinforcing attitudes towards mediation found throughout the Ottawa sample, and in particular the large number of True Believers, is suggestive that greater experience of mediation results in more favorable attitudes towards its use.\textsuperscript{348}

At the same time this conclusion begs the question “what type of mediation experience?” This study has demonstrated the wide diversity of experiences of mediation, reflecting different styles of mediation and mediator style, the needs and goals of the participants, the advocacy approach adopted by counsel, the relationship between the parties and issues in dispute. Furthermore, there are both good and bad experiences of mediation as each respondent had at least one “horror story” to tell us. It is notable that three of the five most experienced counsel (those who had participated in more than 30 mediations) in the Toronto sample were also negative about mediation.\textsuperscript{349} However those Toronto counsel who expressed views along the lines of the “True Believer” were also generally the more experienced group (with 20-30 mediations) albeit with some notable exceptions. Those with the least experience tended to express Instrumentalist or Dismissive attitudes towards the use of mediation.

The Indiana study correlated favorable attitudes towards mediation with a younger generation of lawyers.\textsuperscript{350} Adopting perhaps the same logic, almost every one of our respondents advanced the view that they anticipated that more of the older lawyers would be resistant and hostile towards mediation, with the younger group generally more open and willing to embrace it. Certainly some of the younger lawyers in both parts of the sample made the point that having been introduced to ADR at law school, and/or having only practised in a climate in which mediation was promoted, they had fewer biases against its use and assumed its place in civil litigation, rather than having to be convinced of its worth. Their entry into the profession may also be changing the environment more broadly. One lawyer (called in 1995) was clear that trial lawyers were no longer regarded as role-models in her large Bay Street firm:

\textsuperscript{347}. Toronto-11: text units 453-455.
\textsuperscript{348}. On a related point, McEwen et al's study of Maine divorce lawyers found that lawyers who were more experienced in mediation tended to hold less adversarial attitudes towards resolution of their files.
\textsuperscript{349}. Mather et al., supra n. 33, at 58.
\textsuperscript{350}. Medley & Schellenberg, supra n.13, at 193.
It’s more that the trial lawyers are the ones who are struggling to kind of fit with this mentality, than the rest of us are struggling to be good trial lawyers. 351

The assumption of many of our respondents that the older members of the Bar would be more likely to be resistant to mediation did not in fact apply to the older lawyers in either city. In Toronto, seven of the sample of 20 had practised for more than 20 years. Of these, four were strong or moderately strong supporters of mediation. The most senior (called to the Bar in 1968) was one of the strongest advocates for mediation. Five members of the Ottawa sample had practiced for more than twenty years and all were positive about mediation. Again, the most senior member of the group (called to the Bar in 1965) was one of the very strongest advocates for mediation. On the other hand, just three of the Toronto sample had practised for less than ten years, and two of these were among the most negative and cynical of this group. These results suggest only that despite our theories and hunches, there is no demonstrable correlation here between length of time in practice and perspectives on mediation.

Neither does the data show any clear correlation between gender and attitude. This is not unexpected due to the small number of women in the sample groups (although numerically slightly over-represented) and the actual numbers of women working in this professional milieu being so few. The ten women (five in Toronto and five in Ottawa) who were part of the sample group held a range of views and attitudes between True Believer and Pragmatist, with one sounding more like an Instrumentalist. The only consistent observation that could be made about the female respondents is that none of them expressed real negativity, either as Dismissers or Oppositionists.

In conclusion, two factors seem to be significant in understanding the differences between the two cities and the climate of thought around mandatory mediation. The first is a collection of characteristics described collectively as local legal culture; significantly here, the role played by local leadership, the types of professional relationships formed in smaller centers (Bars) compared with larger and more diverse ones, and the procedural differences (100% of cases going to mediation in Ottawa, and 25% in Toronto) between the two cities. This last point links to the second factor which could help to account for both Ottawa’s warm embrace of mediation and Toronto’s pervasive skepticism - the extent of individual mediation experience. The influence of local legal culture combined with counsel’s familiarity and comfort with mediation appear in this study to be the most significant factors in predicting personal attitudes towards mediation.

The data also offers some hints of several other potential variables. Some lawyers suggested that their approach was significantly affected by the corporate philosophy of their major client base, “[t]here are all kinds of different corporate philosophies, some of which are more litigious and some of which are less litigious.” 352 Others pointed to the attitude adopted by their sub-sector of the

351. Toronto-4 : text unit 211.
352. Toronto-19 : text unit 30. For example, several counsel mentioned the resistance of the CMPA to any form of mediated compromise; see for example Ottawa-5 : text unit 460, Ottawa-6 : text unit 17.
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Bar—really another aspect of local legal culture—or the suitability of particular types of disputes for resolution at mediation. Finally, a couple of comments suggest that some litigators may find it more difficult than others to comfortably embrace the emotional dimensions of conflict that are sometimes brought out in mediation. For example, one lawyer told us frankly:

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

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

VIII. CONCLUSIONS

The data collected in the forty interviews which comprise this study demonstrates a wide diversity of ideas about how mediation should be used in civil litigation, and the meaning and impact of incorporating mediation within the civil justice system. The five “Ideal Types” constructed from this data synthesize the most prevalent themes that emerge in answer to these questions. But while the Ideal Types attempt to identify some convergence of orientation and approach, few lawyers consistently reflect just one of these attitudes in their discussions of mediation. As well, there is diversity within the Ideal Types. For example, among the Oppositionists, there are different reasons for resisting mediation (for example, it undermines the principled basis of adjudicative decision-making, it is too “touchy-feely,” it adds extra costs). Similarly among the True Believers, there are many different views over what “good” mediation is, and what makes for a “good” mediator (for example, a process manager, a proactive negotiator, a creative problem-solver, a reality-checker, an authoritative figure). One implication of this is that continuing debate over whether in fact mandatory mediation means the “co-option” of the “real” values of mediation seems inevitable.

Those who have the strongest views about mediation—those lawyers who take the position of a Oppositionist or a True Believer—are also those who are most likely to see mediation as a radical alternative to traditional “litigatition.” This same group is most likely to experience role tension between their role in mediation and in traditional lawyer-to-lawyer negotiation. For some lawyers, for the most part members of the Ottawa Bar, the integration of mediation into their litigation practice

353. For example, the insurance Bar who have been mediating under the Insurance Act since 1990 (Toronto-20), and the employment Bar whose matters have been referred in greater numbers to mandatory mediation under the earlier pilot program (Toronto-19).
354. For example employment matters where the only issue is quantum: see Toronto-19 : text units 65, 296 & 352. For a comment on the different considerations brought to mediation by commercial litigation versus personal injury litigation, see Ottawa-14 : text units 25-28.
356. See supra Part V(A) for further discussion.
357. See supra Part V(B) for further discussion.
358. Galanter, supra n. 5.
has led to a fundamental questioning of their professional norms and identity, along with a sense of dissonance between their adversarial training and the challenges of consensus-building in mediation. One might anticipate that this group will also experience some pressure to rationalize and perhaps rethink their roles as dispute resolution experts. There may also be increasing divergence between those who consider the introduction of mediation into the civil justice system to be a very important development—whether good or bad—and those who regard this innovation as a mere “fad,” or who are simply disinterested in using or thinking about mediation unless they are forced to (the Dismissers and the Instrumentalists). These types of divisions between lawyers and legal academics are already becoming apparent within local bars and Bar Associations, as well as among legal academics.

One of the reasons why some counsel and academics do not regard mediation as an important or significant process reform may be the dearth of theory development to support the practice and learning of effective mediation advocacy. The data produced in this study reveals no emergent paradigms of practice which offer a consistent and coherent conceptual framework for the use of mediation in civil litigation. With a few exceptions, there is a pervasive sense of tentativeness, ambiguity, and improvisation in what litigators say about mediation. This is illustrated in the multiple Ideal Types often evoked during the course of a single interview, and underlined by the significant absence of explicit conceptual and strategic links made between, for example, the objectives of mediation as a single session, and as part of an overall strategy in litigation. There is no clear or uniform paradigm shift taking place, but instead a collection of diverse and discrete responses to the phenomenon of mediation. Lawyers might explain this eclecticism as their response to the unique context and circumstances of each case. Many counsel spoke of their need to appraise the appropriateness and implementation of mediation (for example, in their choice of a particular mediator) on a case-by-case basis. While this is undoubtedly the case, this sense of tentativeness about mediation advocacy—and in Toronto, a striking lack of dialogue among practitioners over these issues—also reflects the absence of conceptual frameworks which lawyers might use to make these judgments and to develop their strategies for mediation.

The data does offer some evidence of the systemic impact of mediation—especially in file management practices, settlement strategies and client relationships—mostly confined to the city of Ottawa and primarily among those lawyers most experienced with mediation. This means that notwithstanding the apparent lack of explicit models or frameworks for how to be most effective in this environment, the practice of litigation is altering as a result of mediation. Some lawyers are changing the ways in which they operate both functionally (for example with more front-loading on new files) and conceptually (for example how they strategize towards settlement outcomes). We should expect this gap between practice and theory to be reduced as mediation becomes more widely accepted as a serious component of litigation practice, worthy of debate and exchange via both informal dialogue and theory development (for example in continuing legal education programs). If overall growth in the use of mediation continues, and if it is indeed the case that greater exposure to mediation results in increased confidence in its usefulness among lawyers, more intense debate and theory development must
follow. It will be interesting to see how the Dismissers and the Instrumentalists respond to this development.

As this tale of two cities has shown, culture change requires more than reforms in civil procedure, although this may be a necessary first step in order to expose litigators to the mediation process. The results of this study demonstrate the incompleteness of procedural change—here the introduction of Rule 24.1—either as a means of responding to changes in the external world, or as a way of reorienting the internal culture of legal disputing. The relationship between structure and action in informal conflict resolution processes is always a dynamic and essentially unpredictable one. Hence, as we learned, the mandatory mediation process in Toronto and Ottawa is whatever counsel, clients, and the mediator choose to make it: an authentic attempt at relationship-building and problem-solving; a “fishing expedition;” the tentative exchange of previously hidden information; an opportunity for “reality-checking;” a chance to bully and intimidate the other side; an opportunity to find a pragmatic business solution; and so on. In order to change the culture of commercial litigation to embrace consensus-building at both a strategic and a philosophical level, it is necessary to create a climate of acceptance and legitimization for mediation in all its diverse forms. In part this may require counsel to reconcile themselves with the tendency of informal settlement processes (particularly those that directly involve clients and delve into underlying issues as well as legal merits) to defy orthodoxy, predictability and established conventions. At the same time the challenges of this “new advocacy” require the articulation of meaningful theory to better enable and explain choices made by counsel representing clients in mediation.

359. For an articulation of this view in relation to practice, see Sara Cobb, Einsteinian Practice and Newtonian Discourse: An Ethical Crisis in Mediation, 7 Neg. J. 87 (1991), and in relation to research, see McEwen, supra n. 78.
APPENDIX A

Interview questions

Introduction (by interviewer)

In this project we are interested in your experiences of managing cases that have been mandated into mediation under Rule 24.1. We are interested in all aspects of that experience, including the work you put into these cases, how you prepare these files for mediation, how you work with clients, your strategies for getting best results out of mediation, and so on. We are primarily interested in the impact of the mandatory mediation program, that is, mediations under Rule 24.1; however, we expect that the people we talk to will have had other experiences of mediation outside Rule 24.1, i.e. private commercial mediation. Where possible, I shall ask you to distinguish these experiences from your experiences with mediations under Rule 24.1, but I am also interested in any differences you see between mediations under the Rule and other private commercial mediations.\(^{360}\)

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

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

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

\(^{360}\) If some respondents have had parallel experiences of private commercial mediation, it is difficult to see how these experiences will not seep into their answers to many of these questions. We shall try to identify which experiences - mandatory mediation or private mediation - provoke which comments and reflections.
2. What type of input into the management of a litigation file might you “typically” expect from clients? (this may have already come up under Q1) (Try to touch on: meetings with the client (how many, how often, and for what purpose); what type of input is looked for and at what point; would clients be involved in settlement negotiations and in what role). Generally, how would you describe your working relationship with your clients (A partnership? An expert/client relationship? Some other?)

3. Can we now switch our focus to cases which have been selected for mandatory mediation. First, could you walk me through the steps you would take in managing this case, from the time it arrives on your desk, up to the point of the mediation session?

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

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

6. Can you describe how you see yourself / your role as a lawyer? (What are the elements of “responsible representation”?). Can you give some examples of how this role gets played out in practice in an “ideal” situation? What situations arise when that “ideal” role is more difficult to play? Why was that the case?).

7. What do you see as the essence of your role in a case that is mandated into mediation?

8. In what ways does representing a client in a case destined for mediation require you to do anything different, or anything that changes the essence of that role? (For example does it affect any of your client service values? (refer back to Q2 above); are you comfortable with these differences; do you welcome them? Do you see them as appropriate in mediation cases? Do you also see them as appropriate for cases that are not mandated into mediation?).

9. How would you generally evaluate a “good” outcome in commercial litigation? (Could you give me some examples? Is there a difference between a good outcome and a “just” outcome? Is there a difference between a “good outcome” for your client and a just outcome generally? Is there a difference between a “good” outcome at trial and a “good” outcome achieved through settlement? What is it? How do you see “good” outcomes in mediation? Are these any different—are there any different considerations—than “good” outcomes achieved through settlement negotiations? (above)).
10. Are there any differences (both practical and conceptual) between this and what you consider to be a "good outcome" in mediation? (working from actual examples if possible. Also, what type of mediator are you looking for when you select a mediator in order to achieve a "good outcome"?)

11. Can you identify any (further) differences that your experience of mandatory mediation have made generally to the way you manage files, whether or not they are bound for mediation? (Try to touch on whether the respondent is any more willing/likely to consider mediation in matters not mandated; any impact on your willingness to attempt early lawyer to lawyer settlement negotiations; any impact on readiness to proceed with discovery before serious negotiations attempted?).

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

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

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

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

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