

**Judicial Mediation in British Columbia:
Moving Towards a More Effective Process**

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ABSTRACT

My thesis examines judges acting as mediators in the court process. I wanted to examine how judicial mediation compares to private mediation through identified best practices. Styles of mediation are examined looking at evaluative mediation, facilitative mediation, transformative mediation and interest-based mediation. The rules of court dealing with judicial mediation in British Columbia are then examined to identify how judge lead mediations become part of the court process. Identified best practices of mediation are set out with an emphasis on process, neutrality, communication, emotions, culture and continuing education. These identified best practices are then compared and contrasted to how mediation is incorporated into the court process.

The interviews of judges from the Supreme Court of British Columbia are used as an entry to their particular views about the benefits judicial mediation has to parties engaged in the court process and to the court process itself.

I conclude by identifying the important role judicial mediation has within the court process and how the prevalence of judicial mediation will likely continue in family law litigation. Given that judicial mediation will continue, I argue it is important that the judicial mediation process be as effective as possible to maximize the benefits to parties and the court system. To move towards this goal, I make a number of recommendations on how the judicial mediation process may be changed.

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DEDICATION

To my wife Aurora, my children Rhodri and Digby and the many others who, without their support, encouragement and understanding this thesis would not have been completed.

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CHAPTER 1 INTRODUCTION

This thesis examines Alternate Dispute Resolution (“ADR”) undertaken by judges who mediate disputes as part of their daily work in British Columbia. Judges are increasingly being called upon to conduct mediations as part of their daily tasks. There are benefits and challenges of having judges act as mediators. On the one hand, some of these challenges stem from the different skills mediators need to possess to conduct effective mediations. On the other hand, the benefits of having judges conduct mediations may lead to parties being more satisfied with an agreed outcome than an outcome which is imposed on them by the court.

This thesis starts with an examination of mediation as described in the literature. Different styles of mediation are explored: evaluative, facilitate, transformative, and interest-based mediation. This is followed by an examination of the rules of court in both the Supreme and Provincial courts of British Columbia which establish how judicial mediation is part of the court process.

Some people are better than others at being a mediator. I argue that the best practices of mediation stem from the mediator's awareness and ability to effectively address the mediation environment. To be successful at accomplishing this task, mediators need to have the following qualities: 1) They want to be a mediator as opposed to being forced to be a mediator; 2) They are familiar with the theory of mediator neutrality and mediator impartiality; 3) They are aware of the parties' emotional situation and have skills to effectively manage the emotional climate of the mediation; 4) They are able to use various questioning methods to facilitate understanding between the parties and to reality check positions of the parties; and 5) They engage in continuing education as a mediator.

Once the best practices of mediation have been established, these best practises are compared

and contrasted to the current state of judicial mediation in the Supreme and Provincial Courts in British Columbia. The scope of the comparison is limited to judicial mediation in the family law context. The comparison concludes with the suggestion that there are areas where the structure of judicial mediation in the family law context may be improved.

The fifth Chapter examines the perspective of the judges who were interviewed on the benefits of mandatory judicial mediation. Some of the benefits identified include reduced cost of judicial mediation as compared to private mediation, the authority the court brings to the mediation process, the extensive experience the court has in relation to what are possible or likely outcomes if the matter proceeds to trial, and the opportunity to educate the parties about the court process if the judicial mediation does not resolve the issues. The judges I interviewed also thought that early mandatory judicial mediations were a benefit to the court system as this process reduced the number of issues that subsequently needed to be adjudicated and allowed for the the judicial mediator to make procedural orders to expedite the litigation process with respect to unresolved issues.

This thesis concludes by acknowledging that judicial mediation is going to continue to be an integral part of the court process as it provides benefits to the parties and the court process. Further, these benefits have not yet been maximized and there are changes to the rules of court and policies that could be made to realize further improvements. The recommended changes include: 1) having specialized judicial mediators; 2) the parties being able to select who the judicial mediator will be in non-mandatory judicial mediations; 3) the judicial mediator being provided with adequate preparation time and information about the particular dispute before the judicial mediation starts; 4) judicial mediators being provided with extensive training in mediation and undertake continuing education in the area of mediation; 5) judicial mediations in smaller court registries being conducted by video-conference to make judicial mediations conducted by specialized judicial mediators more accessible/available; and 6) a system being established to provide feedback about the judicial mediation process to ensure it is achieving its goals.

This thesis analyzes some of the academic literature regarding mediation and judicial mediation. The initial survey of this literature provided the basis for chapters 1 and 3. The literature survey was also used to prepare questions for the judges who were interviewed. Through reviewing the literature it became clear that the process and rules of judicial mediation are unique in each jurisdiction in which judicial mediations are conducted. There was no current data from British Columbia judges about judicial mediation in British Columbia. As a practising family law lawyer in an interior community in British Columbia, I think the process of judicial mediation in British Columbia had room for improvement and standardization.

The process of acquiring participants for this thesis included 1) obtaining approval from the University of Saskatchewan Research Ethics Board prior to any requests for participation; 2) sending a request for participation letter to the main distribution contact for each of the Supreme Court of British Columbia and the Provincial Court of British Columbia outlining the research and requesting potential participants to contact me for further information; 3) those participants who responded were sent a consent form and an initial questionnaire; 4) interviews of 1 to 1.5 hours were arranged with each participant and I travelled to the participant to conduct the in-person interview; 5) each interview was based around a standard set of questions; and 6) the interviews were audio-recorded and then transcribed.

The purpose of obtaining the information from the judges was to provide their perspective about judicial mediation, how it operates according to them, the benefits of judicial mediation, and possible ways judicial mediation could be improved. The narrative regarding judicial mediation is also examined from the perspective of the lawyer. The basis for the lawyer's perspective comes from myself. The information obtained from the judges is not intended to be representational of all judges just as my perspective is not intended to be representational of all lawyers. There were 4 participants from the Supreme Court of British Columbia and no participants from the Provincial Court of British Columbia. It is not clear why so few judges from the Supreme Court of British Columbia responded to the request to participate or why there were no responses from the judges of the Provincial Court of British Columbia.

Throughout this thesis my personal experiences as a family law lawyer taking part in judicial mediations are used as a source of material to add to, question, and/or provide a rationale for taking a particular perspective. I have predominantly practised in the area of family law since 2007 when I became a member of the Law Society of British Columbia. Throughout the last 10 years of practising family law, I have attended many judicial mediations representing clients. The inclusion of my auto-ethnographical¹ experience was an opportunity for self-reflection and examination of the judicial mediation process in British Columbia.

¹ See Margot Duncan, “Autoethnography: Critical Appreciation of an Emerging Art” 2004 3:4 *International Journal of Qualitative Methods* Article 3; Heewon Chang, “Autoethnography in Health Research” *Growing Pains* (2016) *Qualitative Health Research* 26:4 443 (Sets out five evaluative questions to determine 'desirable' autoethnography).

CHAPTER 2 MEDIATION STYLES

Judicial mediation has become a common practice in British Columbia courts. It is present in both Provincial and Supreme Court of BC levels of court. All judges are engaged to provide judicial mediation services. Judges may have little choice in fulfilling the role of judicial mediator. Some believe in the process of judicial mediation. Some believe in the process but do not view it as true mediation. The mediation style most frequently used in judicial mediation is evaluative mediation. There are other mediation styles including facilitative, transformative, and interest-based. Whether or not there is consensus amongst the judges about whether mediation should be conducted by judges or what style of mediation works best, judicial mediation appears to be here to stay.

Alternate dispute resolution (“ADR”) has been popularized and studied in ever-increasing detail since the 1970s.² Along with the increased academic comment and increased use of ADR by various professionals and institutions, ADR courses have increased in number and variety and have become a staple of law school course offerings³. ADR is alternate to litigation.⁴ It is unclear if the increasing use of ADR by lawyers, judges and others was due to the increasing financial cost of litigation, judges being overburdened⁵, the increase in the time it took to obtain a result through litigation⁶, and/or academics commenting and theorizing about aspects of ADR and its

2 See also Andrew J. Pirie, *Alternate Dispute Resolution: Skills, Science and the Law* (Toronto: Irwin Law, 2000), ch. 1; Louise Phipps Senft and Cynthia A. Savage, “ADR in the Courts: Progress, Problems, and Possibilities” (2003-2004) 108 Penn St. L. Rev. 327 at 329; L. L. Fuller, “Mediation – Its Forms and Functions” (1970) 44 S. Cal. L. Rev. 305.

3 Michaela Keet and Teresa B. Salamone, “From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation” (2001) 64 Sask. L. Rev. 57 at 69, n 52 [Litigation to Mediation].

4 Julie Macfarlane, “The Mediation Alternative” in Julie Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publication Limited, 1997) at 2.

5 See e.g. John G. Baker, “The History of The Indiana Reform Act of 1990 -Final Report” (1997) 157 F.R. D. 62 at 69.

6 John Daniel Rooke, *The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in The Court of Queen's Bench*, (LLM Thesis, University of Alberta Faculty of Law, 2010) at 16, 17, online: University of Alberta Libraries <<https://era.library.ualberta.ca/public/view/item/uuid:581f9da9->

benefits⁷. What is clear is that the use of ADR to resolve disputes has become an integral aspect of dispute resolution in addition to litigation and in some jurisdictions ADR has become institutionalized as part of the court process.⁸

ADR encompasses many different processes, including negotiation, mediation, conciliation, arbitration, case management, case conferences, mini trials, settlement conferences, and judicial case conferences.⁹ It is arguable that most of the academic commentary on ADR has been about mediation. Julie Macfarlane describes mediation:

The process of mediation aims to facilitate the development of consensual solutions by the disputing parties. The mediation process is overseen by a non-partisan third party, the mediator, whose authority rests on the consent of the parties that she facilitate their negotiations. The mediator has no independent decision-making power, or legitimacy, beyond what the parties voluntarily afford her.... The essence of mediation is in effect to be able to create the conditions under which the parties (or on occasion their representatives) will conclude a successful negotiation.¹⁰

Put another way, “the purpose of mediation is to allow the parties to settle their disputes on their own terms.”¹¹

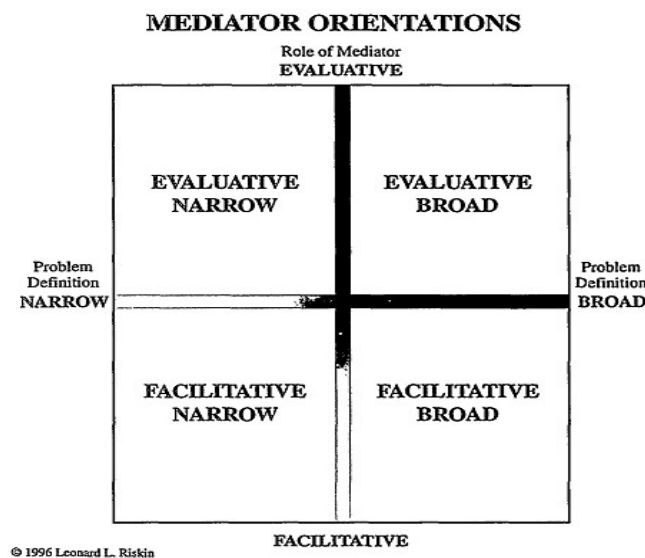
There is a vast amount of literature dealing with many aspects of mediation.¹² This thesis does not attempt to address in detail the large amount of literature associated with mediation. The literature is canvassed to obtain an understanding of the various styles of mediation.

[2455-4e75-82f2-3502208c73fc/DS1/THESIS.FinalPostDefence.10.04.06.pdf](#)>, accessed January 8, 2015.

- 7 See also Michaela Keet, “The Evolution of Lawyers' Roles in Mandatory Mediation: A Condition of Systemic Transformation” (2005) 68 Sask. L. Rev. 313 at 315; *C.f.* Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on System of Civil Justice* (Ottawa: Canadian Bar Association, 1996) (“many Canadians feel that they cannot exercise their rights effectively because using the civil justice system takes too long, is too expensive, or is too difficult to understand” at 11).
- 8 See *Supra* note 6.
- 9 P. Edmond, “ADR: A Conceptual Overview” in Commercial Dispute Resolution (Aurora, ON: Canada Law Book, 1989), at 20-22) in Julie Macfarlane ed, *Dispute Resolution Readings and Case Studies*, 2nd ed (Toronto: Emond Montgomery, 2003) at 104-106.
- 10 Julie Macfarlane, “The Mediation Alternative” in Julie Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publication Limited, 1997) at 2.
- 11 Samuel J. Imperati, “Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation” (1997) 33 Willamette L. Rev. 703 at 741 [Mediator Practice Models].
- 12 See generally, Julie Macfarlane ed, *Dispute Resolution Readings and Case Studies*, 2nd ed (Toronto: Emond Montgomery, 2003).

Mediation has been described as incorporating many different styles. Some of the more discussed styles of mediation include evaluative mediation, facilitative mediation, transformative mediation, therapeutic mediation, and interest-based mediation.¹³ There are other styles of mediation in addition to these, but a comparison of all possible mediation styles is not the purpose of this thesis. The following types of mediation are examined: evaluative mediation, facilitative mediation, transformative mediation, interest-based, and rights-based mediation.

Leonard Riskin developed a grid to aid the discussion of mediation styles. The grid is described as follows: At the bottom end of the y-axis is facilitative mediation, at the top end of the y-axis is evaluative mediation, at the left end of the x-axis is narrow problem definition and at the right end of the x-axis is broad problem definition.¹⁴



13 Dorothy J. Della Noce, “Mediation Policy: Theory Matters”, online: Mediate.com <<http://www.mediate.com/articles/dellanoce.cfm>> (“Is by now no secret that there are many different approaches to mediation practice. The field has seen a proliferation of adjectives that try to capture these differences, including transformative mediation, client-centered mediation, facilitative mediation, problem-solving mediation, muscle mediation, med-arb, arb-med, humanistic mediation, naturalistic mediation, evaluative mediation, therapeutic mediation, rights-based mediation and interest based mediation (to name but a few!).). accessed on January 7, 2015; See also C. Menkel-Meadow, “The Many Ways of Mediation” (1995) 11 Negotiation Journal 217 at 228-30.

14 Leonard L. Riskin, “Understanding Mediators' Orientation, Strategies, and Techniques: A Grid for the Perplexed” (1996) 1 Harv. Negot. L. Rev 7 at 25; Leonard L. Riskin later revised his grid, See Leonard L. Riskin, “Decision-Making in Mediation: The New Old Grid and the New Grid System” (2003) 79(1) Notre Dame Law Review 1.

The broad/narrow aspect of the grid has not been discussed to nearly the same degree as the facilitative/evaluative aspect of the grid.¹⁵ The grid visually shows the continuum from evaluative through facilitative mediation. The grid also shows there is a link between evaluative and facilitative mediation. There is a potential fluidity in the grid in that it permits mediation to be in various quadrants at various times. Riskin describes the evaluative mediation approach as follows:

The evaluative mediator, by providing assessments, predictions, or direction, removes some of the decision-making burden from the parties and their lawyers.... Evaluations by the mediator can give a participant a better understanding of his “Best Alternative to a Negotiated Agreement” (BATNA), a feeling of vindication, or enhanced ability to deal with his constituency.¹⁶

In implementing the evaluative model of mediation, Samuel J. Imperati notes that “a settlement may be reached based on strengths and weaknesses, or the cost of not settling, rather than on a mutually beneficial solution.”¹⁷ This observation raises the question about what the main purpose of mediation *ought* to be, something which is outside the scope of this thesis.

Riskin describes the facilitative approach to mediation as follows:

The facilitative approach offers many advantages, particularly if the parties are capable of understanding both sides' interests or developing potential solutions. It can give them and their lawyers a greater feeling of participation and more control over the resolution of the case. They can fine-tune the problem-definition and any resulting agreement to suit their interests. The facilitative approach also offers greater potential for educating parties of their own and each other's position, interests, and situation. In this way, it can help parties improve their ability to work with others and to understand and improve themselves.¹⁸

15 Richard Birke, “Evaluation and Facilitation: Moving Past Either/Or” (2000) J. Disp. Resol. 309 at 309, n 2.

16 *Supra* note 14 at 44; For a description of BATNA, See Roger Fischer and William Ury, *Getting to Yes: Negotiating Agreement without Giving In*, 2nd ed (New York: Penguin Books, 1991) at 97-106; For discussion on how to identify BATNA and use it negotiations, See William Ury, *Getting Past No*, (New York: Bantam Books, 1991) at 21-24.

17 *Supra* note 11 at 711-12.

18 Leonard L. Riskin, “Understanding Mediators' Orientation, Strategies, and Techniques: A Grid for the Perplexed” (1996) 1 Harv. Negot. L. Rev 7 at 45.

In implementing the facilitative model of mediation, Samuel Imperati notes that “a facilitative mediator is theoretically the least interventionist... [and] is not apt to remedy a substantial power imbalance between the parties by giving the weaker party helpful factual or legal information, [but] will ensure that both parties have a full opportunity to be heard on all issues.”¹⁹ The degree to which a mediator intervenes in the parties' dispute by giving factual or legal information will have an impact on the course the mediation takes and may limit the number and types of resolution the parties consider.

Transformative mediation is thoroughly discussed in the “The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition.”²⁰ Christopher Harper provides a description of transformative mediation:

Transformative mediation is based upon a social and communicative view of conflict, which conflict is primarily a breakdown of the parties' interactions which destabilizes the parties' perceptions of themselves and each other... Transformative mediation is based on a relational ideology. Transformative mediators see humans as social agents, “formed in and through their relations with other human beings, essentially connected to others, and motivated by a desire for both personal autonomy and constructive social interaction.”... [The] transformative model recognizes the importance of resolving the particular issues, but proponents of the transformative model argue that if mediators successfully reverse the cycle of conflict through empowerment and recognition shifts, parties will likely make positive changes in their interaction and return an acceptable agreement where grounds for such an agreement exists.²¹

Lisa Gayneir observes that “[w]hat drives the apparent success of transformative mediation is the principle of self-determination within the context of a relational field.”²² As with any transformation, the time required for the transformation to take place is not instant. For self-

19 *Supra* note 11 at 710.

20 Robert A. Baruch Bush & Joseph P. Folger, (San Francisco: Jossey-Bass 1994); See Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (San Francisco: Jossey-Bass 2005).

21 Christopher Harper, “Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation” (2006) *J. Disp. Resol.* 595 at 599-600.

22 Lisa P. Gayneir, “Transformative Mediation: In Search of a Theory of Practice” (2005) *22:3 Conflict Resolution Quarterly* 397 at 404.

determination to occur in the context of a relational field, attention must be given to cultural aspects of the parties and transparency of the process. Transformative mediation is more likely to occur when techniques associated with facilitation are used as opposed to evaluation, as in my experience people are more receptive to talking about why they think a particular way as opposed to being told they have to think a differently. The goals of transformative mediation are achievable in most situations, as long as there is adequate time and opportunity for the transformations to take place.

To gain an understanding of interest and rights-based mediations, interest and rights-based negotiations are examined and explained as follows:

The aim of interest-based negotiations is to uncover, understand and explore the underlying interests of all necessary parties, in contrast to their stated positions and asserted rights. While positions are right to the conflict, the underlying interests of parties often overlap in material ways.

In contrast, it is said that rights-based negotiations focus primarily on the legal rights of the parties. The parties attempt to anticipate the outcome in court, and the dispute is approached using that prediction as a benchmark. Settlement may be facilitated by obtaining a neutral party's opinion as to the relative merits of the parties and positions in order to better predict the outcome, if the case went to trial. However, some commentators have pointed to the existence of underlying and often overlapping interests in any dispute including the assertion of legal rights and the powerful role interest based negotiations can therefore play in resolving even "legal disputes."²³

Mediation is negotiation facilitated by a third-party, so the above description of interest-based and rights-based negotiation equally applies to interest-based and rights-based mediations, as the inclusion of a mediator does not necessarily change the interest or rights-based approach of the parties.

Given the many styles of mediation described above, and others that have not been explored, one may assume that a mediator is facilitative, evaluative, rights-based, interest-based, or

²³ Honourable George W. Adams and Naomi L. Bussin, "Alternate Dispute Resolution and Canadian Courts: A time For Change" (1995) 17 *Advoc. Q.* 133 at 135.

transformative. Richard Birke examines the concept of a pure facilitative mediator and a pure evaluative mediator and concludes that “all mediation is necessarily both facilitative and evaluative, and therefore, it follows that all mediators are both facilitative and evaluative.”²⁴ The degree to which a mediator tends more to evaluation or facilitation still ensures that no two mediators are the same. The literature suggests that successful mediations are usually conducted by mediators who are able to use the style of mediation that is most conducive to assisting the parties in reaching their own solution.²⁵ Distinctions in mediator style become more pronounced when the mediator is also a judge, as the non-mediating role of a judge is purely evaluative.

The particular aspect of ADR that this thesis examines is judicial mediation. Judges facilitate resolutions across many ADR processes. Some of the processes favour consensus, such as party-driven settlement conversations like settlement conferences²⁶ occurring within the context of litigation, and other processes which are a form of expedited adjudication such as mini-trials²⁷ and summary jury trials²⁸. There is no agreed-upon definition for judicial mediation, due to the large variation of what has been described as judicial mediation. The lack of a consistent definition of judicial mediation has created ambiguity within the legal profession as to what judicial mediation is. For instance, does judicial mediation include adjudication? Judicial mediation in this thesis is used to refer to the following processes: JDR²⁹, and court-connected³⁰

24 *Supra* note 15 at 318; See Susan Oberman, “Mediation Theory vs. Practice: What Are We Really Doing? Resolving a Professional Conundrum” (2005) 20 Ohio St. J. on Disp. Resol. 775 (Oberman describes mediation as evaluative and facilitative “Getting beyond a binary framework allows us to entertain the notion that mediation is always evaluative in the sense that a mediator must evaluate the following throughout the process: (1) the capacity, authority, and intention of the parties to negotiate; (2) tools and interventions to use based on assessment of the situation; and (3) their own neutrality and impartiality regarding the outcome and their ability to balance power. Mediation is always facilitative in its goal to assist parties in crafting agreements that work for them, in addition to its potential to engender understanding, empowerment, and mutual recognition.” at 788).

25 Steven J. Miller, “Judicial Mediation: Two Judges' Philosophies” (2011-2012) 38 Litigation 31.

26 Roselle L. Wissler, “Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences” (2011) 26 Ohio St. J. on Disp. Resol. 271 at 277-79.

27 Honourable George W. Adams and Naomi L. Bussin, “Alternate Dispute Resolution and Canadian Courts: A Time For Change” (1995) 17 Advoc. Q. 133 at 137-8.

28 Honourable George W. Adams, *Mediating Justice: Legal Dispute Negotiations*, (Toronto: CCH Canadian Limited, 2003) at 316.

29 See *Supra* note 6 (“Judicial Dispute Resolution- a Voluntary and consensual process whereby parties to dispute, following the filing of a court action in the court (and, most typically, close to trial), seek the assistance of a JDR justice to help, and maybe try to obtain it, or the nation or binding JDR, to settle the dispute before trial” at List of Symbols, Nomenclature or Abbreviations).

30 Yishai Boyarin, “Court-Connected ADR—A Time of Crisis, A Time of Change” (2011-2012) 96 Marq. L. Rev. 993 at 1001-07.

mediation that is led by a judge.

Rooke looks at what is meant by JDR in the Alberta context and says it includes, “pure facilitation or facilitative mediation, judicial mediation and evaluation, pure mini-trials, mini-trials with added facilitation or judicial mediation and evaluation hybrids, binding JDRs, and ... early neutral evaluation.”³¹ In his research, Robinson found that judges were reluctant to use the term judicial mediation and preferred to refer to the process as a settlement conference.³² Judicial mediation has not been consistently defined.

Mediation, in all of its various flavours, has become integrated in the court process in many provinces across Canada. In Saskatchewan mediation is required in civil cases after the case has been filed with the court and before any other step may take place.³³ In Ontario mandatory mediation is prescribed in civil cases in Ottawa, Toronto, and Essex.³⁴ In Quebec mandatory mediation is required in all family law cases before the court will hear the dispute.³⁵ In the Provincial Court of Alberta dealing with civil actions, not all matters have to attend mediation, and there is a selection process to determine which matters must attend mediation.³⁶ The court processes across Canada do not address mandatory mediations in the same way or the types of disputes that will require mandatory mediation. What is clear is that attendance at mediation is becoming a common requirement as part of the court process across Canada. This thesis looks specifically at judicial mediation as it relates to family law in British Columbia.

Not that long ago not all judges thought it was appropriate for them to take part in judicial mediation. Justice John Agrios takes the position that “[a] most unfortunate term has crept into dispute resolution language, namely 'Judicial Mediation'. This is an oxymoron and it is also

31 *Supra* note 6 at 21.

32 Peter Robinson, “Addition Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial” (2006) J. Disp. Resol 335 at 358.

33 *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01, s.42.

34 *Rules of Civil Procedure*, RRO 1990, Reg 194 at Rule 24.1.

35 *Code of Civil Procedure*, CQLR c C-25 at s. 814.3 (The section specifies that the parties must attend a mediation information session. The information session may be conducted by a mediator.).

36 *Mediation Rules of the Provincial Court - Civil Division*, Alta Reg 271/1997 at s. 2(1).

dangerous.”³⁷ He goes on to say “Trial judges are naturally judgmental. They are not mediators.... Judges should work hard to avoid pretending they are mediators.”³⁸ Issues with the concept and what is judicial mediation have been raised.³⁹ Even with opposition to judges being mediators and judicial mediation not having a consistent universal definition, judicial mediation has been institutionalized in British Columbia through the Rules of Court.

37 Justice John A. Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Lawyers*, Version 1.1 (January 2004), at 25 online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/18586-jdr_handbook.pdf>, accessed on January 9, 2015.

38 *Ibid.*

39 Louise Phipps Senft and Cynthia A. Savage, “ADR in the Courts: Progress, Problems, and Possibilities” (2003-2004) 108 Penn St. L. Rev. 327, (Relating to what form of mediation the judges of a court may employ or the goals of the mediation, “the courts' robust and rapid embrace of mediation, or of various processes labelled or referred to as mediation, without sufficient attention to and clarity about the goals and quality of the mediation process adopted.” at 333), (Discussing the values of the American judicial system as compared to the values of mediation, “The role of the courts in the American judicial system is to resolve disputes and interpret the law. Some of the core values the courts rely on in carrying out this role include the importance of due process, the consistency of outcomes, and legally just results. The law, and courts in interpreting the law, may be concerned with the effect particular interpretations have on relations between people in general, but the legal system is *not* concerned with enhancing the relationship between the particular parties in front of them. The legal system relies on reason, not emotion; on people cast in roles (such as plaintiff, defendant, counsel), not as individuals; on authority, not consensus; on speedy resolution ('justice delayed is justice denied'), not ongoing process; on dispassionate distance distance, not intimate connection. Thus, the values of the legal system are quite different from the values of mediation as an alternative.” at 336 [emphasis in original]).

CHAPTER 3 BRITISH COLUMBIA RULES OF COURT GOVERNING JUDICIAL MEDIATIONS IN FAMILY LAW

Judicial mediation takes place in British Columbia in both the Provincial Court of British Columbia and in the Supreme Court of British Columbia. In the context of family law disputes, judicial mediation is required in both levels of court. The requirement to attend judicial mediation is not absolute, as the rules in both courts allow for a party to apply for an order that a judicial mediation be waived. A waiving of a judicial mediation may take place in situations where the court determines prior instances of family violence create a safety situation, physical or emotional, for either of the parties or their children. Usually the judicial mediation takes place early on in the court process, and it is mandatory for most aspects of family law in both courts. Both the Supreme Court Family Rules and the Provincial Court Family Rules allow judicial mediation to occur later on in the court process. The subsequent judicial mediations usually occur as a result of one of the parties requesting further judicial mediations.

In British Columbia, both the Supreme Court and the Provincial Court have concurrent jurisdiction to deal with some family law issues under the *Family Law Act*.⁴⁰ The Provincial Court is not able to address issues of property division, pension division or children's property under the *Family Law Act*.⁴¹ The Provincial Court is also not able to address any matters under the *Divorce Act*.⁴² The Provincial Court and the Supreme Court both have the jurisdiction to address issues of child support, spousal support, guardianship, parenting responsibilities, parenting time, and contact under the *Family Law Act*.⁴³

40 *Family Law Act*, SBC 2011, c 25.

41 *Ibid* at s. 193.

42 *Divorce Act*, RSC 1985, c 3 (2nd Supp), (“court’, in respect of a province, means ... (c) for the Provinces of Nova Scotia and British Columbia, the Supreme Court of the Province” at s. 2(1)).

43 *Supra* note 40.

It is up to the party initially commencing the court proceeding to pick which level of court the matter will be heard in, as aspects of family law are able to be dealt with in both the Supreme Court and Provincial Court. It is common for the Supreme Court to deal with all aspects of a family law matter if there is an aspect of the family law matter that is only able to be dealt with in the Supreme Court such as the parties being divorced from each other. Some parties prefer to have family law matters addressed in Provincial Court, as there are no court filing fees and there are fewer and more flexible rules governing the Provincial Court. There are benefits and detriments to having a family law matter dealt with in either the Supreme Court or the Provincial Court, but these aspects are outside the scope of this thesis.

Child protection matters fall within the exclusive jurisdiction of the Provincial Court.⁴⁴ Mandatory judicial mediation is part of all child protection matters.⁴⁵ The judicial mediation takes the form of a “case conference.” The case conference is attended by the parties, their lawyers, a judge, and a court clerk. The process may be audio-recorded and may last up to 1 hour. The case conference is a closed process, not open to the public, where the parties meet with a judge. The judge attempts to find agreement between the parties on the main issue which brought the matter to court. If there is not agreement, then the court will make orders necessary for the conduct of the trial, such as document productions orders or orders addressing witnesses. The following is a list of things that the judge/mediator may do at a case conference in a child protection matter:

- (a) *facilitate the resolution of any issues in dispute;*
- (b) *mediate any issues in dispute*, other than the issue of whether the child needs protection;
- (c) with the consent of the parties, refer any issue, other than the issue of whether a child needs protection, to mediation or other alternative dispute resolution mechanism under section 22 of the Act;
- (d) decide any issues that do not require evidence or that can be

44 *Child, Family and Community Service Act*, RSBC 1996, c. 46 at s. 1 (“court’ means the Provincial Court except where this Act provides otherwise”).

45 *Provincial Court (Child, Family and Community Service Act) Rules*, BC Reg 553/95 (“If at the commencement of a protection hearing under section 40 of the Act (a) a consent order is not made, and (b) the judge determines that the matter cannot be heard that day, the judge must direct the parties and their lawyers to attend a case conference.” at Rule 2 (1)) [*Provincial Court CFCSA Rules*].

- decided on the basis of facts agreed to by the parties;
- (e) make any order in the terms the parties agree to, subject to section 60 of the Act;
 - (f) review the adequacy of disclosure by the parties, including responses to requests for disclosure under section 64 of the Act;
 - (g) order that a party provide to another party, within a set time, a summary of the intended evidence of a potential witness;
 - (h) order a party to allow another party to inspect and copy specific documents or records to the extent permitted by the Act;
 - (i) order that those applications that cannot be made at the case conference be brought within a set time;
 - (j) order that a statement of agreed facts be filed within a set time;
 - (k) give directions about any evidence that will be required, how it will be received and the procedure that will be followed, if a hearing is necessary or a mini-hearing is directed;
 - (l) order a party to produce anything as evidence at a hearing;
 - (m) direct that any further case conference be held before the same judge;
 - (n) with the consent of the parties, direct the parties to attend a mini-hearing if
 - (i) the matter can be resolved on the basis of limited evidence and submissions, and
 - (ii) a mini-hearing can be held earlier than the matter could be set for a full hearing;
 - (o) without hearing witnesses, *give a non-binding opinion on the probable outcome of a hearing*;
 - (p) set a date for a hearing or mini-hearing;
 - (q) make any other order or give any direction for the fair and efficient resolution of the issues.⁴⁶

The rules provide the judge conducting the case conference with the option to “facilitate the resolution of any issues in dispute”⁴⁷ and “mediate any issues in dispute.”⁴⁸ It is not clear why the legislators codified facilitation in addition to mediation when what constitutes mediation may be interpreted very broadly.⁴⁹ I assume the codification of facilitation as part of the rule was done to emphasize the different role a judge assumes when mediating, the role being facilitator as opposed to adjudicator.

46 *Ibid* [emphasis added].

47 *Ibid* at Rule (5)(a).

48 *Ibid* at Rule (5)(b).

49 As discussed above, even a relatively narrow definition of mediation would also include aspects of facilitation. See Richard Birke, “Evaluation and Facilitation: Moving Past Either/Or” (2000) *J. Disp. Resol.* 309.

In the family law context in Provincial Court, judicial mediation takes place through what is referred to as a “family case conference”. The family case conference is a meeting involving the parties, their lawyers, if any, a judge, and a court clerk. There is no requirement for the meeting to be audio-recorded and the process may last for up to 1 hour. Any agreements achieved at the family case conference may form an order. The order is recorded by the court clerk and forms part of what is referred to as the clerk's notes or more formally the “Court Summary Sheet”. These notes reflect the clerk's interpretation of what was agreed to by the parties and/or ordered by the judge. The family case conference typically takes place early on in the court process. The judge at the family case conference typically gathers information from the parties and attempts to find areas of agreement. It is common for short term solutions to be agreed to at a family case conference, with that short term solution being evaluated at a subsequent family case conference 3 or 4 months later. Where no short term solution is agreed to, the judge usually makes procedural orders to ensure the parties have required documentation from the other party for a trial or hearing. The family case conference is governed by Rule 7 of the Provincial Court (Family) Rules and the judge/mediator may do the following:

- (a) *mediate any of the issues in dispute;*
- (b) decide any issues that do not require evidence;
- (c) with consent of the parties, refer any issues to mediation with a private mediator;
- (d) if the regional manager has advised the court in writing that the person or program is readily available to the parties, refer the parties to a family justice counsellor or to a person designated by the Attorney General to provide specialized maintenance assistance;
- (e) adjourn the case for purposes of mediation under paragraph (c) or a referral under paragraph (d);
- (f) make an order to which all of the parties consent;
- (g) direct that any or all applications must be made within a set time;
- (h) direct the parties to attend a further family case conference, setting a date for that conference;
- (i) set a date for a trial preparation conference under rule 8;
- (j) make any order that may be made at a trial preparation conference under rule 8 (4);
- (k) if the judge does not set a date for a further family case conference or for a trial preparation conference, set a trial date for the matter or

set a date for a trial that is restricted to issues defined by the parties;
(l) make an interim or final order requested in an application, reply or notice of motion;
(m) without hearing witnesses, *give a non-binding opinion on the probable outcome of a hearing or trial*;
(n) make any other order or give any direction that the judge considers appropriate.⁵⁰

The Provincial Court Family Rules dealing with family case conferences differ from the Provincial Court CFCSA Rules dealing with case conferences in that the former does not include a reference to the judge facilitating “the resolution of any issue in dispute.”⁵¹ It is not clear if this difference in the rules results in any procedural difference between the two conferences or any perceivable difference to any of the parties.⁵² It is possible that the idea of what constitutes mediation in the minds of the drafters of the legislation changed from 1995, when the Provincial Court CFCSA Rules were enacted, to 1998, when the Provincial Family Court Rules were enacted. The judges of the Provincial Court preside over both types of conferences. Given successful mediation may not be purely facilitative or evaluative,⁵³ it is likely that the omission of a specific reference to facilitation of disputes in the Provincial Court Family Rules has no impact on the family case conference process being different from the case conference process in child protection matters. What the difference in drafting *does* illuminate is a lack of consistency in defining judicial mediation as between two very similar processes dealing with families. Further, by eliminating from judicial mediation in child protection matters the key aspect whether a child is in need of protection the Provincial Court CFCSA Rules take the most significant issue off the table from the judicial mediation. In my experience, taking off the table the issue of a child being or not being in need of protection as an issue to be mediated results in case conferences akin to trial preparation conferences focused on the number of witnesses at trial and the length of trial to schedule.

50 *Provincial Court (Family) Rules*, BC Reg 417/98 [Provincial Court Family Rules] [emphasis added].

51 *Supra* note 45 at Rule (5)(a).

52 I have not noticed any difference in the process between family case conferences and case conferences. I have attended many of each type of conference. This distinction between the two sets of rules would have been explored in interviews of Provincial Court Judges, but none volunteered to take part. This may be an area of further research.

53 *Supra* note 15 (“Any mediator who believes that any mediation of a legal dispute can be entirely facilitate or entirely evaluative and still settle is suffering from a delusion” at 315).

In the family law context in the Supreme Court of British Columbia, judicial mediation is governed by two separate rules. The first rule deals with what is referred to as a Judicial Case Conference. The Judicial Case Conference is an initial early mandatory judicial mediation with the parties, their lawyers, if any, and a Justice or Master.⁵⁴ The process lasts for approximately one hour, although in some court registries it may last up to one and a half hours. The judge at a Judicial Case Conference has the ability to make any order the parties agree to and to make orders addressing process which the parties do not agree to. The Judicial Case Conference is governed by Rule 7-1 of the Supreme Court Family Rules. A judge may do the following at a Judicial Case Conference:

- (a) identify the issues that are in dispute and those that are not in dispute and *explore ways in which the issues in dispute may be resolved without recourse to trial*;
- (b) make orders to which all the parties consent;
- (c) *mediate any of the issues in dispute*;
- (d) with the consent of the parties, refer the parties to a family dispute resolution professional, within the meaning of the Family Law Act, other than a family justice counsellor;
- (e) refer the parties to a family justice counsellor, or to a person designated by the Attorney General to provide specialized support assistance, if the court has received written advice from the regional manager that the family justice counsellor or designated person is readily available to the parties;
- (f) direct a party to attend the Parenting after Separation program operated by the Family Justice Services Division (Justice Services Branch), Ministry of Justice;
- (g) make orders respecting amendment of a pleading, petition or response to petition within a fixed time;
- (h) make orders requiring that particulars be provided in relation to any matter raised in a pleading;
- (i) make orders respecting discovery of documents;
- (j) make orders respecting examinations for discovery;
- (k) direct that any or all applications must be made within a specified

⁵⁴ A Master's jurisdiction is less than that of a Judge. Section 11(7) of the *Supreme Court Act*, RSBC 1996, c 443, sets out that the Chief Justice may limit the jurisdiction of a master. Practice Direction 42 of the Supreme Court of British Columbia directs what the limits are. The most significant difference between a Master and a Justice is that a Master is not able to make final orders in family law matters, unless they are by consent. Master usually preside over Judicial Case Conferences.

time;

(l) reserve a trial date for the family law case or reserve a date for a trial that is restricted to issues defined by the parties;

(m) set a date for a trial management conference under Rule 14-3;

(n) make any orders that may be made at a trial management conference under Rule 14-3 (9);

(o) without hearing witnesses, give a non-binding opinion on the probable outcome of a hearing or trial;

(p) without limiting any other orders respecting timing that may be made under this subrule, make orders respecting timing of events;

(q) adjourn the judicial case conference;

(r) direct the parties to attend a further judicial case conference at a specified date and time;

(s) make any procedural order or give any direction that the court considers will further the object of these Supreme Court Family Rules.⁵⁵

The Supreme Court of British Columbia also has a process called a Judicial Settlement Conference. This process is like a longer form of a Judicial Case Conference, in that the Judicial Settlement Conference may be an entire day or multiple days. The length of the Judicial Settlement Conference is typically limited by judicial resources. The Judicial Settlement Conference takes place later on in the court process, after the Judicial Case Conference, and in my experience usually closer to a trial date. Rule 7-2 of the Supreme Court Family Rules deals with Judicial Settlement Conferences:

Rule 7-2 — Settlement Conferences
Settlement conference

(1) If, at any stage of a family law case, the parties jointly request a settlement conference by filing a requisition in Form F17 or a judge or master directs the parties to attend a settlement conference, the parties must attend before a judge or master who must, in private and without hearing witnesses, *explore all possibilities of settlement of the issues that are outstanding.*

Proceedings must be recorded

(2) Proceedings at a settlement conference must be recorded, but no

⁵⁵ *Supreme Court Family Rules*, BC Reg 169/2009 [emphasis added].

part of that recording may be made available to or used by any person without court order.

When judge must not preside

(3) A judge who has presided at a settlement conference must not preside at the trial, unless all parties consent.⁵⁶

In theory the fact that Family Case Conferences and Judicial Case Conferences are required, held in private and not based on evidence leads parties and lawyers to the conclusion that they are without prejudice forum to explore solutions to the issues in dispute.⁵⁷ Both the Provincial Court Rules⁵⁸ and the Supreme Court Family Rules⁵⁹ regarding these conferences refer to the judge being able to mediate any and all of the issues in dispute. It is a tenet of mediation that the mediation process is a without prejudice process. The idea that the process is without prejudice will be examined in more detail later as the adjudicator who acts as the judicial mediator at the Judicial Case Conference or Family Case Conference typically will also hear interim applications on the same matter. When an adjudicator is acting as a judicial mediator initially and then acts as an adjudicator, the question of the adjudicator being able to abnegate⁶⁰ what they heard in the judicial mediation when adjudicating challenges the without prejudice cornerstone of judicial mediation.⁶¹

Judicial Case Conferences and Judicial Settlement Conferences are similar in that both conferences are held on a without prejudice basis to the parties. These conferences “explore all

56 *Ibid* [emphasis added] [Judicial Settlement Conference or Settlement Conference].

57 It is also common practice for the judge in their opening statements to say something along the lines that any thing that is said during the conference is not able to be used in a later court proceeding. An example would be, party A saying in an affidavit that during a case conference party B said X.

58 *Supra* note 50 at Rule 7(4)(a); *Supra* note 45 at Rule 2(5)(b).

59 *Supra* note 45 at Rule 1-1(15)(c).

60 See generally Roselle L. Wissler, “Judicial Settlement Conferences and Staff Mediation Empirical Research Findings” (2011) *Dispute Resolution Magazine* 18, (“inadmissible information learned during settlement conferences or preliminary hearings was found to have altered judges' views of claims and parties and to have affected their subsequent decision. The judges were found to overestimate their ability to disregard such evidence and to underestimate its effects on their rulings”) online: American Bar Association <<http://abanet.org/dispute/drjournal.html>> accessed on January 6, 2015.

61 See Steven J. Miller, “Judicial Mediation Two Judges' Philosophies” (2011-2012) 38 *Litigation* 31, (Judge McCarthy said “if the parties do not want the trial judge to handle mediation because that judge is going to be deciding the substantive issues, then the judge should refer it to somebody else.” at 33).

possibilities of settlement of the issues that are outstanding.”⁶² The Settlement Conference does not specifically reference the use of mediation, although the wording used to describe the Settlement Conference process incorporates the use of mediation.⁶³ As was the situation with the Provincial Court rules not consistently differentiating the judicial mediation process as between child protection matters and family law matters, a similar inconsistency exists in the Supreme Court Family Rules when defining the judicial mediation process in Judicial Case Conferences and Judicial Settlement Conferences. If the judicial mediation process was intended to be the same as between these conferences, then the wording and description of the process as it relates to judicial mediation ought to have been the same in each set of rules. Given each set of rules describes the process differently, this must have been done intentionally by the drafters of the rules. Unfortunately, the difference the drafters were trying to achieve by describing judicial mediation differently each time is not clear.

There is a significant difference between the Judicial Case Conference and the Settlement Conference, the difference being that a judge who takes part in a Settlement Conference is not permitted to be the trial judge.⁶⁴ There is an exception to this rule: if the parties agree, then the settlement conference judge may preside at the trial.⁶⁵ The drafters of the Supreme Court Family Rules were likely aware that a party could be prejudiced if a Settlement Conference judge was also the trial judge in the same matter, or perhaps that confidence in the judicial system could be questioned if the trial judge had also been the Judicial Settlement Conference judge. The ability for a Judicial Case Conference judge or master to hear substantive interim applications, or in the case of a judge, the trial raises the question of why the procedural protection of not allowing a judicial mediation judge to hear subsequent substantive hearings is not put in place for Judicial

62 *Supra* note 55 at Rule 7-2(1), Rule 7-1(15)(a) and (c).

63 Peter Robinson, “Addition Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial” (2006) J. Disp. Resol 335 (“Rather than arbitrarily differentiating between settlement conferences and mediation, this author suggest acknowledging that the content and techniques of the processes are virtually identical.” at 381).

64 *Supra* note 55, (“A judge who has presided at a settlement conference must not preside at the trial, unless all parties consent.” at Rule 7-2 (3)); See Carrie Menkel-Meadow, “For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference” (1985) 33 UCLA L. Rev. 485 (The settlement conference should not be managed by the trial judge “so that the interests and considerations that might effect a settlement but would be inadmissible in court will not prejudice a later trial” at 511).

65 *Ibid* note 55.

Case Conferences as it is in place for Settlement Conferences.⁶⁶

Throughout my practice as a family law lawyer attending all three of these types of judicial mediation processes, I noticed a substantial difference in how different judicial mediators approached what is, in essence, a consensual resolution of substantive issues. I limit the consensual resolution aspect to the substantive issues because during the Family Case Conferences or Judicial Case Conference the judicial mediator has the ability to make orders that the parties do not agree to,⁶⁷ but these orders usually only address procedural issues dealing with the timing of certain events such as subsequent hearings, disclosure of documents, or examinations for discovery. At one end of the spectrum of my experiences taking part in judicial mediation, judicial mediators employed aspects of facilitative mediation, and at the other end of the spectrum the judicial mediators employed a directive/evaluative approach to the judicial mediation process. My impression is that by far the most common approach used by judicial mediators was very far towards the evaluative end of the facilitative/evaluative continuum.

The evaluative method usually employed by judicial mediators fostered the rights-based, adversarial orientation of negotiation, as outlined by Riskin. The tactics used by the judicial mediators as part of the evaluative method typically resulted in the following between the parties:

1. A high initial demand;
2. Limited disclosure of information about facts and one's own preference;
3. Few and small concessions;
4. Threats and arguments; and
5. Apparent commitment to positions during the negotiation process.⁶⁸

Early on in my practice I was aware that some of the judges conducting judicial mediations may not have had a full understanding of the parameters of mediation.⁶⁹ I say this because they had

⁶⁶ *Ibid* at Rule 7-2 (3) “A judge who has presided at a settlement conference must not preside at the trial, unless all parties consent.”

⁶⁷ See *Supra* note 50, at Rule 7(4)(n); and *Supra* note 55, at Rule 7-1(15)(f), (g), (h), (i), (j), (k), (n), (s).

⁶⁸ Leonard L. Riskin, “Understanding Mediators' Orientation, Strategies, and Techniques: A Grid for the Perplexed” (1996) 1 *Harv. Negot. L. Rev* 7 at 41, n 23.

⁶⁹ See generally Robert N. Baldwin et al, *National Standard for Court-Connected Mediation Programs* (1999), (“Judges, lawyers and clients tend to do things in the way to which they are accustomed and may resist new processes with which they are unfamiliar.” at 3.1) online: Centre For Dispute Settlement

difficulties getting parties to talk about their interests as opposed to their positions. The judges' discomfort with the process was shown by how they interacted with the participants and their lawyers. The judges' contributions appeared to be forced and directed towards persuading participants to a particular outcome.⁷⁰ Judges' discomfort was also shown by judicial mediators being abrasive and/or confrontational in their interactions with the participants when the participants were providing information to the judicial mediator. When the judicial mediator appeared uncomfortable in the process, the judicial mediation was usually unsuccessful in facilitating resolution of any of the substantive issues. The discomfort in being in the role of mediator and/or not possessing the required skill set is captured by what Justice John Agrios said,

I have nothing against the word “mediation”; it is like “motherhood and apple pie”. A very good thing. It is simply not the judicial function or one which comes naturally to most judges. The parties and their lawyers should be informed of this fact so they know exactly the kind of process in which they are engaged. Judges should work hard to avoid pretending they are mediators. There are times I personally think that this is a lost cause. In Lethbridge, Alberta, they put a sign at the meeting room “Judicial Mediation”. I controlled myself and did not rip the sign down.⁷¹

From my point of view, part of the challenge of judicial mediations is not knowing who the judicial mediator will be until I arrive. Also, there is no discussion with them about what the nature of the judicial mediation process will be until the judicial mediation starts. This is a challenge because one does not know what style the judicial mediator is going to employ during the judicial mediation. The process the judicial mediator uses during the judicial mediation impacts how one could prepare for the judicial mediation. On the one hand, if the judicial mediator is expecting to be asked to provide their opinion based on the facts, law and discoveries, a lawyer could prepare submissions along the lines of a closing argument or mediation brief. On the other hand, if the judicial mediator is expecting to use a facilitative style

<<http://courtdr.org/files/NationalStandardsADR.pdf>>.

70 Honourable Hugh F. Landerkin and Andrew J. Pirie, “Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?” (2003) 82 Can Bar Rev 249 (“This need not be ‘*muscle mediation*’ where a judge unfairly pressures parties to settle, give up rights, or grudgingly compromise.” at 261) [Judges As Mediators].

71 Justice John A. Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Lawyers*, Version 1.1 (January 2004), at 26, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/18586-jdr_handbook.pdf>, accessed on January 9, 2015.

of mediation, then the statements made by the lawyer at the beginning of the judicial mediation could be very different and may include only the fundamental facts and perhaps some wishes of their client. The lack of a clearly defined judicial mediation process causes inefficiency and unpredictability in the judicial mediation process.

Some of the judicial mediators I experienced made it clear from the very beginning what they thought the outcome of the dispute ought to be and what they would order if the matter had come before them for hearing. Comments like these from judicial mediators are very disconcerting to the participants when a different approach is expected. In my view, the problem with providing an opinion about the outcome in such a situation is the opinion is provided without the full set of facts and law being presented. An issue with providing an opinion when the parties have not requested it is that legally significant facts may not have been communicated to the judicial mediator which could change their opinion. These significant facts may have been intentionally left out, as they could cause emotional reactions for the parties potentially leading to the premature ending of the judicial mediation. Judicial mediation conducted in this manner led me to form the opinion that judicial mediations could be harmful to the parties' attempts to reach their own resolution. It is possible that judicial mediators who conduct judicial mediations this way do so because of the time limitation associated with Family Case Conferences and Judicial Case Conferences. However, because of the shortness of time and lack of evidence or evidentiary rules, they simply cannot have the information necessary to form anything more than a guess at what the outcome of a hearing ought to be.

The rules associated with Family Case Conferences and Judicial Case Conferences contain provisions that seem to be contradictory. During a Family Case Conference, the judge may mediate,⁷² but he may also decide issues that do not require any evidence,⁷³ or make any order he considers appropriate.⁷⁴ During a Judicial Case Conference the judge may mediate,⁷⁵ give a non-binding opinion on the probable outcome of a hearing⁷⁶ without hearing witnesses, or set a trial

⁷² *Supra* note 50 at Rule 7(4)(a).

⁷³ *Ibid* at Rule 7(4)(b).

⁷⁴ *Ibid* at Rule 7(4)(n).

⁷⁵ *Supra* note 55 at Rule 7-1(15)(c).

⁷⁶ *Ibid* at Rule 7-1(15)(0).

date⁷⁷. On more than one occasion, I have been present at judicial mediations where the judicial mediator has tried to force agreement between the parties by suggesting a solution and making it an order without first ensuring the parties understand and agree to the suggestion. When parties perceive a judicial mediator telling them the way it is going to be, such opinions move from being a non-binding opinion to something that is beyond the scope of judicial mediation. It moves the process to adjudication, adjudication without warning where parties may feel they have no choice but to agree although they do not really consent.⁷⁸ Also, many parties do not fully grasp that they themselves are the decision-makers at a case conference. The judges are intermediaries.

The court rules allow and possibly encourage judicial mediators to provide their opinions on issues in dispute. At times, judicial mediator opinions may be incorrectly interpreted by parties as being a decision as opposed to an opinion or observation. The fact that there is no limitation or restriction on judicial mediators from Family Case Conferences and Judicial Case Conferences being adjudicators in later adjudicative hearings raises concerns about the without prejudice nature of judicial mediations.⁷⁹ I have been present when judicial mediators have become frustrated by the behaviour of a party or their position and the judicial mediator ordered that the matter would be heard in court before them, not as a judicial mediator but as an adjudicator. This caused me to question the without prejudice aspect of judicial mediations.

Family Case Conferences are not required to be audio-recorded. Judicial Case Conferences are audio-recorded and typically the judicial mediator makes it clear to the parties at the beginning that the discussions are happening on a without prejudice basis. The judicial mediator explains to the parties that discussions at the judicial mediation cannot be put in an affidavit or given as evidence at the trial. The protection offered by without prejudice discussions enables, to some degree, the parties to explore issues through judge-led mediation. The without prejudice aspect of judicial mediations allows lawyers to explain and reassure their clients that the judicial mediation

⁷⁷ *Ibid* at Rule 7-1(15)(l).

⁷⁸ C.f. Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration'" (2012) 17 Harv. Negot. L. Rev. 61 at 83-85.

⁷⁹ See generally Leroy Tornquist, "The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry" (1989) Willamette L. Rev. 743 ("The judge who is to try the case on the merits should be barred from participating in settlement negotiations." at 773).

process is an opportunity for potential resolution of outstanding issues by having full and frank discussions. The without prejudice nature of judicial mediations for me was brought into question when I had a court hearing take place after a judicial mediation. The adjudicator not only made reference to the fact that the judicial mediation had occurred before them in their reasons for judgment, but also referred to aspects that were discussed during the judicial mediation which were not present in the evidence before the court at the hearing. Situations such as this are uncommon. Such situations also highlight the importance of procedural safe guards being associated with judicial mediation.

The rules of court allow adjudicators a process to follow which is predictable for lawyers and parties. There is minimal variation in how adjudicators approach the adjudication process: evidence is submitted, relevant law is referenced, facts are found, the law is applied, and a decision is rendered. There is much less predictability in the judicial mediation process, as the rules of court do nothing more than say mediation may take place. The term “mediation” covers a vast array of potential styles each of which has had significant academic discussion. The rules of court relating to judicial mediation are likely left ambiguous to allow each judicial mediator to use whatever style of mediation they are comfortable with. The lack of clarity in the judicial mediation process does not provide the parties with enough direction to appropriately prepare for a potentially interest-based discussion. With uncertainty as to what process the judicial mediator may follow,⁸⁰ lawyers seem to typically prepare as they would for a court hearing, dealing only with positions.⁸¹ Unpredictability of the judicial mediation process is furthered by the rules not providing a minimum scheduled duration for the judicial mediation or allowing the judicial mediation to go for longer if the parties want the particular session to continue. The lack of predictability in how the judicial mediation process will unfold is a barrier to maximizing its usefulness.

80 I have experienced a judicial mediator arriving at the judicial mediation and asking the parties if they agreed to anything and if they didn't, they would end the judicial mediation.

81 See generally Julie Macfarlane, “Culture Change? A Tale of Two Cities and Mandatory Court -Connected Mediation” (2002) J. Disp. Resol. 241 at 248-51.

Although I have experienced some challenges with judicial mediations, I have also taken part in judicial mediations where the judge was very skilled with aspects of mediation and able to use her position of authority as a judge to assist the parties in resolving difficult issues. These skilled judicial mediators controlled the process, as opposed to permitting the lawyers to dictate the process, or trying to control the parties.⁸² There is large variation in how judicial mediators approach the process of judicial mediation. It was these experiences of being exposed to judicial mediation and comparing that with what I was exposed to in law school about the theory, styles, and skills associated with mediation that led me to examine judicial mediation in more detail. Standardization of the judicial mediation process will facilitate more consistent definition of judicial mediation and application of the process.

82 When I say the lawyers dictate the process, I mean it is the lawyers making arguments and focusing on the positions of the parties, as opposed to the parties interests.

CHAPTER 4 MEDIATION BEST PRACTICES

Judicial mediation is a subset of mediation in general. To understand what the best practices are in judicial mediation, we need to have an understanding of what the best practices are in mediation and what these best practices are trying to address. It is only when we understand the issue that the best practice is addressing that we will be able to determine if the best practice for mediation as a whole also applies to judicial mediation as a subset.

As a starting point in this thesis, there needs to be a brief discussion about why best practices are important. One purpose of mediation is to provide the parties with a sense of ownership in the solution.⁸³ The mediator may use a variety of styles of mediation to help the parties obtain a sense of ownership in the solution they agree to. I propose that no matter what type or style of mediation is used, whether it be facilitative, transformative, evaluative, or any of the other styles/types of mediation or a combination of these, there are practices which are universally applicable to all styles/types of mediation. Through being aware of the practices and implementing some or all of them, the mediator is able to more skillfully facilitate the parties' negotiation.⁸⁴

Chapter 3 examines best practices on the following topics: mediation process, communication, emotions, and continuing education. In addressing each of these topics, I will refer to material from the interviews conducted with some Justices of the Supreme Court of British Columbia. The particular interviews are referred to as Judge 1, Judge 2, Judge 3, and Judge 4.

83 Julie Macfarlane, "The Mediation Alternative" in Julie Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publication Limited, 1997).

84 For a discussion of mediator attributes, skills and roles, see Henry Brown and Arthur Marriott, *ADR: Principles and Practice*, 3rd ed. (London: Sweet & Maxwell 2011) at 375-403 [Brown and Marriott].

4.1 MEDIATION PROCESS

The elements of mediation process examined here are mediators choosing to be mediators, measures of success, neutrality/impartiality, timing, the environment in which mediation takes place, the role of the lawyer, and voluntary agreement to any resolution.

4.1.1 MEDIATORS CHOOSING TO BE MEDIATORS

It may seem obvious, but the mediator should want to be a mediator. If a mediator does not believe in the process of mediation, is not knowledgeable about the mediation process, or does not have skills associated with being a mediator, then it is very likely that the mediation will be unsuccessful.⁸⁵ The skills of questioning, listening, and rephrasing are not likely developed as fully in a mediator who is forced into the position as opposed to a mediator who wants to be a mediator. The reluctant or uninterested mediator is much less likely to work on the “mediation skills and techniques [that] can be learned, developed, assessed and improved.”⁸⁶

In the realm of private mediation,⁸⁷ mediation is arranged and financed privately by the parties. Mediators choose to mediate and strive to improve their skills so they are better able to compete for the limited number of mediations available or simply out of interest or desire to truly help people resolve their conflicts. Skillful mediators are more likely to be successful at facilitating parties to reach a resolution, which results in the mediator being viewed as competent.⁸⁸ A competent mediator with a good reputation is sought out by potential clients. The mediator with

85 See also Joel Richler, “Court-Based Mediation In Canada” (2011) 50 Judges J. 14 (“the keys to successful mediation include: the skill and experience of the mediator, the willingness of the parties to engage in mediation at a particular time, and whether the mediation is taking place at a stage of the litigation that is suited to the particular matters in issue.” at 17); Claudia L. Bernard, “Is a Robe Ever Enough? Judicial Authority and Mediation Skill on Appeal”, *Dispute Resolution Magazine* (Spring 2011) 16, (Discussing the effect of a judge acting as a mediator and relying solely on their position of authority in the mediation, “The clear lessons of this experience were that:(1) status and authority do not trump skill and experience as a neutral; (2) while often necessary, a neutral's status and authority is rarely sufficient...” at 17) online: American Bar Association <http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/drmspr11.authcheckdam.pdf>.

86 Laurence Boulle and Miryana Nestic, *Mediator Skills and Techniques: Triangle of Influence*, (Haywards Heath, England: Bloomsbury Professional 2010) at 313 [Boulle and Nestic].

87 This is in opposition to mediation provided as part of or through a government organization.

88 See also Julie Macfarlane, “Culture Change? A tale of Two Cities and Mandatory Court -Connected Mediation” (2002) J. Disp. Resol. 241 (“mediators who are simply trying to split the difference are useless” at 286) (“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.” at 288).

a good reputation will have more work and increased job security. The private mediator who does not like mediation and/or is not skilled as a mediator will not be selected to act as a mediator.

In contrast, in the context of judicial mediation, judges are not typically appointed for their skills as mediators or for their belief that the mediation process is one that should be conducted in the courtroom.⁸⁹ Brown and Marriott say “[t]he most important requirement of a mediator is to be an expert in the mediation process.”⁹⁰ It is not possible to be an expert in the mediation process if you have never attended a mediation, conducted a mediation, or have any substantive knowledge about the role of the mediator. Judge 1 was clear that each judge has little or no choice in what their sitting time looks like. He said “The advantage of the job is the variety. Whatever is on the agenda I have to do because I have been assigned there...we really have no choice.” It is entirely possible for a judge to be assigned to conduct a Judicial Case Conference or Judicial Settlement Conference and have minimal skills in the area of mediation.⁹¹

The interviewed judges indicated that there was no formal training or orientation when they were appointed that introduced them to fulfilling their role as a judicial mediator. Judge 2 said “I have no formal mediation training.” Judge 4 said, when talking about their role in Settlement Conferences, “Mediation is different because I think we need training.” Training in mediation is available for judges in British Columbia, although it is not mandatory.⁹²

89 To apply to be a superior court judge in British Columbia there is an application form available online through the Office of the Commissioner for Federal Judicial Affairs Canada. The form as at January 17, 2014 makes no reference to any mediator training, experience or exposure. The “Assessment criteria, candidates for Federal Judicial Appointment” makes no mention of mediation training, experience or exposure. “Personal History Form Federal Judicial Appointments”, online: Government of Canada, Office of the Commissioner for Federal Judicial Affairs Canada <<http://www.fja.gc.ca/appointments-nominations/forms-formulaires/ph-fc/phf-fc-law-lois-eng.doc>> accessed on January 17, 2015; “Assessment criteria, candidates for Federal Judicial Appointment”, online: Government of Canada, Office of the Commissioner for Federal Judicial Affairs Canada <<http://www.fja.gc.ca/appointments-nominations/assessment-evaluation-eng.html>> accessed on January 17, 2015.

90 *Supra* note 84 at 409.

91 There is training for judges in the area of settlement conferencing and judicial mediation through the National Judicial Institute.

92 The National Judicial Institute is one source of judicial training available to judges in Canada. The National Judicial Institute offers courses about mediation. See “Judicial Education Court Calendar and Education Resources”, online: National Judicial Institute <<https://www.nji-inm.ca/index.cfm/publications/nji-education-course-calendar/>> accessed on December 23, 2014. In this calendar there are two courses offered dealing with

It is the norm in private mediations that parties have input to who will mediate their issue. Brown and Marriott say parties need to have input in selecting the mediator: “[p]arties choosing an individual mediator directly may make a joint approach, or each party will nominate mediators, and then they will jointly select one from the list.”⁹³ By allowing party selection of the mediator, the parties are exercising their self-determination in the process. Parties select a mediator who they believe will be best able to help them resolve their dispute.

It was not clear from the interviews of the judges if they were being encouraged to use mediation in situations where it was appropriate. The judges did indicate that they thought settlement was a much better outcome than telling the parties what the outcome was going to be. The judges preferred parties to reach their own agreement as opposed to ordering the outcome. The judges, to some degree, likely volunteered for the interviews because they felt there was merit in judicial mediation. Perhaps subsequent research would be successful in obtaining opinions of judges who do not think judicial mediation ought to be part of the court process.

I had the sense that there are few, if any, steps being taken by legislators to encourage judges to use judicial mediation more frequently or about the potential benefits of the mediation process.⁹⁴ This sense came from comments that some of the judges made about how they had minimal if any input in to what their work schedule looked like, as it relates to the types of matters they

judicial mediation: Judicial Settlement Conferencing (3.5 day program), and Judicial Settlement Conferencing: Clinics. Provincial Court Judges go through an education program which is outlined in the Judicial Council Annual Report 2013. The report does not make any specific reference to mediation training. See “Judicial Council Annual Report 2013” at 20-22, online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/downloads/judicialCouncil/JudicialCouncilAnnualReport2013.pdf>> accessed on January 17, 2015. But see Lisa Walker-Sharp, “Mediation, Family Law Disputes and the Best Interests of Children” (“British Columbia decided to embrace mediation for use in family law in a direct, innovative way. By 1996, 114 of B.C.’s 135 judges had received mediation training, and had mediated over 100,000 cases.”) online: Canadian Forum on Civil Justice online <http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/16166-meditation_best_interests.pdf> accessed on December 28, 2014.

93 *Supra* note 84 at 412.

94 The situation described in San Luis Obispo County where judge-led mediation has become common practice, was first started because the supervising judge had strong feelings that mediation should be part of the justice system. It was due to the initiative of Judge Burke that the benefits of effective judge-led mediation were realized. Institutional support and encouragement is required for judges to become effective mediators. Peter Robinson, “Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial” (2006) J. Disp. Resol. 335 at 347-350.

dealt with, and to the minimal input they had in creating and refining the rules of court. Also, the judges indicated that they were expected to deal with what was put on their agenda for the day, whether it was a hearing, a trial, a Judicial Case Conference or a Settlement Conference. Judge 1, when asked what specific things judges could do to maximize the judicial mediation process said, “Well I guess every so often take a continuing legal education refresher course.... There is a reticence among Judges for some reason they can instruct at continuing legal education, but there is a reticence for some reason, I don't know, to go to the courses.” The reticence could be addressed by ensuring part of the continuing education judges are required to attend includes an aspect of mediation training. It is possible that allowing judges to have some determination over the type of judge duties they take part in could allow judges who believe in the benefits of the mediation process to be able to spend more of their judge time taking part in such processes.

Judges are familiar with imposing solutions on parties. Therefore, it is particularly important when a judge acts as mediator that the judge is knowledgeable about the differences between mediation and adjudication.⁹⁵ Judges are decision makers, except when they are judicial mediators, and then the judge relinquishes the decision making to the parties. If the judge mediator acts as a problem solver, without the parties asking for this, providing the judge's own opinion and solution to the dispute, then it may lead to the judge unknowingly coercing settlement of the parties.⁹⁶ All mediators need to want to be mediators and have the interest and knowledge to be effective in their role as mediator.

95 See Robert A. Baruch Bush, “Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards In Mediation” (1989) 41 Fla. L. Rev. 253 (“the mediator's role is: (1) to encourage the empowerment of the parties – i.e., the exercise of their autonomy and self-determination in deciding whether and how to resolve their dispute; and (2) to promote the parties' mutual recognition of each other as human beings despite their adverse positions.” at 272. In discussing empathetic recognition, Bush says “adjudication and arbitration at best treat such recognition as irrelevant. More often, they destroy the very possibility of empathy by encouraging strong, frequent extreme, adversarial behaviour.” at 271).

96 Omer Shapira, “Conceptions and Perceptions of Fairness in Mediation” (2012) 54 S. Tex. L. Rev 281 (“Following logically from the duty to conduct mediations on the basis of party self-determination is a duty to prevent an outcome that a party agrees to without exercising self-determination – a decision that is involuntary, coerced, uninformed, or made in a state of incapacity.” at 336). See also Donald T. Weckstein, “In Praise of Party Empowerment – and of Mediator Activism” (1997) 33 Willamete L. Rev 501 (“A coerced settlement is inconsistent with a legitimate mediation process, as is any resolution that lacks voluntary and informed consent of the disputants.” at 502, “Before offering an evaluation or prediction, [the mediator] should be satisfied that the timing is appropriate. It probably would not be appropriate unless more facilitative measures had been tried.” at 562).

When judges have sufficient training in mediation theory and practice, adequate knowledge of the mediation process, and awareness of the potential pit-falls of being a judge-mediator, the judge-mediator has the knowledge/skills to help parties reach their own agreements. The above knowledge/skills are much more likely to be gained when the judicial mediator wants to mediate.

4.1.2 MEASURES OF SUCCESS

For mediation to be of value to the parties, the mediator ought to be able to identify what a potentially successful mediation includes: durable agreement, resolution of some or all of the outstanding issues, and the parties determining the outcome voluntarily. One aspect which is not initially apparent from the mediation process is the durability⁹⁷ of the resolution. The durability of a resolution refers to how long and to what extent the resolution is adhered to by the parties. The durability of resolutions obtained through mediation is greater than resolutions dictated by courts because mediation has the ability to repair damaged relationships where a focus of litigation is to amplify parties blameworthy conduct.⁹⁸ Mediated agreements are made by the parties with full knowledge of their lives, needs and desires. A judge simply cannot have as deep an understanding of these things regardless of the length of trial.

The judges I interviewed were aware that solutions dictated to parties are generally not the best solutions. Judge 2 said, “it is always better to reach a settlement or an agreement whether it is through a phone conference or mediation rather than me telling you how it is going to be done

97 Willaim R. Potapchuk & Jarle Crocker, “Implementing Consensus-Based Agreements” in Larry Crump & Lawrence E. Susskind, eds, *Multiparty Negotiation*, vol 1, (Law Angeles: Sage, 2009) 295 (“The underlying logic is that for an agreement to be durable and implementable, stakeholders must develop a deep and shared understanding of the situation, build new relationship characterized by trust and reciprocity, and generate sufficient commitment from individuals and institutions.” at 305).

98 *Supra* note 84 (“Repairing damaged relationships or preserving those that are at risk of becoming damaged is one of the potential benefits of ADR that cannot be offered by litigation. When people work together with the common goal of reaching consensus, when they are helped to understand one another's positions and to respond appropriately, when they communicate respectfully and thoughtfully, conditions exist for a shift in attitudes towards one another and the preservation or restoration of good relationships. When they assume the role of adversaries, when they have to show that the other is wrong and blameworthy, when breakdown is exacerbated, it can be very hard for relationships to survive.” at 36). See Joanne Fuller & Rose Mary Lyons, “Mediation Guidelines”, (1997) 33 *Willamette L. Rev.* 905 (“The mediation process allows parents the opportunity to develop their own plan for their children. Mediation helps build parties' abilities to negotiate effectively and for parties to take control of their own lives in the midst of a divorce. This view reflects the belief that parties who participate in the process of developing the solution will be more likely to comply with it.” at 910) [Fuller and Lyons].

because generally then no one is happy.” Judge 4 had identified themselves as a lawyer who had used mediation extensively for their clients prior to becoming a judge and said, “I participated in mediations all the time, and there is great value and clients are very pleased.” When parties are happy with an outcome they are more likely to follow through, especially when they have had input into the formation of the resolution.

The easy, but not necessarily correct or only, determination of a successful mediation is the resolution of one or more of the issues in dispute. Of course a successful mediation need not necessarily be determined by whether one or more of the outstanding issues in dispute are resolved, although this is an easily identified factor for determining success.⁹⁹ Boulle and Nesic emphasize the importance of “defining the dispute comprehensively in terms of underlying needs and interests before moving into possible solutions.”¹⁰⁰ If some of the underlying needs and interests are met and settlement on the issues is not achieved, then the mediation may still be viewed as a success. An example of a mediation dealing with issues of parenting time of children may not be successful in establishing a new parenting time schedule (the solution). The mediation may still be viewed as a success if it develops trust between the parties allowing them to communicate more effectively going forward. In this example, the underlying need between of parties is to trust each other, to some degree. With trust, the parties are more likely to effectively communicate, which may enable them to reach a solution on their own at some point in the future. This example illustrates how a mediation may be viewed as successful, even though a resolution of the issue was not achieved during the mediation.

All of the interviewed judges seemed to indicate the most significant aspect of determining if a judicial mediation was successful was if one or more of the outstanding issues were resolved. Judge 1 said, “the more we can settle the better.” There was a general consensus that the more legal issues resolved in the judicial mediation, the more successful the mediation. It is likely that

99 Ralph A. Peeples, Suzanne Reynolds, & Catherine T. Harris, “It's the Conflict, Stupid: An Empirical Study of Factors That Inhibit Successful Mediation In High-Conflict Custody Cases” (2008) 43 Wake Forest L. Rev. 505 (“It may be that a mediation, although unsuccessful, serves as a useful step in a larger process of reaching agreement prior to trial.” at 515). For an indication of what some mediator's view as success See generally Colleen M. Hanycz, “Through The Looking Glass: Mediator Conceptions of Philosophy, Process and Power” (2004-2005) 42 Alta. L. Rev. 819.

100 At 313.

this conception of success stems from the background that all judges hold in common, a background of decisively resolving disputes. The judges indicated that addressing issues more likely to resolve first, such as property or children, gave the parties a sense of success. The success the parties had gave them more chance to be successful in addressing more contentious topics. The Judges perceived resolving some of the issues at the judicial mediation, as reducing the money spent continuing in the litigation process, as there are fewer issues to deal with at court. Judge 1 said, “it is usually in the economic interest [of the parties] and emotional issues to get settled without the rigours of litigation, so to the extent that is of assistance, it is to [the parties] benefit.” The measure of success of reducing the number of the legal issues or all of the legal issues that the court has to deal with is a tangible and measurable measure of success.¹⁰¹ Whatever the measures of success are or may be the measures ought to be known or at least contemplated by the parties and the mediator prior to, and/or during the mediation.

4.1.3 NEUTRALITY/IMPARTIALITY

The concepts of neutrality and impartiality are “firmly embedded in the ideas of fairness and justice in western liberal democracies.”¹⁰² Both of these concepts play an important part in the discussion surrounding mediation. Parties who feel that one or both of these concepts have been used against them in a negative way typically indicate they were treated unfairly.¹⁰³ If the parties were asked if their feeling of being treated unfairly stemmed from the mediator being impartial or not being neutral, the party would not likely know which of the two concepts had been breached by the mediator.¹⁰⁴ Both neutrality and impartiality are important to the success and effectiveness of mediation.

101 See Nancy L. Hollet et al, “The Assessment of Mediation Outcome: The Development and Validation of an Evaluative Technique” (2002) 23 Just. Sys. J. 345 (Another measure of success, although not as easily measured is the improvement of the relationship between the conflicting parties: “An important indicator of success is relationship improvement between conflicting parties.” at 348).

102 Hilary Astor, “Mediator Neutrality: Making Sense of Theory and Practice” (2007) Social and Legal Studies 16:2 221 at 236 [Mediator Neutrality].

103 Susan Oberman, “Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum (2005) 20 Ohio St. J. on Disp. Resol. 775 (“Under most circumstances unrepresented parties unfamiliar with mediation might be hard pressed to determine, other than by their subjective sense or feeling, if a mediation had lost impartiality or neutrality.” at 800).

104 Kathy Douglas and Rachael Field, “Looking for Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence” (2006) 13 eLaw J. 177 (“Many people ... consider the neutrality and impartiality to be synonymous.” at 187) [Douglas and Field].

Impartiality in mediation may be defined as “performing the mediation function, in word or deed, free from favoritism or bias, and for the purpose of aiding a resolution of the dispute and not to benefit a particular party.”¹⁰⁵ Ronit Zamir says, “Impartiality not only manifests an aspiration for proper judicial practice, it also is thought to be a supreme judicial virtue that is vital not only to assuring the fairness of the particular process but also to guaranteeing the public's trust in the judicial system in general.”¹⁰⁶ Zamir identifies two stages to judicial impartiality: procedural and substantive.¹⁰⁷ The procedural stage “contains two principal aspects: maintaining equal distance from the parties and the judge's absence of interest in any of the parties or in the outcome of the dispute.”¹⁰⁸ The substantive dimension of judicial impartiality relates to objectivity.¹⁰⁹ Impartiality is an important concept in the judicial system.¹¹⁰ It is also an important aspect of mediation.

Neutrality “refers to the mediator's relationship, if any, with the disputants or the dispute. It seeks to avoid use of a mediator who, by reason of background, experience, financial interest, or relations with one or more of the parties, may be prejudiced or biased for or against a party. Neutrality incorporates concerns with any conflict of interest of the mediator.”¹¹¹ This definition of neutrality is only one.¹¹² Douglas and Field say, “neutrality is not a term with a clear or precise meaning in the context of mediation.”¹¹³ The concept of mediator neutrality is misleading. The

105 Donald T. Weckstein, “In Praise of Party Empowerment – and of Mediator Activism” (1997) 33 Willamete L. Rev 501 at 533 n. 156.

106 Ronit Zamir, “The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic” (2010-2011) 11 Pepp. Disp. Resol. L. J. 467 at 473 [Zamir].

107 *Ibid* at 474.

108 *Ibid*.

109 *Ibid* at 375 (“The subjective perceptions and beliefs of the judge are not considered part of the legal body of knowledge, and therefore bringing them to bear is thought to be dangerous because it might sacrifice the appearance of impartiality that only exists when the judge takes pains to act according to the guidelines of the legal rules.” at 376).

110 *Contra* Susan Oberman, “Mediation Theory vs. Practice: What are we Really Doing: Re-Solving a Professional Conundrum (2005) 20 Ohio St. J. On Disp. Resol. 775 (“If postmodernist theory were acknowledged in mediation as it has been in other disciplines, the idea that no one can be 'objective' would be commonly accepted.” at 799).

111 Donald T. Weckstein, “In Praise of Party Empowerment – and of Mediator Activism” (1997) 33 Willamete L. Rev 501 at 533 n. 156.

112 See *Supra* note 104. The authors examine many different definitions of neutrality at 180-81.

113 *Ibid* at 180.

concept of neutrality, even when considering the above definition, creates a fiction that the mediator will not manipulate the process to the advantage of either of the parties.

The idea that the mediator may act in a purely process driven neutral role is not possible. The mediator brings a wealth of life experience, in addition to their own perspectives and beliefs to the mediation. The mediator controls the mediation process. Douglas and Field say “in the reality of mediation practice, mediators are truly powerful, and any 'notion that mediators are passive participants in a process shaped by forces they have not deployed' is not accurate.”¹¹⁴ This perspective is supported by “a substantial body of research [that] has provided evidence that mediators ... are not 'neutral' in any absolute sense, and in fact actively influenced what the parties can and cannot do in a mediation session in various ways, often corrosively.”¹¹⁵ Della Noce et al. say “mediator practices can and do influence the parties' conflict.”¹¹⁶ It is being aware of these influences that enable the mediator to be aware of the nuances between “assisting others to make decisions and making decisions for them.”¹¹⁷ Zamir suggests the theory of equal partiality guide mediators:

The ethic of equal partiality embodies relations of mutual challenging, in which care undermines and changes the accepted perception of impartiality so that it will cease to fulfill a function of covert power: instead of looking from nowhere, the third party is now obliged to recognize that she has a point of view and must make a conscious effort to identify these blind spots and reveal an openness towards a new and different point of view.¹¹⁸

The idea of equal partiality is appealing because it acknowledges the role a mediator plays as impacting the parties dispute; “the mediator is no longer an expert observing the dispute from nowhere, but is obliged to acknowledge his personal point of view and to show openness toward new viewpoints that are different from his opinion.”¹¹⁹ I have been part of judge-led mediations

114 *Ibid* at 185.

115 Dorothy J. Della Noce, Robert A. Baruch Bush, and Joseph P. Folger, “Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy” (2002-2003) 3 *Pepp. Disp. Resol. L. J.* 39 at 43 [Della Noce et al.].

116 *Ibid* at 47.

117 *Supra* note 86 at 4.

118 *Supra* note 106 at 501.

119 *Ibid* at 516.

where the judge has clearly indicated their point of view, indicated their point of view is no more important than either parties point of view, and used the stated point of view as an opportunity for discussions to start. I have found when the judicial mediator encourages their point of view to be criticized, the parties engage in more dialog, as they are not criticizing the other parties idea. When judicial mediators use this technique of expressing their point of view as done above, I have also heard some of them say they do not want to limit the possible outcomes the parties may consider because of the judicial mediator expressing a point of view.

The idea of equal partiality is similar to the concept of equidistance. James Duffy explains the concept of equidistance,

'equidistance, empathy and attentiveness are tools that can be used during the mediation process to create impartiality.' Equidistance has been described as 'the ability of the mediator to assist the disputants in expressing their side of the case'. To assist the parties in telling their story and expressing their emotions, the mediator may temporarily align themselves with each party as they elaborate their positions. At first blush, this suggestion appears counter-intuitive. If anything, the appearance of an empathic and attentive bond between the mediator and one party would leave the other party with impressions of mediator partiality and bias. Equidistance as a component of neutrality however works to the extent that the mediator can assist each party evenly. By concentrating on the evenness of their interactions with the parties, the mediator can be perceived as behaving impartially. Cobb and Rifkin suggest that 'mediators may, at a given moment, favour one side or the other, but unbiased settlement is the "summative outcome" of this process; [equidistance] is the active process by which partiality is used to create symmetry.'^{119a}

The concept of equidistance differs from equal partiality in that with equal partiality it is the mediator who expresses a point of view and shows openness to changing their point of view from incorporating feedback from the parties. Equidistance has the mediator align with a party who needs assistance expressing themselves. For equidistance to be viewed as impartial over the course of a mediation, the mediator has to align a similar number of times with each party. Equidistance may be used in situations where there are differences in the information each party

^{119a} James Duffy, "Empathy, Neutrality and Emotional Intelligence: A Balancing Act for the Emotional Einstein," (2010) 10:1 Queensland U. Tech. L. & Just. J. 44 at 56.

has or situations where domestic violence^{119b} has occurred in the past.

Basing mediation on the concepts of impartiality and neutrality creates challenges for mediators. The challenges created relate to the almost impossible attainment of either concept. It is important for mediators to be aware of alternate theories which do not rely on impartiality and neutrality. If a mediator is able to make an emotional connection with the parties, the parties are more likely to place their trust in the mediator and the mediation process. It is this trust in the mediator and the mediation process that keep the parties negotiating and attempting to resolve the dispute.¹²⁰

Therapeutic jurisprudence is a paradigm that significantly reduces the importance of impartiality and/or equality as cornerstones for mediation theory. Douglas and Field indicate that “therapeutic jurisprudence concerns itself with effects on the well-being of participants.”¹²¹ It is the potential of basing mediation in therapeutic jurisprudence that gives “rise to an imperative for mediation to 'create the most beneficial and emotionally satisfying solution for a particular client's interests and unique circumstances.’”¹²² Therapeutic jurisprudence¹²³ allows mediation to value “emotion, relationships and the community.”¹²⁴

Mediators with an understanding of neutrality, impartiality, and the importance of an emotional

119b Linda C. Neilson, “At Cliff’s Edge: Judicial Dispute Resolution In Domestic Violence Cases” (2014) 52:3 Family Court Review 529 (The concept of equidistance is applied by using professional and judicial presence to re-balance power as between abused and abuser, “Although experienced judges and mediators, who have specialized understandings of domestic violence, can use professional and particularly judicial presence (and or the presence of domestic violence experts) to re-balance the respective powers of the parties.” at 540).

120 *Supra* note 86 (“If the parties trust the mediator and the mediation process, then they are more likely to remain at the negotiating table and make attempts at settlement than if this trust were absent.” at 55).

121 *Supra* note 104 at 193.

122 *Ibid* at 195.

123 *Ibid* (The authors outline 6 connections, of numerous possible connections, that therapeutic jurisprudence offers mediation as a legitimizing foundation: 1. Therapeutic jurisprudence allows for mediation to acknowledge that mediation is 'an interpersonal and affective activity'; 2. Therapeutic jurisprudence focuses on an interdisciplinary and cross-jurisdictional orientation; 3. Therapeutic jurisprudence focuses mediation on the actual process of mediation as opposed to mythical notions of neutrality; 4. Therapeutic jurisprudence promotes an ethic of care; 5. Therapeutic jurisprudence offers multiple perspectives in understanding mediation as a dispute resolution option; and 6. Therapeutic jurisprudence provides a framework to reform the way conflict is dealt with and to change how the legal and justice systems deal address conflict. at 195-98.).

124 *Ibid* at 201.

connection with the parties are better equipped to influence the mediation process in a way aiding the parties to reach resolution.

4.1.4 TIMING

Mediating a dispute evolves over time. It takes time for the parties to gain trust in the mediator and regain some level of trust in each other before resolution may be achieved. The length of a mediation depends on the complexity of the dispute, number of parties, emotional intensity, and the number of mediations contemplated to resolve the dispute. It has been suggested when multiple mediation sessions are feasible, the ideal family law mediation session is 2.5 to 3 hours in length, as this is “long enough to accomplish a lot, [yet] short enough to avoid burnout.”¹²⁵ In the ideal situation, the parties and the mediator ought not be limited to a specific allotment of time, such as 2 hours. Due to the constraints of resources, mediations are commonly limited in time. In the context of judicial mediation, Family Case Conferences in the Provincial Court are 1 hour in length, Judicial Case Conferences are either 1 hour or 90 minutes in length, and Settlement Conferences are anywhere from 2 hours to multiple days in length.

There are a number of phases mediations go through. The more issues which need to be addressed during a mediation impact the length of time spent on each of the phases. A four phased model is discussed here with the phases being: Introduction, Issue Identification, Interest Identification, and Reaching Agreement.¹²⁶

During the introduction phase of mediation, the mediator introduces himself and the parties. The

125 Jennifer E. Beer & Caroline C. Packard, *The Mediator's Handbook: Revised and Expanded*, 4th ed (Gabriola Island: New Society Publishers, 2013) at 119 [*The Mediator's Handbook*].

126 *Supra* note 84, 6 stages of mediation are discussed: “Preliminary communication and preparation, Establishing the issues and setting the agenda, Information gathering, Conducting substantive negotiations, Dealing with impasse, and Concluding mediation and recording the outcome” at 175; *The Mediator's Handbook* discusses the process of mediation as 2 parts: Exploring the Situation and Reaching Resolution; *Nonverbal Communication in Mediation* outlines 7 steps of mediation: Be Prepared, Maximizing The Initial Telephone Contact, Managing the Environment, Assessing the Parties, Building Rapport, Triggering Action, and Bringing Closure; Boule and Kelly address 10 stages of mediation: Preliminaries, Mediator's Opening, The Party Presentations, Identifying Areas of Agreement, Defining and Ordering the Issues, Negotiating and Decision Making, The Separate Meetings Caucus, Final Decision Making, Recording the Decisions, and Closing Statement and Termination; Cheryl Picard et al, *The Art And Science Of Mediation*, (Toronto: Emond Montgomery Publications Limited, 2004) address 5 stages of mediation: Establishing the Process; Stating Hopes and Problems; Seeking Insights into Interests; Collaborating to Meet Interests; and Making Decisions [*Art and Science of Mediation*].

mediator usually sets out what mediation is and the role of the mediator, establishes guidelines for communication, and confirms the willingness of the parties to continue.¹²⁷ There may also be an agreement to mediate signed by all of the parties, their lawyers and the mediator. The agreement may have many aspects such as the parties having the authority to negotiate and settle the issues in dispute¹²⁸; the discussions occurring on a without prejudice basis¹²⁹; the mediator being an impartial facilitator; the mediator not providing legal advice¹³⁰; the mediation being voluntary; and if there are any costs associated with conducting the mediation, what those costs are and how they will be paid. The introduction phase of the mediation “break[s] the ice with the parties”¹³¹ and allows the mediator to “explain both the nature of mediation generally and what will happen in the mediation meeting specifically.”¹³²

The second phase of mediation is used to identify the issues to be addressed during the mediation. Mediation being a voluntary process requires the parties to identify what they each see the issues being and then agree on what issues will be mediated. If the parties raise issues that are different from each other, then the mediator “may need to find a neutral problem-definition that will satisfy”¹³³ the parties. Once the parties have agreed on the issues to be mediated, the mediation may progress to the next phase.

The third phase of mediation is identifying the interests¹³⁴ of the parties. The mediator uses their skills and techniques to facilitate the parties in discovering what interests are behind their positions for each of the issues. There may be underlying issues that the mediator becomes aware

127 Lisa C. Alexander, *Family Law Mediation*, Coursepack, (The Continuing Legal Education Society of British Columbia 2013) at 2.1.11 [*Family Law Mediation*].

128 Allan J. Stitt, *Mediating Commercial Disputes*, (Aurora ON: Canada Law Books Inc, 2003) at 89 [*Mediating Commercial Disputes*].

129 *Ibid.*

130 *Ibid.*

131 Laurence Boulle & Kathleen J. Kelly, *Mediation: Principles, Process, Practice*, Canadian ed. (Toronto: Butterworths, 1998) at 109 [*Mediation: Principles, Process, Practice*].

132 *Ibid.*

133 *Supra* note 84 at 184.

134 *Supra* note 128 (There are 4 goals in uncovering interests: 1. “By encouraging the disputants to focus on interests instead of positions, the mediator forces them to think about what they really want and why.” 2. “Help[s] the mediator understand what is important in the mediation.” 3. “Help[s] the disputants understand each other.” 4. “Change[s] the focus of the discussion from the past to the future.” at 99-102.)

of through the mediation. These underlying issues have been referred to as the “‘iceberg’ factor.”¹³⁵ If the underlying issues are not dealt with, then these issues “can subvert the resolution of the main issues.”¹³⁶ Assisting parties to become aware of their interests and underlying issues is one of the significant benefits of mediation.

The final phase of mediation is reaching agreement. During this phase the mediator assists the parties to focus on one issue at a time. The mediator assists the parties in generating their own solutions, which may be done by way of brainstorming as a group or individually. Skilled mediators are able to identify areas the parties agree on and measure those areas of agreement against the objective criteria that the parties established in the earlier phases. Once agreement has been attained, the mediator may draft the agreement or prepare a letter of consensus indicating what the parties had agreed to.¹³⁷

It takes time for mediation to progress through these phases. If there is insufficient time to address all issues in one mediation, then there needs to be agreement between the parties about which issues will be addressed. The amount of time allotted for a particular mediation has an impact on what may be accomplished during the mediation.

Another aspect of timing relates to when the mediation takes place in relation to when the dispute first occurred. As private mediation is a voluntary process, it is the parties who decide when and if mediation will take place. Court mandated judicial mediation is not voluntary. Dealing with family disputes, in the Supreme Court of British Columbia, the Judicial Case Conference must, with a few specific exceptions, take place prior to any interim hearing or final hearing. When it comes to family disputes in the Provincial Court, there is a first appearance hearing, which is usually only used to deal with urgent matters, at which a Family Case Conference date is set. These mandated judicial mediation processes force parties to attend judicial mediations early in the litigation process. The theory behind early mandated judicial mediation is to identify and resolve issues the parties agree on before the litigation process

135 *Ibid* at 185.

136 *Ibid*.

137 *Supra* note 127 at 2.1.22.

creates a situation where they are not able to agree on anything. The idea that early mandatory judicial mediation is effective at resolving disputes is not held by everyone. Judge 1 made the observation that the Judicial Case Conference “is too early to settle, they will have to get over the emotional tugging.” The Supreme Court Family Rules and the Provincial Court Family Rules allow the parties to choose to attend subsequent judicial mediations. It is common in the Provincial Court for there to be multiple Family Case Conferences before a matter reaches trial, although multiple judicial mediations in Supreme Court are much less common.

When a mediation takes place during the course of a dispute between parties, numerous factors impact what may be accomplished during the mediation. The amount of time set aside for a mediation and the number of mediations also impact what may be accomplished during a particular mediation. In the ideal situation, a mediation would not be constrained by time and would take place when both parties choose.

4.1.5 THE ENVIRONMENT IN WHICH MEDIATION TAKES PLACE

The physical environment where the mediation takes place has an impact on the emotional state of the parties. The physical environment affects peoples' mood and therefore impacts, either positively or negatively, their emotions. If the physical environment¹³⁸ is one that elicits a feeling of unease, perhaps due to poor lighting, bad smell, ratty furniture, or any one of many other innumerable factors, then it creates a further obstacle to resolution. An environmental obstacle may need to be addressed or overcome by the mediator and/or the parties before the issues to be mediated may be addressed.

Boulle and Nesic talk of ritual and security as being important factors a mediator should consider in ensuring the physical environment encourages mediation. In the context of ritual, Boulle and Nesic indicate that providing “food, drink and other refreshments” in a way that is respectful of all the parties and equal for all the parties is a way to affect the environment. Food, drink and

138 *Supra* note 86 (“Physical environment: Mediators can provide an appropriate physical environment for dispute resolution in terms of neutral venues, accessible buildings, adequate meeting rooms and amenities, and other physical facilities which provide convenience, security and symbolically appropriate seating for decision-making and problem-solving” at 12).

other refreshments provide a common distraction from “the negative features of the dispute.”¹³⁹ Ensuring the parties are not distracted by thirst or hunger during the mediation, reduces the number of barriers to achieving resolution.

Another aspect of the physical environment a mediator ought to consider is the “parties need for freedom and space to make decisions.”¹⁴⁰ People need to feel as though they are able to have their own space to think and contemplate what is taking place. In certain situations, one or more breakout room(s)¹⁴¹ may be needed. In situations where a breakout room is not available, one of the parties is asked to take a break and go for a walk to permit the mediator to speak privately with the other party. The walk itself may be what a party requires to digest what is happening or calm down. It is possible that the main mediation area, based on size or layout, could also provide adequate space for a party to feel as though they are not being pressured. It is easy to understand how parties sitting next to each other may significantly impact their emotional state. In contrast, a situation where parties are sitting across from each other at a rectangular table may also negatively impact the mediation.¹⁴² Mediators use their judgment to determine how the physical mediation environment is arranged, as they are aware of the important role physical environment plays in mediation.

Even though the mediator may not have the ability to optimize all physical aspects of the mediation, a mediator needs to be aware of how the physical environment may impact a party's emotional state. The mediator who is aware of the impact physical environment has on parties may be able to use this knowledge to further the mediation process. An example from my own experience comes from judicial mediators who sit on the bench when conducting judicial mediations as opposed to setting up conference tables for everyone to sit at. The difference between these two physical situations has a definite impact on the feeling of the mediation. The setup of the physical environment impacts mediation.

139 *Ibid* at 58.

140 Roger Fisher and Daniel Shapiro, *Beyond Reason-Using Emotion As You Negotiate*, (New York: Viking 2005).

141 *Supra* note 125 (In discussing what qualities combine to make a good space for mediation the authors identify the need of having a secondary space for separate conversations to take place in. at 26).

142 *Supra* note 131 at 164-167.

Judge 3 was aware of the impact the physical environment has on parties, “[S]ome judges tend to do [Judicial Case Conferences] from the bench, others do them from the table, I do both and I switch back and forth just to see how it is working from time to time and I think that there are some situations, perhaps situations involving really high conflict disputes where it is best if the Judge is on the bench, so that the parties are a little more disciplined.” When the mediator is able to adjust the physical environment and they are aware of the impact physical environment has on the mediation process, they are more likely to create a situation where the mediation will be successful.

I was involved in a mediation where the physical environment was poor. The mediation took place in an old, poorly maintained building. The interior of the building had peeling paint and the stores on the main floor were vacant. The mediation room had inadequate lighting which made it difficult to easily see the faces of the other people at the mediation. There were a number of lights in the ceiling which did not work. The walls and some ceiling tiles were water stained. In this particular mediation, the mediator did not have any choice as to where the mediation took place. The physical environment clearly had an impact on the participants, as more than one of them commented about how poor the room was.

The physical environment the mediation takes place in plays a potentially significant role in how comfortable the parties feel in attending the mediation and how they conduct themselves in the mediation. By maximizing the positive effects of the physical environment, the mediator is able to create a situation that is highly conducive to having the parties achieve resolution of their dispute.¹⁴³

4.1.6 ROLE OF THE LAWYER

The skillful mediator provides clear guidelines and expectations for lawyers. This allows lawyers to contribute to the mediation process and assist the parties in preparing for mediation and going

¹⁴³ See e.g. Barbara Madonik, *I Hear What You Say, But What Are You Telling Me?: The Strategic Use of Nonverbal Communication In Mediation*, (San Francisco: Jossey-Bass, 2001) [*Nonverbal Communication in Mediation*]; See also Mark L. Knapp, Judith A. Hall & Terrence G. Horgan, *Nonverbal Communication in Human Interaction*, 8th ed (Boston: Wadsworth, 2014).

through the mediation process. Lawyers play a significant role in mediation as they have been chosen by a party to provide guidance.¹⁴⁴ Lawyers provide their clients with initial expectations about how a dispute may resolve. Jonathan Hyman states that there are substantial opportunities and challenges for lawyers in mediation:

The opportunities include: speeding up the kind of positional negotiation that lawyers often use for settling their clients' cases; finding mutually beneficial settlement terms that increase value for one side without imposing a corresponding loss on the other; repairing and improving tattered relationships; and increasing clients' understanding of themselves, their real world situation, and the people with whom they find themselves in conflict. The challenges arise because lawyers in mediation too often cannot or do not act in ways that will facilitate these promising alternative means.¹⁴⁵

Lawyers who capitalize on these opportunities are more sought after by parties considering mediation.¹⁴⁶

Lawyers ought to help their client problem-solve by having the client “identify and articulate their goals.”¹⁴⁷ The lawyer should “seek to understand the client's concerns and needs, whatever motivations they may include.”¹⁴⁸ The lawyer who understands a client's needs and concerns is better able to assist them during the mediation process.

It is vitally important for lawyers to adequately prepare for mediation.¹⁴⁹ One aspect of preparing for mediation is to explain the mediation process to their client, which may include the

144 See also Douglas and Field (“[W]hen lawyers have not become part of the therapeutic solution, they can clearly become part of the problem.” at 200); Roselle L. Wissler, “Representation In Mediation: What We Know From Empirical Research” (2010) 37 Fordham Urb. L. J. 419 (“there is some evidence that represented parties might obtain better outcomes than unrepresented parties, though the research highlights the challenge of defining 'better' outcomes, especially in light of widely varying party goals.” at 468).

145 Jonathan M. Hyman, “Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation” (2010) 34 Journal of Law & Policy 11 at 67-8.

146 Julie Macfarlane, “The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law” (2008) J. Disp. Resol. 61 (“The most successful lawyers of the next century will be practical problem solvers, creative and strategic thinkers, excellent communicators, persuasive and skillful negotiators, who are able and willing to work in a new type of professional partnership with their clients.” at 81).

147 *Supra* note 3 at 78.

148 *Ibid* at 79.

149 LaCrisia Gilbert, “Preparation of the Trial Lawyer for Mediation” (2003) 7 Jones L. Rev 85.

following:

- The basics of the mediation, what to expect generally from the process;
- Information about the principles of confidentiality and 'without prejudice';
- What paperwork to bring to mediation;
- Some information about negotiation strategy, the idea of give and take;
- Guidance on the appropriate division of roles between lawyer and client – what is valuable for clients to say as distinct from lawyers, and some written material on the client's role and how the client can prepare; and
- Discussion of the different purposes of mediation; for example, when the goal should be gaining a better understanding of what the issues are rather than striving for settlement.¹⁵⁰

Other aspects a lawyer ought to consider in preparing for mediation are determining the client's goals for resolution;¹⁵¹ explaining useful participation skills to the client;¹⁵² brainstorming creative options for resolution;¹⁵³ knowing the priorities and possibilities that may emerge from mediation;¹⁵⁴ and creating a meaningful opening statement.¹⁵⁵ When these aspects are considered by the lawyer, their role as counsel is being fulfilled.

When the above steps have been taken by the lawyer, they are in a better position to advise their client during mediation. The lawyer may act to some degree during the mediation as a surrogate negotiator, all the while providing legal advice to their client. The lawyer, being a skilled negotiator, is able to provide their client with strategic advice on process and tactics of negotiation. Likely the most important role a lawyer may fulfill during mediation is to enable their client to participate directly in the mediation.¹⁵⁶ Direct participation of a client by them asking and answering questions and proposing possible solutions tends to focus the mediation on the parties instead of the lawyers.

150 Julie Macfarlane & Michaela Keet, "Civil Justice Reform and Mandatory Civil Mediation In Saskatchewan: Lessons From A Maturing Program" (2004-2005) 42 Alta. L. Rev. 677 at 693. See also Olivia Rundle, "Lawyers' Preparation for Court-Connected Mediation: the Supreme Court of Tasmania" (2013) 32 U. Tas. L. Rev. 20.

151 *Supra* note 3 at 82.

152 *Ibid* at 84.

153 *Ibid* at 86.

154 *Ibid*.

155 *Ibid* at 90.

156 *Supra* note 131 at 157.

4.1.7 VOLUNTARY AGREEMENT TO ANY RESOLUTION

Mediation is a consensual resolution of the issues in dispute. It is vitally important that the resolution is agreed to by the parties and that the agreement is reached without coercion or undue influence from the mediator. Pushing the parties towards resolution in terms of what the mediator feels or thinks is preferable is undesirable for the following reasons:

1. The mediator can only view the dispute from an objective 'rights-based' perspective and not from the subject of 'interest-based' perspectives of the parties;
2. The mediator may only have a restricted knowledge of the facts, the law, and other relevant factors, and a push towards an 'incorrect' outcome;
3. At least one party may become more intransigent if they think the mediator's view is against their position;
4. At least one party may lose trust in the mediator if they would not stand to benefit from the expressed view;
5. The mediator may base his or her review, in part, on information disclosed in a confidential separate session;
6. The mediator may confuse parties who did not expect such interventions from a mediator, and it could result in creating confusion in the marketplace about the nature of mediation;
7. The mediator may breach a code of conduct or ethical standard and could be sued for negligence; and
8. The mediator may no longer be 'mediating' and may thereby lose a statutory immunity.¹⁵⁷

Reaching agreement is important, but it is also important that the parties feel and think that they agreed to the outcome voluntarily: “In no model or stage of mediation would it be appropriate for the mediator to threaten or intimidate one party into settling, or to use false deadlines to pressure them both.”¹⁵⁸ It is up to the parties to select the resolution that best meets their needs and to do

¹⁵⁷ *Supra* note 86 at 315.

¹⁵⁸ *Supra* note 131 at 149.

so at the pace they determine.

There may be situations in which the mediator may suggest a course to explore or use reality checking to assist a party to explore their position or interest. It is important for mediators to be aware that their “practices can and do influence the parties.”¹⁵⁹ The mediator should not force a party to any particular outcome.¹⁶⁰ If the mediator is pushing for a particular outcome, then the mediator has become invested in the outcome. By being invested in the outcome, a mediator loses their objectivity and neutrality. In such a situation, the mediator has, to some degree, become part of the dispute and is incorporating their own needs into the dispute.¹⁶¹ By considering the mediator's needs, parties may not voluntarily choose a resolution which best meets their needs.

The interviewed judges suggested that it was the role of the lawyer, and not the mediator, to persuade their client about the benefits of a particular outcome.¹⁶² Judge 1 said it was up to the lawyers to have honest and complete discussions in “attempting to persuade clients ... on some sort of economies.” Judge 1 gave the example of parties losing perspective on the financial consequences of disputes, “[I] think all of us have had experience with taking a half day in a trial to sort out who gets Aunt Minnie's vase, you know, sort of things like that which are viewed as incredibly important by the clients but of less importance in an economic sense.” It is the role of

159 *Supra* note 115 at 47.

160 Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution*, (San Francisco: Jossey-Bass, 2001), Dudley D. Cahn & Ruth Anna Abigail, *Managing Conflict Through Communication*, 5th ed (San Francisco: Pearson 2014) (“mediators are *unbiased*, and there is no reason for them to take one party's side against the other.” at 251)[*Frontiers of Conflict Resolution*].

161 Marshall Rosenberg, *Living Nonviolent Communication: Practical Tools to Connect and Communicate Skillfully in Every Situation* (Boulder, Colorado: Sounds True, 2012) (“When I am called into a conflict resolution, i begin by guiding the participants to find a caring and respectful quality of connection amount themselves. Only after this connection is present do i engage them in a search for strategies to resolve the conflict. At that time, we do not look for *compromise*; rather, we seek to resolve the conflict to everyone's complete satisfaction. To practice this process of conflict resolution, we mus completely abandon the goal of *getting people to do what we want*. Instead, we focus on creating the conditions whereby *everyone's needs will be met*.” at 2).

162 *C.f.* Linda Silberman & Andrew Schepard, “Court-Ordered Mediation In Family Disputes: The New York Proposal” (1986) 14 N.Y. U Rev. L. & Soc. Change 741 (In talking about a situation where the mediator is not a judge and the mediation is taking place outside of the court process, the authors say “The mediator is in a better posture than the parties' lawyers to question and challenge the positions a party takes regarding various issues in a matrimonial dispute.” at 746) [Court-Ordered Mediation].

the lawyer to highlight and accentuate the financial cost of the process when the parties focus overly on the items of little financial value but potentially high emotional value. At the same time, it is not the role of the lawyer to force their client to agree to any particular resolution.

The judges were aware of the impact their opinions about possible resolutions had on the parties. Judge 3 said, “I think that as a Judge I have to be careful if I make suggestions about resolution. I make it clear that is what I am doing and the parties do have a right to a rights based adjudication at the end of day. In other words, I don't see my role or that of any other Judge as being to use the powers we have or the authority we have to bully people into accepting settlements they do not want, it is a question of bringing them to the point where they recognize that it is truly in their interest to resolve and that they make a decision voluntarily to do so.” Parties have to come to their own resolution voluntarily. The mediator should not push any one particular resolution on the parties. The skilled mediator is “adept at assisting the parties and their lawyers to reach their own settlement ... rather than imposing a resolution on the participants.”¹⁶³

The best practices for mediators in terms of mediation process are: 1) mediators wanting to be successful mediators; 2) mediators being able to identify the aspect of a successful mediation for the parties; 3) mediators being aware of the difference between neutrality, impartiality and the impact they as mediators have on the mediation process; 4) mediators being aware of the phases mediations proceed through and what may be accomplished given particular time restrictions; 5) mediators manipulating the mediation environment to maximizes the parties' emotional and physical comfort; 6) mediators using the involvement of lawyers to aide the parties to reach resolution; and 7) mediators allowing the parties to reach their own resolution by being aware of how their opinions and actions affect the parties voluntarily agreeing to any resolution.

4.2 COMMUNICATION

Mediation may be viewed as facilitated communication. The role of the mediator would be to ensure understanding as between the parties. Mediators ought to be highly effective listeners,

¹⁶³ Harry G. Goodheart III, “The Essence of Effective Mediation or How I Ended Up Mediating a Couple of Angry Dogs In My Girlfriend's Garage” (2010-2011) 1 Resolved J. Alternative Disp. Resol. 1 at 1 [Effective Mediation].

have well developed active listening skills, be adept at questioning, and have the ability to reality check with the parties.

4.2.1 LISTENING

To be an effective mediator, one needs to be an active listener. Active listening has four components: identifying the feelings being expressed, assessing the intensity of the feelings, selecting an appropriate “feeling” word for response that accurately expresses emotion and intensity of the speaker's feelings, and phrasing the feedback message.¹⁶⁴ Active listening¹⁶⁵ by its very nature requires the listener to take an active role in the discussion by using the skills of questioning, restating, paraphrasing, refocusing, reframing, and confronting. These skills may be referred to as micro-skills. Through the use of active listening, the listener shows the speaker their understanding of what has been communicated.

Active listening is a skill which requires practice to implement seamlessly. To illustrate some of the differences between active listening and non-active listening, the following table is presented:¹⁶⁶

Active listening	Non-active listening
Repeat conversationally back to them, in their words, your understanding of their meaning	Give the other person your version of what you heard
Don't talk about yourself	Give your own opinions and advice. Talk about your experience
Don't introduce your own reactions or well intentioned comments	If you're helping with a problem, try hard, make sure you know what to say next

164 Christopher W. Moore, *The Mediation Process: Practical Strategies For Resolving Conflict*, 4th ed (San Francisco: Jossey-Bass, 2003).

165 Active listening is a fundamental skill set that mediators need. See Boule and Nestic, Boule and Kelly; See also Matthew McKay & Martha Davis, *Messages: The Communication Skills Book*, 3rd ed (Oakland California: New Harbinger, Publications Inc, 2009) [*Messages*]; *The Mediator's Handbook*; Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution*, (San Francisco: Jossey-Bass, 2001), Dudley D. Cahn & Ruth Anna Abigail, *Managing Conflict Through Communication*, 5th ed (San Francisco: Pearson 2014) [*Frontiers of Conflict Resolution*].

166 “Rhizome Guide to Active Listening in Mediation”, online: Rhizome Network <http://rhizomenetwork.files.wordpress.com/2010/12/active_listening_in_mediation.pdf>.

Let the speaker take the lead	Introduce new topics to get off the subject if it's uncomfortable
Ask for clarification	Don't let them know, you don't know what you're talking about
Let them correct your feedback	Don't let them correct you
Let them come to their own answer. Don't advise	Give them your answers and advice
Acknowledge their feelings. Don't diagnose, reassure, encourage or criticize them	Reassure them; 'it's not that bad' or talk them out of it
Reflect back to them, not only so they know you understand, but so that they can hear and understand themselves	Make sure you fix, change or improve what they've said, especially if you know you're right
Support their feelings. 'You feel hopeless about it now'	Agree with generalizations. 'Yes, it is hopeless.'
Allow silences. Breathe	Fill silences
Reflect back tentatively - 'so what I think I heard you say was...' to allow room for you to be wrong.	State your reflection as fact: 'so you believe that...'

Active listening enables the mediator to better understand what a party is communicating. A complete understanding enables a mediator to facilitate negotiations between parties.¹⁶⁷ Through the use of active listening, mediators create an environment where effective communication between parties may occur.

Only some of the communication between parties is verbal. A significant amount of information is communicated between parties by way of nonverbal communication.¹⁶⁸ It is important for a mediator to have skills to understand both verbal and nonverbal communications. In the Continuing Legal Education Society of British Columbia Family Law Mediation materials the following techniques are described: restating, paraphrasing, refocusing, reframing, confronting, and open questioning.¹⁶⁹ The mediator's use of these techniques helps the parties communicate

¹⁶⁷ *Ibid.*

¹⁶⁸ *Supra* note 86.

¹⁶⁹ *Supra* note 127.

clearly and to understand what is being communicated to them. It also helps the parties to communicate this understanding. The mediator's proficiency in using and implementing these techniques has a profound impact on mediation.

Restating is a technique where the idea a party has expressed is restated by the mediator using different words or even most of the same words a party has used. The purpose of restating is to quote the chief emphasis, give clarity, demonstrate mediator comprehension and obtain a moment's delay in the negotiation so each party may consider the content of the comments.¹⁷⁰

Paraphrasing is a technique where only the essence of what a party has said is repeated while maintaining the content and feeling of what was said. Paraphrasing differs from restating in that paraphrasing is used to maintain the “emotional content” of what has been said and to elicit a response to the emotional content.¹⁷¹ A more detailed explanation of the purpose of paraphrasing is to

1. Convey understanding about what the party has said;
2. Make the party aware that you are listening to what they are saying;
3. Possibly provide the party with an opportunity to clarify their meaning, if the content of the paraphrase was inaccurate;
4. Allow the mediator the opportunity to remove emotionally laden words or phrases from the original statement which may facilitate understanding by the other party; and
5. Provide the participants with another opportunity to hear the concept and process it.¹⁷²

Refocusing is the skill of keeping discussions on topic. People use disjunctive words, such as “but”, and then continue to focus on the disjunctive aspect of their thought. The disjunctive aspect typically creates a tangent for communication. The mediator uses refocusing to identify the disjunctive word and refocus the party on the topic being discussed.¹⁷³ In family law disputes parties will want to address historically emotional events which are highly important to them.

¹⁷⁰ *Ibid.*

¹⁷¹ *Supra* note 131 at 190.

¹⁷² *Supra* note 127 at 1.1 .27- 1.1.28.

¹⁷³ *Ibid* at 1.1 .28.

These historical emotional events are typically not the topic being mediated. It is the job of the mediator to refocus the parties “on relevant and constructive issues.”¹⁷⁴

Reframing is used by a mediator when an idea or emotion is expressed by a party in a way that is “negative, accusatory, or positional.”¹⁷⁵ The mediator changes the negative tone, accusatory statement, or positional comment to one that has positive connotations. The reframe allows the parties to move forward towards resolution as opposed to becoming engulfed in the quagmire of criticism and hurt feelings.¹⁷⁶ Another way of looking at the issue of reframing is identified by Boule and Nestic, where they say,

[F]raming is carried out proactively, reframing is a reactive mediator intervention. All parties communicate within a certain frame of reference, based on how they see the world in terms of their culture, experiences and sense of justice. The goal of reframing is to change this frame of reference in order to get the parties to think differently about things, or at least to get them to see things in a different light.¹⁷⁷

The reframing skill is an important one for the mediator to be able to use as it allows the mediator to impact the emotions associated with the communication. The emotions are impacted by the mediator because “the judgment placed on the event takes a different meaning or perspective”¹⁷⁸ after the reframing. John Livingood summarizes reframing, “at the heart of reframing verbal communications is the endeavour to get to the essential elements of the dispute and remove distractions, so that these elements may be understood and productively addressed.”¹⁷⁹ The mediators use of reframing has the potential to positively impact the mediation process and enable the parties to communicate more effectively.

Confronting is the skill of inquiring about inconsistencies or discrepancies in what a party has said. The purpose of this skill is to invite a party to see the weaknesses in their own position.

174 Mariane Roberts, *Mediation in Family Disputes: Principles and Practice*, 4th ed (Hampshire, UK: Ashgate, 2014) at 196 [*Mediation in Family Disputes*].

175 *Supra* note 127 at 1.1 .29.

176 *Ibid*.

177 At 151.

178 *Supra* note 84 at 390.

179 John Livingood, “Reframing and Its Uses”, (2002-2003) *Dispute Resolution Journal* 42 at 49.

When using this skill, it is important to be aware of how the parties perceive the mediator's neutrality. Confronting may be done through the use of open questions.¹⁸⁰ When confronting is used, it is important that it be done in a way that is neutral, non-judgmental and non-critical otherwise the listening party may “argue”¹⁸¹ with you. The use of “How” and “What” questions is one way to use the skill of confronting in a neutral, non-judgmental and non-critical way.

The mediator's effective use of the whole range of skills which compose active listening contribute to effective communication occurring between the parties.

4.2.2 QUESTIONING

Active listening is usually implemented through the use of questions. The effective active listener requires an understanding of questioning techniques. There are two main types of questions: open questions and closed questions. Closed questions are also referred to as leading questions. Closed questions are only able to be answered with a “yes” or a “no”. Closed questioning focuses on what the person asking the question determines is important. If a mediator were to primarily use closed questions, the mediator may be adversely influencing the course the mediation takes. The mediator may also lose the perception of being neutral in eyes of the party being questioned. Closed questions are best used with caution.

Open questions come in four varieties: probing questions, clarifying questions, justifying questions, and consequential questions. An open question is a question which requires the answering party to provide all of the context and emotion themselves. Open questions begin with: what, when, where, how, who and why.¹⁸² It is noted that “why” questions be used with caution as they are more likely perceived as criticizing or judging the person being asked the questions. A “why” question tends to challenge the person being asked the question to defend their feelings. The “why” question can often be replaced with another questioning word, such as “how”.

180 *Supra* note 127 at 1.1 .30.

181 *Supra* note 165 *Messages* at 21.

182 *Supra* note 127 at 1.1 .31.

Probing questions are used to obtain more information and further understanding for both the mediator and the parties. This type of question is used when a party has expressed an idea that is not complete. This type of question may also be used by the mediator to test an option that is being considered by the parties.¹⁸³

Clarifying questions are used to bring more precision to concepts or ideas that may be ambiguous. This type of question may also be used to “verify or correct the listener's understanding of the communication.”¹⁸⁴

Justifying questions are used when a party has expressed inconsistent or contradictory ideas. This type of questioning is used to put the inconsistent ideas or contradictory positions to a party and allow them to provide an explanation. The purpose of this type of questioning is to alleviate the ambiguity caused by the inconsistent ideas.¹⁸⁵ Justifying questions may also be used when there is “incongruence between what the speaker has said and his or her body language.”¹⁸⁶

Consequential questions are used to allow parties to explore potential outcomes and risks. This type of questioning ensures parties have explored all options and risks associated with a particular outcome. Consequential questioning may create a resolution that is more detailed and thoroughly thought out.¹⁸⁷ Consequential questions may be used as a form of “reality test.”¹⁸⁸

It is through the mediator's skillful use of the various types of questions “in an impartial way”¹⁸⁹ that mediators facilitate parties to communicate, explore and define what is being discussed with the goal being the resolution of the issues in dispute.

183 *Supra* note 86 at 156.

184 *Ibid* at 155

185 *Supra* note 127 at 1.1 .32.

186 Michelle LeBaron Duryea, *Conflict Analysis & Resolution as Education: Culturally Sensitive Processes for Conflict Resolution*, (Victoria, BC: University of Victoria Institute of Dispute Resolution, 1996) at 37.

187 *Supra* note 127 at 1.1 .32.

188 *Supra* note 186 at 37.

189 *Supra* note 143 *Nonverbal Communication in Mediation* at 174.

4.2.3 REALITY CHECKING

Reality checking or reality testing¹⁹⁰ is more commonly used in evaluative styles of mediation, although it may also be used in facilitative forms. Reality checking may be an aspect of early neutral evaluation, although typically early neutral evaluation is a separate dispute resolution process similar to mediation.^{190a} Reality checking encourages a party to consider unintended consequences or potential roadblocks when contemplating potential solutions.¹⁹¹ Reality checking is different from evaluation in that the mediator who is using reality checking is inviting the party to test and create their own alternate situations, while evaluation by a mediator happens when a mediator provides their own opinion as to the flaws, or likely consequences of a particular option. Reality checking is an important skill mediators employ to ensure potential solutions are meeting the needs and interests of the participants.¹⁹²

Reality testing is used to encourage a party to “reflect more systematically and practically on a position, behaviour or attitude, and to think beyond the present situation to future consequences.”¹⁹³ Judge 1 provided an example of reality testing taking place during Settlement Conferences. Judge 1 said, “I am asked or I say look if this went to trial and it was in front of me and this was the evidence I would likely do this”. The risk of reality testing at this extreme is that it “may be experienced as a pressure tactic”¹⁹⁴ by the party it is directed towards. In comparison, reality checking usually incorporates attempts by the mediator to get a party to understand the strengths and weaknesses of their position and the position of the other party by asking them specific questions the answers to which highlight aspects of their position that are strong and weak. The following questions may be used in reality checking:

1. What do you see as the strengths of your case?

190 C.f. *Supra* note 128 (The reality testing described relates to parties considering their Best Alternative To a Negotiated Agreement (BATNA) as compared to going through the litigation process. at 138-42).

190a *Supra* 84 (“There is also some inconsistency in the way terminology is used: parties in dispute jointly seeking a third party opinion to help them assess the merits of a claim or an aspect of it, an other forms of case evaluation, either of which may take place at any stage an note necessarily 'early', are sometimes also referred to as 'early neutral evaluation' or ENE” at 446).

191 *Supra* note 125 at 67.

192 *Supra* note 84 at 193, 193 and 401.

193 *Supra* note 131 at 149.

194 *Ibid* at 150.

2. What do you see as the weaknesses of your case?
3. What do you see as the strengths of the other's case?
4. What do you see as the weakness of the other's case?
5. What is your best case scenario if this matter goes to trial?
6. What is your worst case scenario if this matter goes to trial?
7. What is the most likely scenario if this matter goes to trial?¹⁹⁵

Reality checking, if used thoughtfully, may lead to parties being more willing to move from their position, as they realize, through their own discovery process, their position is able to be replaced with a solution which is more acceptable to the other party.

In summary, mediators ought to be skilled communicators, which includes having the following skills: 1) active listening; 2) awareness of the significance of non-verbal communication; 3) restating, paraphrasing, refocusing, reframing, and confronting; 4) questioning techniques; and 5) the thoughtful use of reality checking.

4.3 EMOTIONS

Emotions play a very significant role in mediation. Parties typically have a very complex emotional history. This complex history has the potential to negatively impact the mediation. The mediator ought to have many techniques available to him or her to manage his or her own emotions and the emotions of the parties. One aspect which significantly impacts emotion is culture. A mediator's awareness of the culture(s) of the parties may result in the difference between a successful mediation and a mediation that does not resolve any issues.

4.3.1 MEDIATORS BEING AWARE OF THE EMOTIONAL NEEDS/STATUS OF THE PARTIES

Mediation is a process that deals with people in varying states of emotional discomfort and/or distress. The state of emotional arousal of the parties impacts the mediation process.¹⁹⁶ I have

¹⁹⁵ Brad Spangler, "Reality Testing", online: Beyond Intractability. Conflict Information Consortium, University of Colorado, Boulder. <<http://www.beyondintractability.org/essay/reality-testing>> .

¹⁹⁶ See also Ellen Waldman, ed, *Mediation Ethics Cases and Commentaries*, (San Francisco , USA: Jossey-Bass,

been with clients that are so nervous about a mediation that they were not able to remember the specific important details they wanted to specifically address at the mediation. The mediator needs to be aware of the emotional level of the parties as the parties' emotional level may be better addressed through a particular style/type of mediation.¹⁹⁷

A mediator who is aware of rising tensions between the parties may use caucusing to attempt to diffuse the rising tensions.¹⁹⁸ The mediator may separate the parties or bring them together depending on how the mediator thinks the parties emotional situation will impact the mediation process.¹⁹⁹ Mediators use their judgment to best manage the emotional environment, as a party may benefit from being exposed to an emotional situation being exhibited by the other party. Through their use of judgment, mediators attempt to manage the emotional environment by attempting to predict which expressions of emotion are best experienced by other parties directly or by communication through the mediator. The technique a mediator uses to manage the expression of emotion by the parties is based on the mediator's level of comfort in a situation, their skill level, and their experience.

When parties are dealing with disputes it may be difficult for a mediator to determine what a particular party's emotional triggers²⁰⁰ are before that party has been stimulated or “triggered” into an emotional expression which negatively impacts the mediation. Once a party has been triggered and their emotional state starts to escalate, the mediator is faced with the challenge of helping that party deescalate while at the same time attempting to insulate the other party from also being triggered. When both parties are triggered, constructive, effective communication

2011). Chapter 3, Autonomy and the Emotions, the mediator's ethical responsibilities when working with disputants. A number of questions are suggested for the mediator to ask themselves about the impact of the situation on the disputants: “Does the disputant have the ability to understand the information being presented? Can she appreciate the significance of the information for her own life? Can she consider her option in light of her long-standing needs and interests?” at 56, “Do the level and intensity of emotion doom the process to failure? Might the disputant's emotionality place the other disputant at risk for emotional or verbal abuse?” at 59, The answers to these questions help the mediator to determine if the mediation could continue and if so how.

197 *Supra* note 86 at 52.

198 *Supra* note 131 (“In mediation high emotions should be controlled, but not forbidden.”).

199 *Ibid.*

200 *Shorter Oxford English Dictionary*, 6th ed, *sub verbo* “trigger” an event, occurrence, etc., that sets off a chain reaction. Thus, an emotional trigger is anything that initiates a reaction from a party that leads to the mediation stalling or breaking down.

does not occur. The sooner a mediator is able to identify that a party has been triggered, the sooner the mediator is able to manage the situation. The sooner the triggered party is managed, the less likely the mediation will be delayed, compromised, or terminated prematurely. How a mediator handles a situation where a party has been emotionally triggered is a “a major factor in the success of a dispute resolution initiative.”²⁰¹

Emotional escalation is not usually helpful during mediation, as the emotionally escalated party is less able to rationally process the issues being discussed. When emotional escalation results in an “escalating spiral or persistent avoidance,”²⁰² parties may be prevented from moving forward in the mediation.²⁰³ Symptoms of avoidance may include quick acceptance of a solution, little sharing of information, no plans made to implement a chosen solution, and people 'tuning out' of the interaction.²⁰⁴ Symptoms of escalation may include an issue taking much longer to deal with than anticipated, threats being used to win arguments, immediate polarization on issues or the emergence of coalitions, and heated disagreements seeming pointless or about trivial issues.²⁰⁵ There are techniques and skills a mediator may use to manage avoidance and emotional escalation in a party.

Boulle and Nesic identify five ways a mediator could deal with emotion: discourage the expression of intense emotion, ignore the emotion and proceed with mediation, acknowledge the emotion and then continue, encourage venting of the emotion, and identify and deal with the underlying problem therapeutically. The particular technique the mediator uses will depend on the mediator's experience, skill, and comfort in a situation.²⁰⁶

201 Christopher W. Moore, “Mediator Communication and Influence in Conflict Management Interventions” in Joseph P. Folger & Tricia S. Jones, eds, *New Directions in Mediation: Communication Research and Perspectives* (Thousand Oaks California: Sage Publications, 1994) 209 at 221.

202 Joseph P. Folger, Marshall Scott Poole & Randall K. Stuntman, *Working Through Conflict: Strategies for Relationships, Groups, and Organizations*, 7th ed. (San Francisco: Pearson, 2013) at 21 [Working Through Conflict].

203 *Ibid.*

204 *Ibid* at 22.

205 *Ibid.*

206 *Supra* note 86 at 63-65.

Boulle and Nesic describe the possible ways of dealing with emotion as follows:

- Discouraging intense emotion involves the mediator attempting to prevent the expression of the emotion once it starts. There may be a benefit to this technique in situations where time to mediate is short and the parties need to stay focused on the mediation. The disadvantage of this technique is the party expressing the emotion may become frustrated. The frustration of the discouraged party could lead to them withdraw or not be able to fully engage in the rest of the mediation;
- Ignoring the emotion involves the mediator using other tools, such as a white board, to focus the emotional party's attention on the dispute and distracting him or her from their emotional response. This technique usually focuses on ignoring negative emotions and using positive emotions to move the process forward. The advantages and disadvantages of this technique are similar to discouraging the emotion;
- Acknowledging the emotion involves the mediator explicitly identifying the emotion and its intensity. The mediator does not approve of the emotion, thus the party expressing the emotion may feel heard, but will not usually use the acknowledgement of the emotion by the mediator as an opportunity for further intense emotional outbursts. The advantage of this technique is that the emotional party may become less emotional after feeling they have been heard and therefore, able to refocus on the issues being mediated. The potential disadvantage is the emotional party may view the acknowledgement of the emotion by the mediator as a license to continue to be emotional, thus negatively impacting the mediation;
- Encouraging venting of the emotion involves the mediator inviting the emotional party to further explain how they are feeling. The potential advantage is the emotional party is provided with an opportunity to explain how they feel and the other party is exposed to why the emotional party is feeling the way they are. This may lead to the parties being able to focus or refocus on the mediation issue(s). The potential disadvantage is the time required for the emotional party to vent is not specific and may take longer than anticipated or lead to the mediation ending prematurely;
- Identifying the problem and dealing with it therapeutically involves a mediator who is also trained as a counsellor. This technique usually leads to an adjournment of the

mediation while the emotional party is referred to a professional counsellor. The benefit of this technique is the emotional party receives professional assistance with the issue(s) causing the intense emotion and once the issue(s) has been addressed are more likely to be able to effectively continue with the mediation process. The disadvantage to this technique is it can cause the mediation to span many sessions over a period of weeks or months.²⁰⁷

Triggering an uncontrolled emotional response may be detrimental to the mediation process, although it does not have to be. An uncontrolled emotional response is a form of expression which may show the significance of a particular topic to the other party. A mediator's awareness that strong emotion has been elicited may uncover underlying issues – where there is smoke, there is fire. The emotional mediation climate must remain conducive to resolving the dispute. As the emotional climate constantly changes, it falls upon the mediator to assist the parties in managing their emotions. A mediator's constant awareness and assessment of genuine emotional reactions assists the mediation process in proceeding towards resolution.

In addition to being aware of the parties' emotional situation during the mediation, mediators also need to be aware of the potential for parties to become emotionally unstable after the mediation has concluded. Emotional instability after mediation has the potential to lead to violence between parties, especially in the context of family law disputes. To deal with the potential of emotional instability after mediation and the possibility of violence occurring, it is common practice in private mediations for the mediator to keep one of the parties for an extra 5 or 10 minutes after the mediation has concluded. This extra time spent with one of the parties, usually the more aggressive or vocal party, allows the first party time to leave the vicinity of the mediation. By staggering the time the parties leave, the mediator has some limited control over the interactions between the parties after the mediation has concluded. The mediator is able to create a situation where there is less likelihood that there will be a conflict or confrontation between the parties immediately after the mediation.²⁰⁸

²⁰⁷ *Ibid* at 63-65.

²⁰⁸ See *Supra* note 131 (“In some circumstances mediators will have to supervise the departure of the parties from the mediation venue. This will be necessary where there has been high emotion and tension in the mediation

The emotional needs and/or status of the parties play a significant role in the mediation process. The mediator may use a pre-mediation session to attempt to identify a party's emotional triggers before the mediation session starts. When a party becomes emotionally triggered during a mediation, a mediator may use a variety of techniques to deescalate the party. The particular technique the mediator uses will impact how the mediation progresses. Effective mediators are able to use many different skills to address the emotional climate of the mediation.

4.4 CULTURAL AWARENESS

Mediators ought to be aware of how differences in culture, between the mediator and the parties or the parties themselves, impact the mediation. Something as seemingly simple as the type of questioning used may be appropriate in one culture and not appropriate in a different culture. There are many aspects of culture which impact mediation. Some of these aspects may be a requirement of a particular culture needing the presence of other parties such as elders, or the requirement that a religious figure approve any agreement. Without awareness of the nuances culture introduces into mediation, the mediator is disadvantaged at assisting the parties to reach resolution.²⁰⁹

An aspect of cultural awareness is nonverbal communication and how different cultures have different expectations associated with nonverbal communication. It is also important for mediators to be aware of nonverbal communication when there is no cultural difference between the mediator and the parties. Nonverbal communication is distinct between cultures. One culture may interpret a shoulder shrug as showing a lack of understanding, while a different culture may

session or where the mediation has taken place despite a past history of violence between the parties.” at 164); See also Mariane Roberts, *Mediation in Family Disputes: Principles and Practice*, 4th ed (Hampshire, UK: Ashgate, 2014) (“It is more likely that the atmosphere between the parties will be strained at best and hostile at worst. They need to be assured in advance that they will be meeting each other in a safe arena...” at 185).
209 See Stella Ting-Toomey & John G. Oetzel, *Managing Intercultural Conflict Effectively*, (Thousand Oaks, California: Sage Publications, 2001). See also *Supra* note 126, *The Art and Science of Mediation* (Discusses the impact traditional versus modern societies, high-context versus low-context societies, and individualistic versus collectivist societies may have on mediation. At 91-94); For a discussion on the cultural aspects of Aboriginal groups and conflict See Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts*, (Vancouver: UBC Press, 2004).

associate no meaning to a shoulder shrug.²¹⁰ Judge 2 thought that nonverbal communication was more important than verbal communication, “I think a lot of the necessary skills are not skills that are taught by reading books. They are an ability to understand what is not being said, to understand body language, to read between the lines, and to watch the dynamics... [We] have to have an ability to not just listen to what is being said, but listen to what is not being said and the body language.” Awareness of nonverbal communication may lead to clarification of verbal communication. Effective awareness of nonverbal communication by a mediator requires the mediator to be aware of culturally significant aspects of nonverbal communication.

Mediators, when addressing the emotional expressions of parties, need to consider 1) how emotion impacts a party's ability to participate in mediation; 2) how different ways of managing a party's emotional expression may impact the mediation; and 3) the significance culture has on the mediation process.

4.5 DOMESTIC VIOLENCE

The presence of domestic violence has the potential to significantly impact a mediation, both in process and resolution. In examining domestic violence in Australia and how it was considered by magistrates, Rosemary Hunter observed that “Magistrates' generally focus on incidents rather than patterns of abusive behaviour was clearly associated with a focus on physical violence,

210 Stella Ting-Toomey & Leeva C. Chung, *Understanding Intercultural Communication*, 2nd ed (Oxford: Oxford University Press, 2012) (“To be a flexible nonverbal communicator across cultures, be mindful of your own nonverbal behaviours and signals that you send, intentionally or not. Be cautious when you interpret unfamiliar gestures and nonverbal behaviours in a new culture. We present you with a set of nonverbal points to consider in communicating across cultures: -Be flexible when you observe and identify nonverbal display rules. Your observation and initial recreation may not match the rules across cultural groups. Flexibility allows you to be patient when you observe and match identities, status, distance, expectation, and appropriate nonverbal behaviours in various situations; -Go deeper: different meanings and expectations of nonverbal norms and rules are more than what one sees; there is typically a deeper-than-surface explanation. This may help you move toward an alternative explanation and a clearer picture. -Remember that **what** someone says is not as important as **how** it is said. It is important to be aware of one's actions when expressing feelings in words. Sometimes a person can portray a more serious and unfavourable tonal presence than the intended meaning. - As a flexible nonverbal communicator, express emotions and attitudes that correspond to your comfort level but, at the same time, be adaptive and sensitive to the appropriate nonverbal display rules in a particular situation and within a particular cultural community. - Because nonverbal behaviour is oftentimes so ambiguous and situation dependent, learn to be less judgmental and more tentative in interpreting others' unfamiliar nonverbal signals.” at 152-53.)

which was considered more serious and compelling than other forms of abuse.”^{210a} Violence is more than physical assault, violence includes the “exercise of power and control producing fear.”^{210b} Domestic violence is serious and needs to be evaluated before determining if a mediation will take place.

There are some who take the position that the existence of domestic violence is of such significance that mediation ought not occur between victim and abuser. The largest detrimental impact of domestic violence is typically on women who are the victims. Mediation in situations where there has been domestic violence “acts against women's interests; such mediation diminishes the importance of context, downplays the importance of rights, undermines the ability to hold a party accountable for his actions, and focuses on formal, rather than substantive, equality.”^{210c} The view of mediation being inappropriate in all situations where there has been domestic violence is not held by everyone.

In order to determine if mediation is appropriate in situations where there has been domestic violence a “detailed analysis of pattern and context is needed in order to distinguish dominant aggressor violence from the targeted person's resistance violence from minor-isolated-violence that has not caused lingering fear or harm.”^{210d} As mediators performing the analysis, we need “to know something of our inner terrains – how we work, what we tend to see, what we may miss for tending not to see it.”^{210e} By being mindful, a mediator is more likely to do a thorough analysis of domestic violence by being aware of their blind spots and prejudices. The mindful mediator is in a better situation to establish processes to mitigate the detrimental impact domestic violence has on a victim's decision-making ability.

Decision-making “involves rational and emotional processes centered in the body, so we cannot

210a Rosemary Hunter, “Narratives of Domestic Violence” (2006) 28 Sydney Law Review 733 at 756.

210b *Ibid* at 751.

210c Gopika Solanki & Geetanjali Gangoli, “Defining Domestic Violence and Women's Autonomy in Law” (2016) 12:1 Socio-Legal Review 51 at 78.

210d *Supra* note 119b at 540.

210e Michelle LeBaron & Mario Patera, “Reflective Practice in the New Millennium, (2010) 31 Hamline J. Pub. L. & Pol'y 405 at 423.

observe, think or respond clearly without our bodies and our feelings.”^{210f} Decision-making when there has been “[r]epetitive, severe or coercive domestic violence can have a profound effect on a person's ability to participate equitably in a settlement process.”^{210g} Linda Neilson notes that “even optimum settlement processes may not be able to restore fully the capacity to present arguments relating to self-interest after years of domination, coercion, and control.”^{210h} Given the complexity of determining the impact domestic violence has on a victim's decision-making ability when in the presence of their abuser or about situations involving their abuser, the final decision about a mediation starting or continuing ought to be made by the victim of the domestic violence.

In terms of the mediator choosing to mediate or not, the mediator must consider a central issue when domestic violence has been present. The central issue “is not simply whether or not domestic violence has ended but rather whether or not the harm from domestic violence in the past has been treated or otherwise overcome such that the targeted party is able, in the presence of JDR judge or mediator with support and procedural options, to participate fully and equitably in the process and in equitable outcome.”²¹⁰ⁱ Knowledge of domestic violence, domestic violence screening, and the impact domestic violence has on a targeted party, are all areas a mediator ought to be knowledgeable in.

4.6 CONTINUING EDUCATION

Continuing education is a method of remedying a deficiency identified through the best practice of self-awareness and professional growth. Self-awareness and professional growth are qualities which are journeys to be taken as opposed to states of accomplishment. To continue the journey of self-awareness and professional growth, a significant aspect along this journey is undertaking continuing education.

210f Nadja Alexander & Michelle LeBaron, “Dancing to the Rhythm of teh Role-Play, Applying Dance Intelligence to Conflict Resolution” (2012) 33 Hamline J. Pub. L. & Pol'y 327 at 351.

210g *Supra* note 119b at 540.

210h *Ibid.*

210i *Ibid.*

Effective Mediation states that “[m]ediation is actually structured negotiation.”²¹¹ Being a structured negotiation, mediation involves the application of a set of systematically acquired skills. To learn and develop the skills of mediation, continuing education ought to be utilized by mediators as “mediation skills and techniques can be learned, developed, assessed and improved.”²¹² It has been suggested that “[t]here is no correlation between effectiveness as a regulator, or litigator, or judge and the skills of mediation.”²¹³ As such, continuing education that specifically applies to the theory, skills, and process of mediation is important for all mediators no matter what their background.²¹⁴

Continuing education allows a mediator to be exposed to concepts and ideas that they may otherwise not be exposed to. Through these exposures the mediator may obtain new skills or techniques that could be used during mediations they conduct. Continuing education also allows the experiences and skills of the accomplished mediator to be disseminated with other mediators.²¹⁵

Through an exchange of ideas and experiences individuals within a profession grow. This growth leads to the profession as a whole maturing. As has been seen through the development of alternate dispute resolution over the last 40 years, it is through continued education by way of

211 At 1.

212 *Supra* note 86 at 2.

213 Matthew Taylor et al, “Using Mediation In Canadian Environmental Tribunals: Opportunities and Best Practices” (1999) 22 Dalhousie L. J. 51 at 73.

214 See Mieke Brandon & Tom Stodulka, “A Comparative Analysis of The Practice of Mediation and Conciliation In Family Dispute Resolution in Australia: How Practitioners Practice Across Both Processes” (2008) 8 Queensland U. Tech. L. & Just. J. 194 (“[R]apport building, active listening, empathy, reframing, summarizing, a range of questioning techniques, problem solving, and option generation, interest based negotiation, and agreement writing skills. Ideally practitioners must have knowledge of conflict and negotiation theories, relationship forming and breakdown, family violence, relevant legislative requirements, social science research in the area of child development, the effects of separation and persisting inter-parental conflict, attachment theory and 'parental attunement'. Their training, ideally, also includes such subjects as emotional intelligence, non-violent communication, and neuro-linguistic programming.” at 208).

215 Robert B. Davidson & Deborah Gage Haude, “The Key To Developing Strong Mediation Skills” (2005-2006) 12 Disp. Resol. Mag 13 (The authors suggest that shadowing of experienced mediators be an option to learning about mediation; “When you shadow, you get to watch an experienced practitioner's choices and actions in regard to a number of questions such as: How much focus and time should be spent on the parties' expressing feelings, telling their facts and identifying interests? How active should the mediator be in asking questions about positions and goals? When and how might the mediator get to the issue of money-- or generate or test possible solutions? What signs does the mediator look for to determine what the parties want or need that might effectuate a settlement? How does the client -lawyer dynamic affect the mediator's style and work?” at 14).

writing, reading, dissecting, and reconfiguring that mediation has grown, diversified, and entered new areas that were not even contemplated 20 years ago. One such area of alternate dispute resolution that has only recently, in the last 20 years, been recognized is judicial mediation. Mediation has gone from only occurring in the private sector to becoming commonplace as part of the court process, to taking place in the courtroom, and to occurring in appeal courts. It is through continuing education that mediation has grown and been refined. Only with ongoing continued education will a quality process be maintained and expanded.²¹⁶

In summary, the mediator who is able to create and perpetuate an emotionally²¹⁷ and physically safe environment will provide the parties with an optimal opportunity in which to reach resolution of their dispute. The mediator does this by being aware of the emotional needs/status of the parties, ensuring the mediation environment is emotionally and physically safe, using reality checking to ensure the parties have an understanding of what their solution is and any number of situations which may not work, using various listening skills to facilitate understanding, being aware of cultural differences and the impact of them on the mediation, ensuring only voluntary agreements are reached, using active listening to maximize the opportunities for the parties to reach their own agreement, and by being perceived as being neutral by the parties in dispute. All of these skills are refined, adjusted and shared with other practitioner's through continuing education.

216 *Supra* note 98, in the context of divorce mediations Fuller and Lyons state “Underlying the development of standards is the need for mediators and child custody evaluators to receive comprehensive training in domestic violence” at 915).

217 Nonviolent communication is a way to ensure that the mediation is emotionally safe. See Marshall Rosenberg, *Living Nonviolent Communication: Practical Tools to Connect and Communicate Skillfully in Every Situation* (Boulder, Colorado: Sounds True, 2012).

CHAPTER 5
COMPARISON AND CONTRAST BETWEEN THE BEST PRACTICES OF
MEDIATION AND THE CURRENT SITUATION IN JUDICIAL MEDIATION IN
BRITISH COLUMBIA

The prior chapter dealt with some best practices associated with mediation as established through literature. This chapter takes aspects of those best practices and compares and contrasts them to the rules of court.²¹⁸ The rules of court provide the boundaries of what a judge may do in a judicial mediation. As well, the rules of court establish which judges take part in judicial mediations.

5.1 MEDIATORS CHOOSING TO BE MEDIATORS

Rule 7-1 (2) of the Supreme Court Family Rules establishes that every family law case, unless it falls within one of the exceptions, must go through the Judicial Case Conference process. This results in there being many Judicial Case Conferences that need to be dealt with as part of judicial duties of the court. The Judicial Case Conference includes an expectation that the judge will mediate the issues between the parties.²¹⁹ The Settlement Conference is another venue where mediation is expected to be one of the techniques used to “explore all possibilities of settlement of the issues that are outstanding.”²²⁰ Judges who conduct Judicial Case Conferences and Judicial Settlement Conferences are expected to be as skilled at mediation as they are with adjudication.

An essential component of the mediation process is for the mediator to have the skills to implement the mediation process. The effective mediator is aware of and able to implement the various styles of mediation. The success of the mediation process, in terms of obtaining agreements between the parties, is largely dependant on how effective the mediator is. If the mediator had no effect on the parties, then mediation would be no more successful than the

218 The rules being Supreme Court Family Rules and the Provincial Court Family Rules.

219 *Supra* note 55 at Rule 7-1(15)(c).

220 *Ibid* at Rule 7-2(1).

parties negotiating on their own. Christopher Moore sets out the mediator's role as helping disputing parties to

(a) open or improve communications between or among them, (b) establish or build more respectful and productive working relationships, (c) better identify, understand, and consider each other's needs, interests, and concerns, (d) propose and implement more effective problem-solving or negotiation procedures, and (e) recognize or build mutually acceptable agreements.²²¹

By acknowledging their role as mediator, mediators successfully facilitate parties to reach their own resolutions.²²²

Judges do not inherently have the skills to fulfill the mediator role as the skills of mediation are possessed by mediators who are trained and practised in mediation. Historically, judges determine facts, apply the law, and render decisions. There is no aspect of the historical role of the judge which requires any aspect of the mediator's role to be used during the judging process. As such, judges are not typically aware of or familiar with all aspects of the mediator's role.

I wanted to know if judges in British Columbia had any input into what their work schedule looked like. The ability to influence the type of disputes they resolved could be a way to focus judicial mediations with those judges who want to engage in that type of work. The judges were asked whether or not they had any input into what their schedule included. Judge 2 said they had

221 *Supra* note 164 at 8-9.

222 See also Family Mediation Canada, *Practice, Certification, and Training Standards*, Waterloo: Family Mediation Canada, 2003 ("The following personal attributes or qualities are associated with successful family mediators: a) A non-directive, non-judgmental nature that respects individual autonomy; b) Personal warmth, an empathetic nature and a genuine liking of people; c) Ability to be firm and assertive when needed to control the mediation process, without the need to control the outcome for the participants; d) An ability to separate the professional from the personal while retaining professional warmth, empathy and objectivity and keeping personal feelings and experiences in abeyance; e) Self awareness, including an awareness of one's own interpersonal communication style, its effect on others, and one's own culture, values and biases; f) Flexibility, both cognitive and behavioural, a lack of rigidity, an ability to adapt readily to unexpected changes; g) Experience with the diversity of life and acceptance of differences; h) Interpersonal understanding and intelligence; i) An ability to remain calm, level-headed and caring in the face of hostility, adversity and tension; j) Well-developed lateral thinking and problem-solving skills and the ability to be clear, creative and imaginative; k) An inherent ability to demystify and simplify human problems; l) Common sense; m) Intuition and perception; n) Comfort with ambivalence, the tension of uncertainty and ambiguity; o) Patience; p) A sense of humour; q) A willingness to learn by asking and listening; r) A sense of humility; and s) A responsible, ethical and honest nature." at 24, 25).

no input in to their schedule. Judge 1 provided more detail and said,

No, no. About a year and a half or two years in advance, like in October [2012] we would have got our 2014 schedule. ... I would have known my 2013 schedule probably for a year and a half and so were assigned automatically to go to Kelowna for two weeks or Smithers or wherever and so whatever is on their agenda at the time that is what we do. The only exception, I guess if we were in Vancouver and our trial goes down or we had a spare day here or there they will try to slot us in....

From the answers provided, it was clear judges had minimal if any impact on the type of work they were assigned.

Given the lack of input judges have in the type of work they will be doing, I wanted to know also if they had any input into the number of judicial mediations they would take part in. Judge 2 was asked, "What sort of input do you have on how many judicial mediations you take part in?" His answer was brief, "none." Not only do judges not have input in the type of work they do, they also have no input in the amount of any particular type of work they do.

Not all judges are comfortable fulfilling the role of mediator, and some judges may not want to be a judicial mediator at all. It is important that judges have some say as to what type of work they perform. Judge 4 was asked, "Can you refuse to take part in mediations completely or in a particular mediation?" His response was, "I could just say no, somebody else needs to do it, either because I will be the trial Judge or the Judge hearing merits or I am charged with the Case Management of it or if I don't think I have the skills to deal with it. I have never had that happen before except when I am the Trial Judge I cannot do this." All of the Judges were asked, If they were able to refuse to take part in a mediation? Judge 1 responded,

No, not really. I mean the advantage of the job is the variety. Certainly if I go to [a particular town], whatever is on the agenda I have to do because I have been assigned there. The only exception would be conflicts or in a very rare occasion one of my female colleagues was doing a hearing on, an adjudication hearing on people protesting abortion and she got a couple of days into it and then said, "I don't feel comfortable carrying on", so another Judge was assigned. But basically, we really have no choice.

Judge 3 responded,

The only situation in which I would refuse to take part in a mediation would be one where I felt either because of my background in practice or an acquaintance with the parties I might decline to act on the basis that I had a conflict but that would be equally in any litigation matter as well. My view, of my role as a Judge, is I essentially do whatever I am asked to do by Trial Scheduling or the Chief Justice and our function is to be available to provide a service and one aspect of that service is through Judicial Case Conferences or other forms of mediation when they are available.

Judge 3 thought it would be useful if judges had some influence over their schedule, especially when they were acting as a judicial mediator:

I think it is fair to say that there are some Judges who see the role of the Judiciary as being adjudication of rights and who may not be particularly interested in mediation or particularly comfortable doing mediations and there may very well be some Judges who have made it known that they do not wish to do them. I have the sense, and it is no more than that, that in assigning Judicial Case Conferences, at least in the larger centres, the Trial Schedulers do so on the basis of assigning the work to those Judges who they think are either interested in doing the work or get the desired results.... I think to some degree [Trial Schedulers] will assign Judicial Case Conferences to Judges they know are interested in doing them. But it is only a sense that I have....

Judge 2 also addressed the issue of judges having input into if they will act as a judicial mediator, “We are aware that some are better at it than others. I think the Schedulers, they are the ones that know who is better than the others because they get the feedback from the lawyers.” There was no indication from this Judge if he or she had ever indicated to Supreme Court Schedulers if he or she had a preference for any particular type of work and if that request had been acted upon.²²³

The responses from the judges confirmed they had minimal input into what their schedule included. Trial Scheduling was the body that determined what the judge did on a particular day, whether that was to be in a trial, be in chambers, or to be conducting some form of judicial mediation. As one of the judges pointed out, conducting judicial mediations is part of the role of

²²³ It was outside the purview of this thesis to interview Supreme Court Schedulers. If a further examination of the aspects of Judicial Mediation were to be conducted, then all relevant parties should have an opportunity to provide input.

being a judge and by inference if you are asked or told to take part in a judicial mediation then that is what you will do.

As there were no judges from the Provincial Court of British Columbia who volunteered to take part in the research, there is no direct information about how they see their role in respect to being able to refuse to take part in judicial mediations. The judges of the Provincial Court have their schedule dictated by a scheduling body, and it is reasonable to conclude there is little if any difference between the two courts in relation to how work is assigned to judges.

Before judges are appointed, they have been lawyers for a lengthy period of time. In terms of the area of law that they practised, it is possible that many judges were not exposed to mediation as lawyers. Upon becoming judges, they are also becoming judicial mediators, whether they want to or not and whether they have skills to conduct successful judicial mediations or not. The judges of the Provincial Court of British Columbia and the Supreme Court of British Columbia do not have the choice to be or not be judicial mediators. It could be beneficial for parties and the court system if all judges took part in mandatory judicial mediation training.²²⁴

5.2 VOLUNTARY PROCESS

Mediation in the private sector takes place on a voluntary basis. All parties need to agree to take part in mediation. Further, the parties agree on who the mediator will be. In the private mediation setting, if there is no agreement on who the mediator will be, then the mediation does not take place.²²⁵ It is also common in the private mediation setting that the mediation is conducted on a without prejudice basis. This means that the mediator is not able to be called as a witness in court

224 Justice Warren Winkler, “Some Reflections on Judicial Mediation: Reality or Fantasy?” (“[t]here are judges who do not want to work in the mediation environment.... [N]ot all judges are well-suited for this additional role and should not be dropped, or forced, into such a specialized milieu.... [T]he expansion of judicial mediation will only be effective if the judges carrying out the mediations are willing and able to do so.”) (online: Court of Appeal for Ontario <http://www.ontariocourts.ca/coa/en/ps/speeches/reflections_judicial_mediation.htm>, accessed on December 30, 2014.

225 There are situations where parties are given the opportunity to agree on a mediator. If the parties are not able to agree on a mediator then a mediator is selected from a rotating list of mediator. Another way of mediator selection when parties do not agree is to have the option of 3 mediators, with each of the two parties selecting a mediator that they do not want to mediate. This results in there being 1 mediator left by the process of elimination, which mediator then conducts the mediation.

and the discussions that take place during the mediation are not allowed to be put before the court as evidence. These issues and other issues are dealt with in the mediation agreement signed by the mediator, the parties, their lawyers, and any other people present during the mediation.

Judicial mediations vary substantially from mediations in the private sector. A few of the significant differences are examined here. Firstly, in judicial mediations in British Columbia parties are not able to select their judicial mediator. Secondly, taking part in the judicial mediation process is mandatory.²²⁶ Thirdly, the judicial mediation may be recorded. Lastly, there is uncertainty whether the judicial mediator may also be the adjudicator at a subsequent hearing.

5.3 SELECTION OF WHO IS THE JUDICIAL MEDIATOR

In the private mediation setting, the parties agree who will mediate the issues. This allows the parties to select a mediator that they think will best be able to assist in the resolution of the outstanding issues.²²⁷ For instance, parties with a commercial construction dispute may want a mediator with experience in a particular aspect of construction. This mediator experience may lead the parties to have more trust in the mediator. Selecting such a mediator may reduce the cost of the mediation as the mediator would already have a base level of knowledge about disputes of this particular variety. It is preferable for parties to select the mediator. In the ideal situation, the parties will have confidence in the mediator and the mediator will have expertise about the context of the dispute.

In judicial mediation, judges are assigned their duties by Scheduling. There is no process provided for in the rule of court for parties to select a particular judge to act as a judicial mediator. A party or a party's lawyer may desire a particular judge to act as a judicial mediator because they think that judge would be the most suited to assist in the resolution of the outstanding issues. The inability to request a particular judge for a judicial mediation likely

226 See Jeffrey W. Stempel, "Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?" (1996) 11 Ohio St. J. On Disp. Resol. 297 (Stempel argues that the benefits of mandatory ADR outweigh the drawbacks. at 365-68.).

227 Justice Warren Winkler, "Access to Justice, Mediation: Panacea or Pariah?" (Speech, 2007), online: Court of Appeal for Ontario <<http://www.ontariocourts.ca/coa/en/ps/speeches/access.htm>>, accessed on December 30, 2014.

stems from a time before judges were required to conduct judicial mediations, as “judge shopping” has been a frowned upon practice in the adjudicative process. As the duties of being a judge have changed, there is a necessity to also change the rules to allow parties flexibility to select or indicate who they prefer to conduct the judicial mediation.

Parties ought to be able to have some input into which judge conducts a judicial mediations as the court process is supposed to be conducted in a timely and cost effective way. If a particular judge is successful at facilitating parties to reach their own agreement, then the outcome is beneficial for the parties and the judicial system. Choice of judicial mediator only has a beneficial impact on judicial mediations. Choice of judicial mediator is different from choosing an adjudicator because the judge in the adjudication context determines the outcome where the judicial mediator facilitates an outcome determined by the parties.

5.4 SELECTION OF THE JUDICIAL MEDIATION PROCESS

In the private sector, outside of the court process, disputing parties choose the dispute resolution process followed. If the parties agree, they may pursue arbitration, mediation, or some other form of voluntary dispute resolution process. As part of the voluntary aspect of choosing which of these methods to follow, both parties decide and agree which method will be used.

Rule 7 (1) of the Provincial Court of British Columbia allows a judge to order parties to attend judicial mediation. There is no input from the parties as to whether or not they want to take part in a Family Case Conference, as the court has the sole discretion to order that the parties take part. If a party fails to attend the ordered judicial mediation, Rule 7(5) allows the presiding judicial mediator to make orders on substantive issues in the absence of a party. The consequences for failing to attend a court ordered judicial mediation may be significant. Not only is it possible that the court could make a final order, is also possible that the court could make the order without any evidence – a rather extreme consequence for the parties and an extreme behaviour for the usually evidence-governed court.

Judicial mediations in the Supreme Court of British Columbia are dealt with differently than they

are in the Provincial Court. The Supreme Court Rules are structured to require attendance at a judicial mediation before the adjudicative process may take place. Parties are not able to file applications or affidavits until the requirement of attending the mandatory judicial mediation has been fulfilled. The parties are not provided the option to agree to waive the attendance at the Judicial Case Conference.

The consequence of non-attendance by a party at a Judicial Case Conference is much less severe as compared to what may occur if a party does not attend a Family Case Conference. The judicial mediator at the Judicial Case Conference is unable to make any orders respecting the substantive issues in dispute between the parties based on the non-attendance of one of the parties at the Judicial Case Conference. The judicial mediator *is* able to award costs against the party who did not attend the judicial mediation. The Attorney General of British Columbia has decided that every party, with a few exceptions, is to attend a judicial mediation in family law disputes.²²⁸

I wanted to know what judges thought about mandatory judicial mediation. The perspective of Judge 3 as to why Judicial Case Conferences are mandatory was, “the whole impetus for introducing Judicial Case Conferences in Family Law matters was because of the recognition that these cases make such a huge demand on the system and an adversarial approach is not always the best way to resolve them.” There was consensus among the interviewed judges that the benefit of having the mandatory Judicial Case Conference early on in the court process reduced the strain on the court system. It was not explicitly stated how the strain on the court system was reduced, although I assume the reduced strain was achieved by reducing the number of contentious issues requiring adjudication later on in the court process and/or reducing the time cases took before the court.²²⁹

Rule 7-2 of the Supreme Court Family Rules deals with Settlement Conferences. This rule sets

228 See e.g. Patricia Hughes, “Mandatory Mediation: Opportunity or Subversion” (2001) 19 Windsor Y. B. Aces Just. 161 (“There is nothing wrong with courts requiring parties to submit their dispute to rules and process designed to enhance efficient use of public resources; this is an inherent part of the courts' jurisdiction and of the litigation system. The problem arises when particular forms of dispute resolution are subverted as part of that process, since this risks diminishing, in the long run, the value of those processes.” at 202).

229 I was not able to find any empirical studies showing that mandatory judicial mediation reduced the strain on the court system.

out that the parties have to request the process take place or a judge may direct it to take place. In my experience, I have not seen or heard of the court forcing unwilling parties to take part in a Settlement Conference. This rule, unlike Rule 7-1 or Rule 7 in the Provincial Family Court Rules, does not address the situation where one of the parties does not attend the Settlement Conference. It is likely that the rules omit dealing with non-attendance with respect to Settlement Conferences as Settlement Conferences have to be specifically requested by both of the parties before they are scheduled. If parties are specifically requesting a process to take place, then it is highly likely they will attend the process when it is scheduled.

Mandatory judicial mediations have the potential to achieve all of the benefits that voluntary mediation offers; however, mandatory judicial mediations, especially those that are time-limited to 90 minutes or less, need to have a very clear process in place that the parties have been educated about before the process begins because the time is so limited. The judicial mediator also needs time to prepare in advance and become familiar with the dispute between the parties. Mandatory judicial mediations have the potential to achieve the system goals of reducing court backlogs, keeping people from regularly coming back to court with similar disputes, and to achieve the party goals of reaching a resolution to their dispute in a cost-effective and timely fashion.

5.5 RECORDING OF THE JUDICIAL MEDIATION

In private mediations it is commonplace, if not exclusively, the situation that mediations are done on a without prejudice basis. This results in a block on what is said and discussed in the mediation then being used in the court process or anywhere else. To ensure the parties' privacy is maintained, the parties typically agree in writing that all notes will be destroyed from the mediation, the mediation is done on a without prejudice basis, and many other clauses that are structured in such a way to ensure the process is not able to be used by one party for their advantage in litigation or elsewhere. The court process in British Columbia is not as detailed with respect to ensuring judicial mediations are conducted on a without prejudice basis as compared to private mediations. For private mediations to be audio-recorded, the parties would have to agree to the recording occurring.

The rules of court dealing with recording judicial mediations are different between the Supreme Court of British Columbia and the Provincial Court of British Columbia. In the Supreme Court of British Columbia, Rule 7-1 (19) and Rule 7-2 (2) say, “Proceedings at a judicial case conference must be recorded, but no part of that recording may be made available to or used by any person without court order.” The wording with respect to Settlement Conferences is the same, except “Judicial Case Conference” is replaced with “Settlement Conference”. In the Provincial Court of British Columbia, there is no rule that specifically states Family Case Conferences are to be recorded. It is my experience that Family Case Conferences do not take place in a typical court room and are usually conducted in a separate Family Case Conference room. The separate Family Case Conference room does not contain any recording equipment. There is no direction from the Provincial Family Court Rules in relation to audio recording Family Case Conferences.

There does not seem to be any rationale as to why judicial mediation proceedings in the Supreme Court are recorded while the judicial mediation proceedings in the Provincial Court are not recorded. In fact, it would seem to be more logical to record the proceedings in the Provincial Court as opposed to the Supreme Court proceedings because in the Provincial Court the judicial mediator is able to make interim and final orders according to Rule 7(4) (b), (l), and (n) of the Provincial Family Court Rules. Whatever the rationale behind recording or not recording the proceedings at a judicial mediation, I expect the rationale would apply equally to the Supreme Court as it does to the Provincial Court which would lead to the same or similar result regarding recording in both courts.

It is likely the reason proceedings are recorded in the Supreme Court of British Columbia is to allow some protection to the judicial mediator and/or to have a record of any agreements or consent orders made during the process. In interviewing the judges, there was indication that some judges are not comfortable or do not believe it is within the scope of adjudication for judges to conduct judicial mediations. By having the judicial mediations recorded, judges are afforded some protection from complaints made by parties and their lawyers that the process was

unfair or that they were forced or unduly influenced into an agreement. I assume that judges of the court likely feel there is greater potential for risk in judicial mediations involving lay litigants, as the parties likely have minimal if any knowledge of the judicial mediation process and how it differs from a court hearing. By having the judicial mediation process recorded, there is a degree of protection for the judicial mediator and the parties.

The main argument against recording the judicial mediation is that having a record of what is said may inhibit what the parties are willing to say and discuss. As long as there is a recording, that recording can always be listened to, even if there are restrictions on accessing it. The recording raises issues about confidentiality. The question that begs asking is why is the judicial mediation recorded? I have supposed some reasons above, yet it would be helpful for the rules of court to specify the answer to this question. If the purpose of the recording is to document any orders or agreements made, or to protect the parties and/or the judicial mediator from allegations of undue influence or actual undue influence, then these situations could easily be enumerated in the Rules of Court.

An uncertainty as to the rationale for recording judicial mediations is provided by the case of *Shuker Czerwinski v. Czerwinski*.²³⁰ In this case, a party was attempting to obtain a transcript of the recording from the Judicial Case Conference. The applicant had brought an application before the court to have a copy of the transcript from the Judicial Case Conference produced as they wanted to establish at trial that the other party made an inconsistent statement at the Judicial Case Conference as compared to their examination for discovery. The court identified the risk of making such an order,

At stake is the integrity of the protocol involving JCCs which has as one of its cornerstones, the notion that there is confidentiality for the parties with respect to everything that is said. The reason for that is well known to the Court and to the bar - to ensure a free-flow of exchange between the litigants themselves so that they can speak with impunity about the topics that are relevant to the issues at stake and without fear of having it brought up at a later time.²³¹

230 2014 BCSC 432.

231 *Ibid* at para 3.

The court went on to say at paragraph 6, “the subsequent use of or reference to an inconsistency said by one of the parties at the JCC is precisely the kind of thing which is intended to be avoided by the confidentiality rule.” The court denied the application to produce a copy of the transcript but did not set out any factors to be followed for subsequent applications when a transcript is requested from a recording of a Judicial Case Conference. The court did not make reference to other decisions which established factors to consider when a transcript from a Judicial Case Conference or a Settlement Conference is being requested.

In both the Provincial Court of British Columbia and the Supreme Court of British Columbia judicial mediators are able to make orders on issues that are procedural in nature. This means that the court is able to make orders with respect to the time-line for filing documents, setting further judicial mediations, or referring the matter to other aspects of the court administration to schedule trial dates or other hearings. In the Provincial Court of British Columbia there is no requirement for judicial mediation to be audio-recorded. Typically, the court clerk will take notes regarding who is in attendance and what orders are made. It is unclear why there is such a substantial difference between the Supreme Court of British Columbia and the Provincial Court of British Columbia in recording or not recording judicial mediations.

5.6 CONFIDENTIAL PROCESS

It is a fundamental tenet of private mediation that discussions occurring at the mediation are confidential and conducted on a without prejudice basis. When examining the rules governing judicial mediations in the Provincial Court of British Columbia and the Supreme Court of British Columbia, it is not explicitly stated that the judicial mediation is conducted on a without prejudice or confidential basis. Due to the fact that the judicial mediations are not explicitly conducted on a without prejudice basis, it leaves the parties and their lawyers with an uncertainty as to how open and free flowing the discussion should be. If the discussions at a judicial mediation are to be conducted on a without prejudice basis, then the without prejudice aspect should be codified within the rules.

Upon a closer reading of the Supreme Court Family Rules, in particular Rule 7-1(17), the

conversations and discussions taking place at a Judicial Case Conferences cannot be intended to be conducted on a without prejudice or confidential basis, as the judge or master may seize themselves of all future applications. This aspect of Rule 7-1 is in contradiction to Rule 7-2(3), which says that a judge who presided at a Settlement Conference must not preside at a trial, unless the parties agree that they may hear the trial. The rules ought to be consistent and clear about which aspect of judicial mediation are confidential and without prejudice and which are not.

In the Provincial Court of British Columbia, judicial mediations are governed by Rule 7. Rule 7 is similar to Rule 7-1 of the Supreme Court Family Rules. The rule does not explicitly say the Family Case Conference is a confidential discussion conducted on a without prejudice basis. This lack of clarity creates uncertainty in the minds of the parties and their lawyers as to how much should be said. The concern being that something said during the judicial mediation, not being said under oath, could be brought up and used at a later time or at a subsequent hearing or trial. A further concern is that the judicial mediator may be an adjudicator between the same parties at a later date. The information obtained from the judicial mediator during the judicial mediation may colour how they perceive and interpret evidence at a hearing. Such a situation is prejudicial and ought to be avoided by clearly codifying the concepts of confidentiality and without prejudice communications in the rules.

The issue of confidentiality at a Judicial Case Conference was addressed by the court in the case of *N.B. v. S. B.*²³² The court said that what takes place in a Judicial Case Conference is confidential,

Both parties described in their affidavits the reasons behind consenting to these orders. Such evidence was unnecessary as the order speaks for itself. In order to protect the integrity of the judicial case conference process and, in particular, the confidential nature of that process, I have not considered any of that evidence. In fact, I would entertain an application to strike portions of the affidavits addressing such matters. However, no such application is being made at this

232 2010 BCSC 1487.

time.²³³

The court delineated between the confidential discussions taking place during the Judicial Case Conference and the consent order made. The consent order was all that was important and the only aspect the court was going to enforce. Any order or agreement from a judicial mediation is prejudicial to the parties and enforceable.

The importance of confidentiality to the success of the Judicial Case Conference is discussed in the case of *N.L.W. and K. W. v. T. M. W. and R. W.*,²³⁴

I pause to observe, at this point, that I am told that a case conference in the Provincial Court is the same as a judicial case conference in this Court. I note that in this Court, at the Conference the judge informs the parties that they should be open and frank while discussing the issues, and that nothing that they say can be used against them in subsequent proceedings. They are also told by the Conference Judge that he or she will not be the Trial Judge, and for the same reason, that is to say that nothing that the Conference Judge is told or that he concludes or opines can be used against the parties in the subsequent proceedings. In my opinion all of this advice is fundamental to the success of the Conference, and the Conference Judge simply cannot be the Trial Judge period.²³⁵

The judge in *N.L.W. and K. W. v. T. M. W. and R. W.* expresses their opinion that the judicial mediator at a Judicial Case Conference should not be the trial judge. He does not go so far as to say that the judicial mediator should not be an adjudicator at a subsequent hearing. There is no discussion addressing the difference between a judicial mediator being an adjudicator at trial or a judicial mediator being an adjudicator at a hearing which is not a trial. If there is any difference between these two situations, the difference is minimal and not significant enough to create a situation where a judicial mediator could be the adjudicator at any subsequent hearing.

Confidentiality in judicial mediations is of such importance that what is talked about during judicial mediations can not be given as evidence in an affidavit and the judicial mediator who

233 *Ibid* at para 17.

234 2006 BCSC 905.

235 *Ibid* at para 19.

was privy to the confidential discussions is excluded from being the trial judge. The confidentiality and without prejudice aspects of judicial mediation must be preserved. The best way to preserve these aspects is to codify in the rule that the judicial mediator must not be an adjudicator at any subsequent step in the court process.

5.7 JUDICIAL MEDIATOR NOW ADJUDICATOR

One of the benefits of the mediation process is the free flow of discussion knowing that the discussions are done on a without prejudice basis. The free flow of discussion is created, in part, by the confidentiality of the judicial meditation process. The free flow of discussion permits an exploration of all possible areas of settlement. If parties feel they can speak freely and what they say will not be used against them later on, then they are more likely to engage in the mediation process. The more committed to the mediation process and the more emotionally safe the participants feel, the more likely they are to reach a consensual resolution to some or all of the outstanding issues. To protect the without prejudice nature of mediation, in the private sector, it is explicitly stated in the agreement to mediate. It is typically also stated in the agreement that the mediator will not be called as a witness in any court proceeding. There are situations in which a mediator may later become the adjudicator, but these situations are expressly agreed to by the parties before the mediation process begins. The parties may also agree at some other time that the mediator may adjudicate their situation, although the fundamental aspect is the parties agree for this to occur.

The idea in private mediation that the mediator will not be a decision-maker at some later step is reflected only in the Supreme Court of British Columbia Rule 7-1 dealing with Settlement Conferences. The concept of the judicial mediator not being allowed to act as a decision-maker later on in the court process is established by Rule 7-2 (3) which says, “A judge who has presided at a settlement conference must not preside at the trial, unless all parties consent.”²³⁶ This procedural safeguard does not exist for Judicial Case Conferences or Family Case Conferences, although *N.L.W. and K. W. v. T. M. W. and R. W.* may be used to prevent a judicial mediator of Family Case Conferences from being the trial judge in the same matter. Judges being

²³⁶ *Supra* note 55.

placed in the role of judicial mediator while still being an adjudicator creates a number of ethical challenges for them. This thesis does not examine these ethical challenges as such an examination could be a thesis in its own right.

The safeguard in Rule 7-2 is not provided for in Judicial Case Conferences. In the Supreme Court of British Columbia Rule 7-1(17) says, “At a judicial case conference, or at any other time, a judge or master may order that all applications in the family law case be heard by that judge or master.”²³⁷ The concept of confidentiality and without prejudice communications at a Judicial Case Conference clearly do not apply as between the parties and the judicial mediator. Judge 3 gave an example of when he used this rule, “I have had the experience of going to a JCC and it becoming apparent that there is a very significant access issue that needed to be dealt with right away and then taking jurisdiction and dealing with it.” It is unclear why this rule exists and how it may exist when it conflicts with confidentiality and without prejudice communications during judicial mediations. Urgent issues such as described by Judge 3, could easily be heard by another judge. This would preserve the without prejudice nature of the judicial mediation.

Judicial mediators who make decisions about substantive aspects of the dispute at interim hearings or trial negatively impact the judicial mediation process. Parties are led to believe the judicial mediation is conducted on a without prejudice/confidential basis (especially given the comments made by the court in *N.L.W. and K. W. v. T. M. W. and R. W.*) and then they are prejudiced by what was said when the judge seizes himself of the adjudication process going forward. I had an experience where I represented a client at a judicial mediation and a number of issues were discussed. The judicial mediator began the process by saying the proceeding was being done on a without prejudice basis. The judicial mediator was then the adjudicator at a subsequent interim hearing. At the hearing, the adjudicator made reference to discussions and disclosures that had taken place during the judicial mediation. The referenced discussions were not part of the evidence before the court. The client was upset about the violation of the without prejudice aspect of the judicial mediation. The client said they felt deceived by what was said by the judicial mediator at the judicial mediation. It is possible for the judicial system to be viewed

²³⁷ *Ibid.*

negatively by members of the public who enter a judicial mediation process with the expectation that the process is confidential, have that expectation reinforced by the judicial mediator, and then later in the litigation process find out that their expectation of confidentiality was transgressed by the institution. Transgressions such as this ought to be avoided at all costs as they bring the administration of justice into question.

The judges were asked about the importance of confidentiality in the judicial mediation process. Judge 4 was asked, “How important it is that a judge participating in a judicial mediation not take part in any subsequent hearing between parties unless the parties agree?” Judge 4 said it was “very important.” I asked why he thought it was very important and he said, “Because you are made aware of information that is confidential, you may be made aware of information that is privileged, you may be made aware of evidence that is not admissible at all and it can taint your, potentially taint your objectivity.” Judge 1, when asked the same question, said

Well, I think that is fairly fundamental only in the sense that if the settlement is unsuccessful then the parties, unfortunately, go back to their original positions.... I have just ordered a Settlement Conference [in a matter] and I have said to them I won't necessarily be the Trial Judge but if I am I would like it on the basis of – or you tell me whether you are prepared to allow me to do the trial if the thing does not get settled.

Judge 3 was asked the same questions and said “it is the essential.” I asked him why that was and he said,

Well, I think -- and even if the parties agree it may not be a good idea, it depends on what you have heard in the mediation. If you have formed the opinion that one side or party is completely unreasonable and you are then asked to go back and make a rights-based determination, I don't think that your thinking can help but be coloured by what you have seen and heard in the mediation process.

Judge 2 responded by saying, “It's really important.” I asked why that was, and he said, “Because we are only human beings. I think it is very hard at times. I think if you think you can disabuse your mind of certain things you are fooling yourself. You even have an impression already whether you like a certain person or not.” All of the responses clearly identify that judicial mediators ought not take part in any subsequent adjudication when they have acted as a judicial

mediator.

The judges' answers mostly focused on the Settlement Conference under Rule 7-2, but the same issues (confidentiality, privilege, disabusing one's mind of information) addressed by the judges in Settlement Conferences also arise in the context of Judicial Case Conferences. These same concerns were considered by the court in *N.L.W. and K. W. v. T. M. W. and R. W.* when describing how the judicial mediator in a Family Case Conference was subsequently the trial judge of the same matter:

It is common grounds that during the case conference, the Conference Judge, who later became the Trial Judge, (I will refer to His Honour as the "Conference Judge" while dealing with the events which occurred at the conference) expressed his firm opinion that the Respondents should have custody of the Child, and advised them how they should go about obtaining custody, including waiting for material change in circumstances, pressed the Appellants as to how long the child had resided with them, and chastised them for their "attitude" that they should continue to have custody of the Child, until he was of age, as opposed to his biological Parents. This is clear from the transcript.... The Appellants brought on an application before the Trial Judge to recuse himself on the grounds that his comments at the Case Conference gave rise to a reasonable apprehension of bias. The trial judge declined to recuse himself and the trial continued.

The appellate court set aside the trial judge's decision as a reasonable apprehension of bias was found. The appellate court's decision seemed to rely heavily on there being a transcript from the family case conference which was used to establish the potential of bias.

There are many potential pitfalls for a judicial mediator subsequently becoming an adjudicator on the same matter. It is not clear why the Rules of Court permit a judicial mediator to be an adjudicator on the same matter. The administration of justice could be brought into disrepute by a judicial mediator subsequently acting as an adjudicator. A party who feels as though a judicial mediator who has mediated at a Family Case Conference or a Judicial Case Conference and should not be an adjudicator on the same matter ought not to be put in the position of having to request the adjudicator to recuse himself. The obligation ought to be on the adjudicator to seek

the agreement of the parties to adjudicate the matter. If the adjudicator refuses to recuse himself and makes a decision, then either party has to appeal the decision to change it. The appeal would need to establish a reasonable apprehension of bias on the part of the adjudicator. This process does not make the court process more cost-effective or resolve issues more quickly. The best solution is to not allow judicial mediators to be adjudicators on the same matters.

5.8 CONTINUING EDUCATION

Continuing education is mandated by the Law Society of British Columbia for all lawyers to undertake a minimum of 12 hours each year with a minimum of two of those hours being devoted to ethics.²³⁸ To be classified as a Family Law Mediator in British Columbia further mediation-specific education needs to be obtained.²³⁹ It was alluded to during the interviews with the judges that they too had some requirements to undertake continuing education. The judges were not specifically asked what their requirement for continuing education was, and perhaps in subsequent research this question could be asked. What all the judges did say was that they had not had any formal mediation training.

Judicial mediation, in the family law context, was brought in as requirement that the parties undertake. The early resolution of issues benefits parties and the court system. Early resolution of issues results in fewer issues requiring adjudication and decreasing animosity between the

238 Law Society of British Columbia, *Report of the Lawyer Education Advisory Committee: Continuing Professional Development Review and Recommendations*, Vancouver: Law Society of British Columbia, 2011, online: Law Society of British Columbia <http://www.lawsociety.bc.ca/docs/publications/reports/LawyerEd-CPD_2011.pdf>.

239 A minimum of 80 hours of approved mediation skills training and a minimum of 14 hours of approved training in screening for family violence. Law Society of British Columbia, *Qualifications for Lawyers Acting as Arbitrators, Mediators, and/or Parenting Coordinators in Family Law Matters*, Vancouver: Law Society of British Columbia, 2012 at 31, online: Law Society of British Columbia <http://www.lawsociety.bc.ca/docs/publications/reports/FamilyLawTF_2012.pdf>; To be eligible to be on the Family Roster of Mediate BC an applicant must have: at least 80 hours of core education in conflict resolution and mediation theory and skills training; at least 14 hours of family violence training; at least 21 hours focusing on issues related to family dynamics in separation and divorce; a university or college degree or diploma in law, social sciences or related field; completion of a minimum of 80 hours of mediation work over the course of a minimum of 10 family mediations over the past 5 years, as sole mediator, co-mediator, or as co-participant in an accepted practicum or mentoring program. Mediate BC, *Mediation BC Society Summary of Qualifications for Admission: Family Roster*, Vancouver: Mediate BC, 2014, online: Mediate BC <<http://www.mediatebc.com/PDFs/1-26-Family-Roster-Admission/Summary-of-Qualifications---Family-2014-01-08.aspx>>.

parties. If the purpose of early judicial mediations is to reduce the judicial case load and to some extent the backlog in the court system, then judicial mediators ought to be as proficient and effective as possible. To be skilled at a process requires more than trial by fire. Being skilled requires a belief in the process and that the process will be successful. Being skilled also requires judicial mediators to be self-motivated to become versed and practised with the theory and techniques associated with successful mediators. Formal continuing education could provide all judicial mediators with a common basis to build from to become excellent judicial mediators.

In summary, judges ought to be able to choose if they are going to conduct judicial mediations. Forcing judges who do not believe in judicial mediation or do not have the skills to be a judicial mediator to conduct judicial mediations is inefficient and costly. Parties ought to be able to select who the judicial mediator of their dispute will be. The audio recording of judicial mediations provides protection for the judicial mediators and parties. Audio recording ought to be consistently done in all judicial mediations and the situations in which access to the recordings must be codified in the rules of court. To ensure confidentiality of the judicial mediation process, the rules of court ought to be standardized and clarified. If the rules of court are going to permit judicial mediators to be adjudicators in the same matter at a later date, then the parties must agree to this occurring. A better situation would be to not allow judicial mediators to adjudicate matters in which they were the judicial mediator. Finally, by providing standardized mandatory continuing education for all judges who want to be judicial mediators, the judicial mediation process will become more efficient and successful and can even grow and contribute to the evolution of mediation in general.

CHAPTER 6

BENEFITS OF JUDICIAL MEDIATION AS COMPARED TO PRIVATE MEDIATION: JUDGES PERSPECTIVES

There is debate about mandating parties to attend mediation in the context of the litigation process as mediation has historically been a voluntary consensual process. There is disjuncture in forcing parties to attend a mediation when one of the basic tenets of mediation is the parties choosing to participate in the process. Judicial mediation is different from private mediation as judicial mediation provides the mediator with the ability to make orders on issues when the parties do not agree, in the event there is no resolution on the substantive issues in dispute, and it is part of the court process.²⁴⁰

Judicial mediation is mandatory in almost all family law disputes in British Columbia. This section examines the judges' thoughts about the benefits mandatory judicial mediation has as compared to voluntary private mediation. The judges indicated many benefits associated with judicial mediations: affordability for the parties, authority of the court,²⁴¹ perspective of the court about possible outcomes, and the ability to impact the course of the litigation with respect to matters that were not resolved at the judicial mediation.

The judges were all asked what qualities judges offered to the mediation process that private mediators did not offer. The quotes from the transcripts of the recorded interviews of the judges are as follows:

1) Judge 1

240 In the family law context in British Columbia at both the Judicial Case Conference and the Family Case Conference, judges are able to make procedural orders relating such things as document disclosure and timing of subsequent court processes.

241 See also *supra* note 104 (“[P]articipants seem to value telling their story and being listened to by an authority figure.” at 198).

Well cost, we work for free and I guess in particular areas we will have greater experience, I mean there's people who have done a great deal of Family Law or a great deal of Commercial Law, whereas with private mediators they're all terrific but at the same time they may not have the breadth. The other thing I guess we can offer would be this – it's often the case when I have been doing it I ask, I am asked or I say look if this went to trial and it was in front of me and this was the evidence I would likely do this, and that is often handy so that [the lawyers] get the roadblock of sometimes difficult clients, you know, sometimes you can see the lawyer sort of going and say “I told you so.”

2) Judge 2

I think just the status of their position.... I think the average layperson believes that a Judge would have a better idea of how a case would be decided than let us say someone who is not a judge.

3) Judge 3

I think what judges offer or the advantage that judges have may be the authority of the office and by that I mean if in a Judicial Case Conference, for example, very often the parties want some indication of what the Court might do or what the Court has to say about the risks that each party faces and I think that that tends to carry a significant amount of weight. I know yesterday I did a JCC and the parties were a long way apart but what they were arguing about from the cost benefit point of view did not make a whole lot of sense, it made no sense to take the case to trial. And I think hearing that from a Judge, hearing a Judge say you have to think not only of the financial cost but also the emotional cost and they are higher in this kind of litigation than they are in anything else, you should take that into account. Based on what you have told me I think that X has some trouble with their case because of A, B, and C and [Y] has some difficulties because of this and I think you should go away and spend 15 minutes taking instructions from your respective clients and seeing whether the matter can be resolved. They came back, a settlement proposal was presented and it was accepted immediately and the whole thing was done. Which is not to say that highly experienced mediators may not command a similar kind of authority based upon their reputations and experience but I think it is the dual role you are there as an adjudicator, you have some understanding of how the system works and what the advantages and disadvantages of rights based adjudication are and I think that judges bring their office to the table with them and it does make a difference.

4) Judge 4

My views on it have changed from practice to now. I think as judges what I see,

particularly in the family context, is the weight of authority, the respect for the office and likely in Commercial cases and perhaps a Tort case, certain types of Tort cases, less respect for the weight of the office to cajole a result and more respect for the opinion that comes from the judge. So if you have got experienced, seasoned parties who are used to litigation and they want the judge's opinion then the value is the respect for the weight of the office and that judge.

The judges all identified the authority of the office of judge as having a significant impact on the mediation process. The authority was perceived as arising from knowledge obtained through the course of adjudicating many different types of disputes and being aware of the financial and emotional impact a trial has on parties.

In addition to what judges offer to the mediation process, I wanted to understand what judges thought the benefits of judicial mediation were for the parties. The judges all identified the main benefit of judicial mediation being associated with the cost of the process as the financial cost to be before a judicial mediator is much less than the financial cost of hiring a private mediator.

In addition to the financial benefit of judicial mediation, the judges also identified the ability of the judicial mediator to make procedural orders as benefiting the parties. Judges 3 and 4 elaborated on this point:

1) Judge 3

I think the benefits are, first of all, they are conducted in the presence of an Officer of the Court who can provide the parties with a very realistic assessment of what will happen if they are unable to resolve the matter. In those cases where matters can't be resolved you also have the opportunity to use the JCC in order to ensure that any issues relating to disclosure are resolved and that when the case does go ahead, it goes ahead efficiently and expeditiously. So timelines can be set.

2) Judge 4

Well I have discussed the weight of the authority of the office. Our ability to – if it is at a JCC and they don't settle, I can say all right, here is what I am going to do then. You haven't been able to agree on anything but I don't have the right to

make substantive orders without consent, but I have the right to make procedural orders, so this is what I am going to do. You are going to give your documents by this time, you are going to do that, you are both going to attend Parenting After Separation courses, you are going to do all these things and you still want me to do that because that is where I am driven to and sometimes, wait a minute here and let's talk again. So the JCC, the benefit of the judicial mediation process is I have the authority to order them to do things where a practising lawyer couldn't do that, they could warn them. So in a family context it is very valuable.

The judges were aware of the gravitas the office of judge had on the judicial mediation.²⁴² They indicated their ability to evaluate the issues in dispute was respected by the parties and their lawyers when the parties requested such evaluation.

In terms of the litigation process, the judges wanted judicial mediation to continue to be mandatory in family law cases. Judges 1 and 3 were both of the view that early mandatory judicial mediation was beneficial as it reduced posturing and provided an educational function to the parties:

1) Judge 1

Yes. Well it's usually in the economic interest and [that the] emotional issue[s] get settled without the rigours of litigation, so to the extent that's of assistance it's to their benefit and it also, sometimes it is to early to settle, they still have to get over the emotional tugging. But to the extent that early settlement, early intervention is of assistance it gets rid of, sometimes it gets rid of the posturing. ... So I think the quicker and less confrontational [the dispute] is [the better]. Sometimes Judges or Masters are an inhibitor to yelling and screaming and unpleasantries, you are sort of in a Court setting.

2) Judge 3

I think they are necessary in the sense that they have an educational function in terms of assisting the parties to understand what lies ahead if they have to litigate. That there is an opportunity at the outset to identify issues and perhaps resolve some of them. To reinforce the message that even if everything can't be resolved at this stage it is still possible for the parties to continue to negotiate and

²⁴² See also Report of the Ontario Bar Association Judicial Mediation Taskforce, *A Different 'Day in Court': The Role of the Judiciary in Facilitating Settlements*, Toronto: OBA, 2013online: Ontario Bar Association <<http://www.oba.org/News-Media/News/2013/July-2013/A-Different-%E2%80%98Day-in-Court-The-Role-of-the-Judiciar>>.

to arrange for further JCC if they wish at a later stage in the proceedings.

The judges identified a benefit of early mandatory judicial mediation being a reduction in win-lose outcomes for the parties. The judges thought the win-lose aspect of the litigation process resulted in parents being less likely to communicate effectively. The reduction in effective communication between parents typically has a negative impact on their children. The reduction of win-lose outcomes by parents working together to reach agreement had a beneficial outcome for children. Judge 1 explained this benefit of early mandatory judicial mediation,

In Family Matters we do them automatically before the affidavits start to fly so I describe the affidavit processes as this, I am representing the wife and I say the worst possible things about your client, you are representing the husband and you say the worst possible things about my client and then the fight starts, as opposed to trying to get them fairly early before the affidavits fly. So that is always a benefit and we have moved in the last 10 or 15 years away from litigation and Court procedures dealing with Family Matters as best we can because the children tend to get lost in the litigation and the bitterness is there and when you are just suing for money, there is no personal animosity. If I am suing you, I don't know you and it is just money. But if we are divorcing then all hell breaks loose.

Judge 2 indicated that early mandatory judicial mediation reduced the number of win-lose court hearings,

The purpose of the Judicial Case Conference was to try to resolve as many issues as we can before the first application starts. And, unfortunately, the more applications you have there is only a winner and a loser in every application, so the more applications you have the more polarized the parties become and the more hatred they have for one another. So it is, my view is what you try to do is diffuse the bad attributes of an adversarial system and attempt to get them to cooperate more than becoming adversaries.

Situations where relationships were going to continue between the parties such as family law situations involving children, and employment situations where people continue to work together, are disputes which benefit especially by early judicial mediation. The judicial mediation provides the parties with an early experience of the court process and information of what lies

ahead if the dispute continues in the court process. Early judicial mediation provides parties with an opportunity to limit further damaging their relationship and potentially an opportunity to start to repair it.

The court system is usually perceived as being slow at resolving disputes. Part of the slowness is related to there being more matters than the current number of judges are able to deal with. The judges all thought the mandatory Judicial Case Conference process lessened the number of issues judges had to adjudicate. They thought the Judicial Case Conference process should continue to be mandatory, although they did not comment on whether or not Judicial Settlement Conferences should be mandatory. The judges commented as follows:

1) Judge 1

Well, I guess only from this angle, we only have so much time. Probably, I think the statistics are still the same that something like 96 percent of the actions started settle before trial but all hell would break loose and the delays would be incredible if only 90 percent settled. So the more we can settle the better ... By way of judicial economy to settle things early is of assistance to the Court because it [allows us] more time and quicker time to deal with matters which do require attention.

2) Judge 2

I think they are necessary in the sense that I think they have done a number of things, more importantly they have done away with these humongous files we used to get where they would go to court continually and before a different Judge and get nowhere.

3) Judge 3

In Family Law matters they certainly have been until this stage because they are an early opportunity to have the parties think about resolving matters other than through litigation. I say up until this stage because it may be that, depending on how the the new *Family Law Act* pans out, that we are going to become the resolution system of last resort in many cases and by the time parties get to us they will have been through mediation and perhaps other forms of dispute resolution. So some of that winnowing and narrowing down what needs to be litigated presumably will take place before the Judge sees the parties in many cases. As I understand it, the whole impetus for introducing Judicial Case

Conferences in Family Law matters was because of the recognition that these cases make such a huge demand on the system and an adversarial approach is not always the best way to resolve them.

4) Judge 4

They are helpful to it but not necessary. They are helpful because we can reduce backlogs, we can reduce expense for parties, free up judges to hear cases that simply can't settle.

There are benefits for parties to attend judicial mediation. The judges preferred parties to reach their own resolution as opposed to having a judge dictate it to them. Judge 2 commented about the benefit to parties in reaching their own resolution, "it is always better to reach a settlement or an agreement whether it is through a settlement conference or mediation rather than me telling you how it is going to be done because generally no one is happy [with what the court imposes]." In addition to the benefit of parties reaching their own resolution through the judicial mediation process, the judges indicated the judicial mediation process was rewarding for them when there was resolution. Judge 2 commented on the rewarding aspect of judicial mediation, "I really enjoy doing [judicial mediations] I get a lot of satisfaction out of doing it rather than the win/lose model, which is what my job normally entails." There is benefit for the parties and the judicial mediator when resolution is achieved through the judicial mediation process.

The judges indicated there was great benefit to the judicial system when the longer form of judicial mediation, Judicial Settlement Conferences, was used by the parties. The judges indicated resolution was typically achieved on all or most of the issues at Judicial Settlement Conferences. The Settlement Conference typically takes either half a day or a whole day to conduct. Judge 3 indicated these conferences save the court system many days of trial time, "I would like to be able to use Judicial Settlement Conferences more than we are able to do at the moment but it is an issue about workload and very often there simply are not Judges available to conduct Settlement Conferences, even though one sees cases were a couple of hours of judicial time at a Settlement Conference might very well successfully resolve the matter that would otherwise take two or three days of trial time." There is a significant potential benefit to the court system by allocating more judicial time to Settlement Conferences.

From my perspective, well conducted judicial mediations do benefit the court process. The Judicial Case Conference provides parties with an initial experience of court by being at the courthouse and in a courtroom before a judge who is focused on them. This initial experience in a situation where the party still has control over the substantive outcome removes one of greatest causes of stress in attending court, the stress of not knowing how the court is going to resolve the dispute. The Judicial Case Conference also gives parties who are dealing with an unreasonable person or are unreasonable themselves an indication of how future court appearances may be, as the judicial mediator describes possible results if the unreasonable party does not provide required information.

In situations where the judicial mediation is not well conducted by the judicial mediator, I have had clients tell me that going through the process was furthering the mental and emotional abuse they had experienced during their relationship with the other party. Other clients have indicated they thought and felt the Judicial Case Conference process was an utter waste of time and money. From my perspective, the single most determining factor which impacts how a client thinks and feels about a judicial mediation is the judicial mediator. Judicial mediators have particular styles, as a lawyer preparing for a judicial mediation knowing who the judicial mediator will be impacts greatly the type and extent of preparation I do and what I say to my client as to what they may expect to accomplish at the Judicial Case Conference. Well conducted judicial mediations have a great potential to resolve not only the legal issues between parties but also have a potential to transform how parties interact and communicate going forward.

The self-represented participants are at a disadvantage compared to parties represented by lawyers. My experience in dealing with self-represented participants in judicial mediations is that they do not have a good understanding of the process, are typically unprepared for the judicial mediation in terms of being able to discuss interests or being able to support their position, want the judicial mediator to “make the decision”, or are unwilling to agree to anything. These difficulties associated with self-represented participants at judicial mediations do not apply in all situations. Judicial mediations with self-represented participants tend to focus on procedural

aspects such as what documents need to be provided and by when, as opposed to focusing on more significant issues in dispute.

Judicial mediations have benefits, from the perspective of the interviewed judges, to private mediations. These benefits are 1) There is no cost to the parties for the judicial mediator's time, no matter how long the judicial mediation takes; 2) The evaluations of judicial mediators as to the possible outcome at a trial is supported by the authority of their office;²⁴³ 3) If the judicial mediation does not resolve the dispute, then the judicial mediator is able to make procedural orders which could expedite the litigation process; and 4) Early mandatory judicial mediations have the potential to reduce animosity between parties which is beneficial if the parties will have a continuing relationship.

243 See e.g. *supra* note 70 (“Judges should seek to obtain, if they have not already, a sense of ‘presence’ or ‘gravita’. By this, we mean a judge should be a centred, integrated, congruent person, being connected to his or her governing values and beliefs and highest purpose. ‘Mindfulness’ can describe this quality. We may define ‘mindfulness’ as ‘living in harmony with one’s self and the world’. Such a judge brings the ‘Hawthorne Effect’ settlement conference. The judge’s presence by itself impacts favourably on the settlement process, regardless of input by the judge.” at 296).

CHAPTER 7 CONCLUSION

[C]ontinuing commitment to innovation in court-based ADR is a necessity if court programming is to meet the needs of 21st-century disputants.... The real challenge of innovation is not its justification, but its practice. The heart of real and effective innovation is changing or modifying values, requiring us to look closely and deeply at our core beliefs and assumptions about disputing; often, it requires tearing them up and rethinking them in the face of yet another unique challenge for conflict.²⁴⁴

Dr. Julie Macfarlane

Professor McFarlane observed “the widespread introduction of judicial case management and judicial mediation, which are often pushed for by judges themselves are never effective without their support.”²⁴⁵ It follows that for the process of judicial mediation to improve there has to be buy-in from those conducting the judicial mediations. In addition to buy-in from judges to improve the judicial mediation process, a willingness on the part of government to provide judges with the time and resources to be more effective judicial mediators is essential.²⁴⁶ In addition to more resources, the rules of court ought to be modified to 1) ensure consistency in the judicial mediation process; 2) protect parties and judges from having subsequent adjudications heard by a judge who acted as a judicial mediator on their matter; 3) provide a process for parties to have input as to who their judicial mediator will be in non-mandatory judicial mediation; and 4) to permit judges to self-select in or out as a judicial mediator.

244 Julie Macfarlane, “ADR and the Courts: Renewing our Commitment to Innovation” (2011-2012) 95 Marq. L. Rev. 927 at 939.

245 Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming The Practice of Law* (Vancouver: UBC Press, 2008), at 224.

246 Yishai Boyarin, “Court-Connected ADR-- A Time of Crisis, A Time of Change” (2011-2012) 95 Marq. L. Rev. 933 (“Courts have a responsibility to ensure that the parties they server get the right kind of intervention and of the highest quality.” at 1039).

Judicial mediation has become an integral aspect of the family law litigation process in British Columbia. Judicial mediation is going to continue as an aspect of the litigation process. Judicial mediation benefits parties as follows: 1) it is less costly than private mediation; 2) it provides parties an opportunity to reach a resolution they have crafted; 3) it allows parties the opportunity to have the judicial mediator evaluate their issues; and 4) it is currently constructed to expedite the litigation process by allowing the judicial mediator to make procedural orders. In addition to the benefits judicial mediation has for parties, the court system also receives the benefit of having matters resolved more quickly while using fewer judicial resources. With these significant benefits to parties and to the court system, judicial mediation will continue to be an integral aspect of family law litigation in British Columbia.

Mandatory judicial mediations occur in both the Provincial Court and Supreme Court of British Columbia. The benefits of mandatory judicial mediations may be improved with changes to how the process is conducted. As with the mandatory judicial meditations, voluntary judicial mediations are an integral part of the process in the Supreme Court. It is imperative for judicial mediations to be consistently conducted to a high standard as poorly conducted judicial mediations “can negatively affect citizen perception of and satisfaction with the judicial system.”²⁴⁷ Well-conducted judicial mediations have the possibility to bolster the public's perception of the judicial system and foster resolutions that are tailor crafted for each dispute. In addition, the process of judicial mediation ought to be predicable and standardized across the province.

To be an outsider attempting to help parties resolve their own dispute is a very challenging task. Being a mediator is difficult. People in dispute bring a whole range of interests and positions to mediation. Many mediation styles have been developed to address how a mediation ought to be conducted and what the outcome of mediation should be. The styles discussed here were facilitative, evaluative, transformative, therapeutic, and interest-based mediation. There are skills which allow mediators to effectively assist parties. The skills discussed were mediators wanting

²⁴⁷ Nancy L. Hollet et al, “The Assessment of Mediation Outcome: The Development and Validation of an Evaluative Technique” (2002) 23 Just. Sys. J. 345 at 349.

to fulfill the role of mediator, being able to measure success on a variety of levels, creating an environment conducive to conflict resolution, managing their own emotions and those of the parties, and effectively communicating. Along with these skills the importance of what impact a mediator has on the parties, the concepts of neutrality and impartiality, the role of culture, and a continuing commitment to be informed of changes in mediation theory were examined as being aspects all mediators ought to have. Judges in British Columbia have had the role of mediator thrust on them. The judicial mediation process has improved the court system for parties and has positive effects on the system itself. Mediation has evolved over time and judicial mediation must also evolve to continue having the most positive impact for parties and the court system.

CHAPTER 8 RECOMMENDATIONS

Given the many benefits of judicial mediation, the fact that it has been mandated for the majority of family law cases in British Columbia, and there being areas where the process of judicial mediation could be improved, I make recommendations to address these areas where improvement is possible. My recommendations address Judge Burke's thought that, "if the court was going to strongly encourage litigants to mediate, then mediation should be available at no cost, and sitting judges should make their singular accountability and strengths as *mediators* available for that purpose."²⁴⁸

Recommendations:

1. Mandatory judicial mediations would be conducted by specialized members of the judiciary. These members of the judiciary would only perform mandatory judicial mediations;
2. In non-mandatory judicial mediations, the parties would select which judicial mediator or judge they want to be their judicial mediator;
3. Scheduling of judicial mediations and provision of mediation outlines/briefs to judicial mediators would be done with adequate notice to the judicial mediator;
4. A court form, mediation brief, would be created relating to mandatory judicial mediations. The requirement of parties to file the form should be within a reasonable period of time prior to the date of the judicial mediation. The court form should be basic and no more than one page;
5. There should be a requirement that judicial mediators who conduct mandatory judicial mediations have some formal standardized training in mediation and undertake continuing education in the area of mediation;²⁴⁹
6. Mandatory judicial mediations should be conducted, if necessary, via video-conference in

²⁴⁸ Peter Robinson, "Addition Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial" (2006) J. Disp. Resol. 335 at 349 [emphasis added].

²⁴⁹ Stephen B. Goldberg, Margaret L. Shaw, and Jeanne M. Brett "What Difference Does A Robe Make? Comparing Mediators with and Without Prior Judicial Experience" (July 2009) Negotiation Journal 277, at 301 ("the absences of process skills dealing with interpersonal relationships was viewed as sufficiently harmful to the mediation process to explain the lack of success of some former judges").

- smaller court registries where there is no resident judicial mediator; and
7. A system should be established so participants are able to provide anonymous feedback regarding the judicial mediator process.

8.1 SPECIALIZED JUDICIAL MEDIATORS

The judges indicated more resources are needed to effectively deal with the disputes being brought to them. Judge 2 indicated the recent reduction in the availability of Settlement Conferences was due to

cut back[s] on the Judges' sitting time by a week by giving us a reading week because we are just overwhelmed by the amount of work. ... We never have the full complement of Judges and then we found that the Trial Management Conferences, Case Planning Conferences and all these mandatory conferences that the new rules have put in place have taken away from judicial resources.

The judges felt pressure to accomplish more in less time. The suggestion was that Settlement Conferences were one of the first services to be reduced, so the other process could be completed. The other processes being Trial Management Conference, and Case Planning Conferences.

One suggestion raised by the judges to address the lack of judicial time to conduct Settlement Conferences was to have a full complement of judges by appointing more judges. This is a possible solution, but as governments seem to always be attempting to limit expenses it may not be realized any time soon.

Another potential way to address the perceived lack of judicial resources is to maximize the impact of the current judicial resources. I suggest a way to maximize judicial resources is to have particular judges specially trained as judicial mediators. The purpose of having members of the judiciary who specialize in mandatory judicial mediation would be to address the following issues: experience at mediations,²⁵⁰ workload of the judicial mediator, skills of the judicial

250 Daniel Bowling and David Hoffman, "Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation" (2000) 16:1 Negotiation Journal 5 (Bowling and Hoffman argue that mediators go through three stages of development: (1) "as beginning mediators, we studied technique"; (2)

mediator,²⁵¹ flexibility within the schedule of the judicial mediator to accommodate longer mediations and short notice mediations, maintaining the authority of the office, eliminating the possibility the judicial mediator could be an adjudicator of the same matter in the future, and maximizing the effectiveness of judicial mediations which could result in a reduction in the number of cases proceeding to adjudicative hearings and trials.²⁵²

The specialized judicial mediator may be a dedicated position within the judiciary. The appointment could be for a specific duration or be a permanent position.²⁵³ By allowing the judicial mediator the opportunity to dedicate a portion of their career to judicial mediation and then move back to the role of adjudicator, this would allow those members of the judiciary who are interested in judicial mediation the opportunity to gain experience in the area. When a judicial mediator moves back into the role of adjudicator, parties would still be able to select that particular judicial mediator, now adjudicator, to perform non-mandatory judicial mediations. The judges who are interested in being judicial mediators would identify themselves and/or apply to fill this specialized position. Justice Warren Winkler highlights that not every judge would serve as a mediator, “though mediation and adjudication are entirely compatible functions, mediation

“working toward a deeper understanding of how and why mediation works”; and (3) how the mediator’s “personal qualities – for better or worse – influence the mediation process.” at 7; Bowling and Hoffman conclude “that the personal qualities of the mediator can be influential in shaping [the mediation] process and its outcome.” The personal qualities of self-awareness, presence, authenticity, congruence, and integration are developed over “time, intention and discipline, and comes, in our view, not from intellectual inquiry or scholarship but from experience.” at 24).

251 Ansley Barton, Susan Raines & Timothy Hedeem, “Improving Mediation Training and Regulation Through Collaborative Assessment” (2007-2008) 14 Disp. Reol. Mag. 47 (“In order for court systems to ensure high-quality mediation services, attention to the training and preparation of mediators must be central.” at 47). Accord *supra* note 227 (Mediation is not a cure-all. But many cases that would otherwise drag on interminably at considerable cost and anxiety to the parties can be resolved through the efforts of skilled mediators.” at 7).

252 *Contra* Jeffrey W. Stempel, “Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?” (1996) 11 Ohio St. J. On Disp. Resol. 297 (In examining the role of the judge in judicial ADR, Stempel suggests that it is frightening to think of a judge who is totally passive in judicial ADR and gives the analogy of a judge who is an umpire in baseball and only calls “balls and strikes”, but also says that a judge who only does judicial ADR and conducts no trials or hearings as “similarly frightening.” at 359- 61).

253 The establishment of such a position would be a move away from the idea that judges are to deal with whatever comes before them. Mediation moves beyond what judges and lawyers are comfortable with, rights based outcomes. Boyarin argues that lawyers and judges entrenchment in the status quo of conflict resolution “is hindering the needed changes from taking place” to better incorporate mediation into the court system. Yishai Boyarin, “Court-Connected ADR-- A Time of Crisis, A Time of Change” (2011-2012) 95 Marq. L. Rev. 933 at 1039.

is not and should not be prescribed for every judge.”²⁵⁴

The specialized judicial mediator who performs mandatory mediations would only perform judicial mediations. This would provide flexibility within the judicial mediator's schedule, as the judicial mediator would not also have to deal with adjudicative functions while filling the role of judicial mediator of mandatory judicial mediations. The judicial mediator of mandatory judicial mediations would deal with all mandatory judicial mediations in all aspects of the law.

Before conducting mandatory judicial mediations, the specialized judicial mediator would be required to have attained some level of formal training in mediation. The formal training would address the issues of best practices in mediation and deal with questioning techniques, the impact of culture, and other factors. The formal training requirement would be determined through policy, mediation theory, mediation process, and in consultation with experts in the field. Judicial mediators who become judicial mediators of mandatory mediations would have an understanding and familiarity with the theory and best practices of mediation. With this understanding, it is likely the resolution rate associated with mandatory judicial mediations would increase and participant satisfaction would also rise.

Scheduling of judicial mediations could be performed by the local court registry or through a centralized system. Mandatory judicial mediations would be set for a minimum of 90 minutes and there could be flexibility built in to the schedule to allow for longer mandatory judicial mediations if the parties request as in the case the mediation shows progress or promise. By having a minimum time that reasonably permits some issues to be addressed and explored, there is a greater likelihood of resolution. The more flexible the mandatory judicial mediation process is, the more likely the parties are to resolve aspects of their dispute. By reducing, early in the litigation process, the number of cases requiring subsequent adjudication, the courts will become more efficient at providing cost-effective and timely resolution of issues.

The judicial mediator would apply to be a judicial mediator of mandatory mediation. They would

²⁵⁴ *Supra* note 224 at 5.

be a member of the judiciary. By being a member of the judiciary, they would be able to make procedural orders without the consent of the parties but could only make substantive orders with the consent of the parties. Judicial mediators of mandatory judicial mediations would be able to make procedural orders that the parties do not agree to. As the judicial mediator of mandatory judicial mediations would have specialized training in mediation, the likelihood of variation in the conduct of the judicial mediations would decrease and situations like those addressed in *N.L.W. and K.W. v. T.M.W. and R.W.*, and *N.B. v. S.B.* would be eliminated.

The judicial mediator of mandatory judicial mediations would not perform any adjudicative functions while they were filling their mandate as judicial mediator of mandatory judicial mediations. This would eliminate any possibility of them adjudicating a matter in which they were also the judicial mediator. The specialized judicial mediator would have many positive impacts on the court system and the parties.

8.2 PARTIES BEING ABLE TO SELECT THEIR JUDICIAL MEDIATOR IN NON-MANDATORY JUDICIAL MEDIATIONS

One of the goals of judicial mediation is to resolve disputes in a timely, cost-effective, and emotionally aware manner.²⁵⁵ By allowing parties to choose who they wish to be their judicial mediator in non-mandatory judicial mediations, it allows the parties to select a judicial mediator who they think will best be able to resolve the dispute. If the parties voluntarily select their judicial mediator, they are more likely to have confidence that the selected judicial mediator will be able to assist them in resolving the dispute.²⁵⁶ The confidence parties have in the selected judicial mediator increases the likelihood of the judicial mediator successfully facilitating a resolution.²⁵⁷ By increasing the number of resolutions through non-mandatory judicial mediation,

255 *Supra* note 55 (“The object of these Supreme Court Family Rules is to

(a) help parties resolve the legal issues in a family law case fairly and in a way that will

(i) take into account the impact that the conduct of the family law case may have on a child, and

(ii) minimize conflict and promote cooperation between the parties, and

(b) secure the just, speedy and inexpensive determination of every family law case on its merits.” at Rule 1-3(1)).

256 Chris Guthrie and James Levin, “A ‘Party Satisfaction’ Perspective on a Comprehensive Mediation Statute”

(1997-1998) 13 Ohio St. J. On Disp. Resol. 885 (“Parties are more likely to be satisfied with mediation if it gives them process control.... [W]e recommend a ‘party choice’ mediator selection provision.” at 902).

257 Stephen B. Goldberg, Margaret L. Shaw, and Jeanne M. Brett “What Difference Does A Robe Make?

Comparing Mediators with and Without Prior Judicial Experience” (July 2009) *Negotiation Journal* 277,

the number of matters being adjudicated is reduced.

Selection of judicial mediator by the parties has occurred in other jurisdictions. In describing the situation of judicial mediation in San Luis Obispo County after Judge Burke became the supervising judge there, Judge Burke said “Litigants can ... ask any one of the judges to serve as the mediator.”²⁵⁸ In 1999 Judge Burke mediated 91 of the 93 cases that went to judicial mediation. The other judges became trained as mediators which led to Judge Burke being chosen to mediate a smaller and smaller percentage of cases in subsequent years as litigants were requesting other Judges to mediate.²⁵⁹ In Alberta, litigants are also able to request who the judicial mediator will be.²⁶⁰ Justice Rooke's research showed 87% of the lawyers surveyed thought choosing the judicial mediator was helpful in resolving the dispute.²⁶¹ The parties selecting who their judicial mediator will be has been implemented successfully in other jurisdictions.

As with private mediations, where the mediator is selected by the participants, the parties in judicial mediations, when given the opportunity, are also likely to want to select their judicial mediator. By having the choice in selecting who the judicial mediator will be, the “[p]arties are more likely to be satisfied with the mediation.”²⁶² Satisfaction with the mediation, even if there is no resolution of any of the issues in dispute, does promote parties confidence in the justice system.

Speaking of the results from two studies which attempted to determine what attributes former judges were bringing to mediations as compared to non-judges, the authors determined that the parties confidence in the mediator was the most cited reasons by the respondents as to why the mediation was successful, and “it appears equally important to the success of both former judges and nonjudges that they gain the confidence of the parties.” at 288.

258 Peter Robinson, “Addition Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial” (2006) J. Disp. Resol. 335 at 348.

259 *Ibid* at 350, n 93.

260 *Supra* note 6 at 57.

261 *Ibid* at 98.

262 Chris Guthrie and James Levin, “A 'Party Satisfaction' Perspective on a Comprehensive Mediation Statute” (1997-1998) 13 Ohio St. J. On Disp. Resol. 885 (“We believe that mediators should be required to notify parties in advance ... so that they can contact the mediator prior to the first session to clarify procedural questions that may arise.” at 902 n 53. This conversation would also allow the “mediator to disclose detailed information regarding the mediation process and the mediator's view of the roles and responsibilities of the parties and the mediator.” at 901)).

8.3 JUDICIAL MEDIATORS SHOULD KNOW WHAT THEY ARE MEDIATING BEFORE THEY START²⁶³

To increase the likelihood of settlement at mandatory judicial mediations and to effectively use the limited time assigned for judicial mediations, it is important for the judicial mediator to know what they will be mediating and to have more than a basic understanding of what the parties' issues or even interests are from the pleadings. Currently, in British Columbia, judicial mediators' only source of information in mandatory mediations comes from a review of the pleadings in the court file, if they have adequate time to obtain the court file and review it before the mediation takes place.

One aspect that all of the judges commented on was how beneficial it is to have each party provide an outline as to what they see the issues being and what their interests are. The judges did not want any argument in the outline. The judges also indicated that the mediation brief/outline should be short.

To create predictability and alleviate possible stress of unrepresented parties in completing a mediation brief/outline, a court form could be used to standardize how information is provided to the judicial mediator of mandatory judicial mediations.²⁶⁴ I recommend the court form ask questions that focus on parties' interests and be forward looking. To keep the form manageable, the answers could be contained within a particular space or to a particular length.

I suggest that the court form be mandatory for all parties. The completion of the form would be

263 ABA Section of Dispute Resolution, *Task Force on Improving Mediation Quality, Final Report*, (2006-2008), online: American Bar Association <http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/finaltaskforcemediation.pdf>, accessed on December 2, 2014 at 3 (The report found that four issues were important to mediation quality: 1. Preparation for mediation by the mediator, parties and counsel; 2. Case-by-case customization of the mediation process; 3. “Analytical” assistance from the mediator; and 4. “Persistence” by the mediator.) at 6 (“All but one of the parties interviewed by phone heavily endorsed both significant mediation and party/counsel preparation. The one party who claimed he had not prepared for mediation indicated that he wished he had.”).

264 See also *supra* note 69 (“1. The purpose of mediation; 3. Role of the parties and/or attorneys in mediation; 4. Role of the mediator.” at 3.2(b)). Heather Scheiwe Kulp, “Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice” (2012-2013) 14 *Cardozo J. Conflict Resol.* 361 (“Education about mediation prior to appearing for the court call may improve settlement, as people are more likely to know what to expect.” at 377).

applicable for mandatory judicial mediation and could serve as a basis for a more detailed mediation brief at non-mandatory judicial mediations. Unrepresented parties could be directed to Legal Aid to assist them in completing the form, or be provided with an instruction sheet on how to complete the court form.

The use of such a court form would provide the judicial mediator with a recent indication from the parties as to what the outstanding issues are and what each party sees as their interests. The judicial mediator would have a much more complete picture of the dispute than they currently do.

8.4 JUDICIAL MEDIATOR EDUCATION

The judges identified two reasons mandatory judicial mediations have been implemented in British Columbia: 1) to encourage early settlement/resolution of issues; and 2) to reduce the animosity created from parties being exposed to the win/lose adjudications. To increase the frequency of achieving these two goals, I recommend judicial mediators have a developed understanding of mediation and the process of mediation.²⁶⁵ In addition to having a developed understanding of mediation, judicial mediators would be required to pursue a portion of their continuing education in the area of mediation.²⁶⁶

Continuing education is an important factor for all mediators, including judicial mediators.²⁶⁷ I recommend judicial mediators undertake continuing mediator education, at a level to be determined by policymakers, each and every year. Continuing education would provide judicial

265 See generally Harry T. Edwards, “Alternative Dispute Resolution: Panacea or Anathema?” (1985-1996) 99 Harv. L. Rev. 668 (“Many judges simply lack the mediation skills necessary for the successful resolution of cases through compromise.” at 670).

266 See also Michaela Keet and Brent Cotter, “Settlement Conferences and Judicial Role: The Scaffolding for Expanded thinking about Judicial Ethics” (2012) 91 Canadian Bar Review 365 (The authors identify the need for there to be a discussion surrounding judicial ethics of settlement conferencing, due to “i) the growth of judicial settlement conferencing, ii) the variation in form across the country and even among judges in the same courts, and iii) the importance of judicial mediation proceeding in ways that offer benefits to litigants while preserving the public’s confidence in judges for impartiality, independence and fairness, represent a call for judicial action.” at 392-3).

267 See also *supra* note 102 (“Mediation practice will be improved by mediators understanding the influences on their conduct in mediation that arise, for example, from their families of origin, their values, cultures, identities, professions.” at 230).

mediators with exposure to the current best practices of mediation/judicial mediation and would allow judicial mediators to share their experiences in a collegial format.²⁶⁸ Continuing education in the area of mediation is just as important for judicial mediators as is continuing education in aspects of adjudication.

8.5 JUDICIAL MEDIATION VIA VIDEO-CONFERENCE

Judges are required to travel throughout the Province. This travel is done to allow judges in smaller communities to be exposed to other communities and to have vacation time. The demands of smaller communities and their associated court registries likely would not require a full time judicial mediator. To accommodate the system's potential need to provide adequate mandatory judicial mediation time in smaller communities, mandatory judicial mediation could be provided by way of video-conference.²⁶⁹

Video-conferencing is regularly used in the court process and has been in use for many years.

268 *Supra* note 11, In discussing the intersection of the styles of practice of mediation and ethics, it is suggested that mediators discuss the following points with the parties before the mediation proceeds: “(1) Will we use a facilitative, evaluative, combination, or some other model for this mediation? What do these terms mean to you? Can the model change, and if so, under what circumstances? (2) Will we use an 'interest-based' or 'rights-based' approach? (3) Is your relationship with the other party or adherence to the law more important to your belief that the process and resolution is just? What will you look for when determining fairness? (4) Are there time and financial constraints affecting your choice of mediation models? (5) Will the parties meet only in joint sessions, only in private caucus, or both? Under what circumstances and condition, if any, will the process move from joint session to caucus or vice versa? (6) Will there be premediation submissions to the mediator? If so, will they be confidential? Will they be shared with the other side, in whole or in part? (7) Must both parties fully disclose all relevant information, or is it appropriate for a party and/or the mediator to have information that the other party does not have? (8) How much subject matter expertise should the mediator have, and when and how should such expertise be used? (9) Should the mediator offer options or propose settlement terms? If yes, under what circumstances? (10) Should the mediator offer opinions? If yes, under what circumstances? (11) Should the mediator raise issues, claims, or defences? If yes, under what circumstances? (12) Should the mediator make the parties aware of the importance of consulting other professional? If yes, under what circumstances? (13) Should the mediator intervene if one party is about to accept a settlement when, in the mediator's opinion, that party is likely to achieve a more favourable result in court or elsewhere? (14) Should the mediator raise or advocate for the interests or rights of a party missing from the mediation? If yes, under what circumstances? (15) Should the mediator offer 'legal information' as contrasted with 'legal advice'? If yes, under what circumstances? (16) What exceptions to confidentiality, if any, will be observed in this mediation? (17) Should the mediator rectify 'power imbalances' between the parties? If yes, under what circumstances? (18) Should the mediator raise or suggest other ADR processes (e.g., mini-trial, summary jury trial, arbitration)? If yes, under what circumstances? (19) When, if ever, should the mediator declare the mediation over? More specifically, should the mediator withdraw or postpone a session if a party cannot participate because of drug or alcohol use or other physical or mental incapacity?” at 742-43).

269 *C.f. supra* note 86 at 243.

The technology associated with video-conferencing is well-established. The benefit of being able to have greater accessibility to judicial mediators associated with mandatory judicial mediations, outweighs any potential drawbacks associated with having the judicial mediator appear by way of video-conference.²⁷⁰ It has been employed, as has telephone conferencing, by private mediators effectively for years. Judicial mediation by way of video-conference would eliminate the situation where the local judge acts as a judicial mediator and is then the adjudicator of subsequent applications.

8.6 ANONYMOUS FEEDBACK

Both the mandatory judicial mediations of Family Case Conferences and Judicial Case Conferences and the voluntary Settlement Conferences were established with particular goals and objectives. Due to the confidential aspect of these processes, it is difficult to determine if the processes are achieving the goals and objectives. Robert N. Baldwin et al. highlights the situation where process are sometimes put in place without the requisite evaluations of needs:

All too often courts implement programs based on models from other courts without evaluating their own particular operating environments and needs. This situation is likely to result not only in the court's failing to achieve the particular benefits it seeks but also in litigant's confusion and dissatisfaction with the justice system as a whole.²⁷¹

It is important for there to be a system/process in place so parties are able to provide anonymous feedback about judicial mediations.²⁷² Judicial mediations use a limited resource, judge time. To ensure the resources being used are being used as effectively as possible, “programs should be

270 See also Jeffrey W. Stempel, “Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?” (1996) 11 Ohio St. J. On Disp. Resol. 297 (Stemple argues to get the most benefit out of judicial resources, the courthouse “must possess modern technology to facilitate conference calls, video-conferencing, audio and video recordings...” at 383).

271 See also *supra* note 69 at 2.2 Commentary.

272 Nancy L. Hollet et al, “The Assessment of Mediation Outcome: The Development and Validation of an Evaluative Technique” (2002) 23 Just. Sys. J. 345 (Hollet et al argue that with the increased use of mediation in the court process there needs to be a demonstration of “mediation's effectiveness while clarifying why mediation works.” at 256. The authors suggest the use of the Assessment of Mediation Process and Successful Outcome (MPSO) instrument. This instrument considers the following process and outcome dimensions. Process dimensions are: Interactional Justice; Procedural Justice; Clarity; Mediator Empathy; Pressure to Agree; and Satisfaction with Mediator. Outcome dimension are: Satisfaction with the Mediation; Distributive Justice; Relationship to Change; and conflict resolved. at 350).

required to collect sufficient, accurate information to permit adequate monitoring on an ongoing basis and evaluation on a periodic basis.”²⁷³ With the ongoing evaluation of the impact judicial mediations are having on different aspects, the Rules of Court or judicial mediator training could be modified to better achieve stated goals and objectives.

²⁷³ See also *supra* note 69 (1. the purpose of mediation; 3. role of the parties and/or attorneys in mediation; 4. role of the mediator. at 16.2).

APPENDIX A

RULES OF COURT IN BRITISH ADDRESSING JUDICIAL MEDIATION IN THE FAMILY LAW CONTEXT

PROVINCIAL COURT (CHILD, FAMILY AND COMMUNITY SERVICE ACT) RULES

Rule 2 — Case Conferences and Mini-hearings

Case conference must be directed

(1) If at the commencement of a protection hearing under section 40 of the Act

(a) a consent order is not made, and

(b) the judge determines that the matter cannot be heard that day, the judge must direct the parties and their lawyers to attend a case conference.

Case conference may be directed

(2) A judge may at any other time direct the parties and their lawyers to attend a case conference

(a) if a party requests it, or

(b) if the judge considers that it may promote a fair and efficient resolution of the issues.

Disclosure must be reviewed

(3) When a judge directs a case conference under subrule (1), the judge must review the extent of disclosure made and requested under section 64 of the Act and may make any order for disclosure consistent with the Act.

Case conference notice

(4) When a case conference is directed, the director must notify the other parties of the date, time and place of the conference, unless the conference

was directed when the parties or their lawyers were present.

What happens at a case conference

(5) At a case conference, a judge may do one or more of the following:

- (a) facilitate the resolution of any issues in dispute;
- (b) mediate any issues in dispute, other than the issue of whether the child needs protection;
- (c) with the consent of the parties, refer any issue, other than the issue of whether a child needs protection, to mediation or other alternative dispute resolution mechanism under section 22 of the Act;
- (d) decide any issues that do not require evidence or that can be decided on the basis of facts agreed to by the parties;
- (e) make any order in the terms the parties agree to, subject to section 60 of the Act;
- (f) review the adequacy of disclosure by the parties, including responses to requests for disclosure under section 64 of the Act;
- (g) order that a party provide to another party, within a set time, a summary of the intended evidence of a potential witness;
- (h) order a party to allow another party to inspect and copy specific documents or records to the extent permitted by the Act;
- (i) order that those applications that cannot be made at the case conference be brought within a set time;
- (j) order that a statement of agreed facts be filed within a set time;
- (k) give directions about any evidence that will be required, how it will be received and the procedure that will be followed, if a hearing is necessary or a mini-hearing is directed;
- (l) order a party to produce anything as evidence at a hearing;
- (m) direct that any further case conference be held before the same judge;

- (n) with the consent of the parties, direct the parties to attend a mini-hearing if
 - (i) the matter can be resolved on the basis of limited evidence and submissions, and
 - (ii) a mini-hearing can be held earlier than the matter could be set for a full hearing;
 - (o) without hearing witnesses, give a non-binding opinion on the probable outcome of a hearing;
 - (p) set a date for a hearing or mini-hearing;
 - (q) make any other order or give any direction for the fair and efficient resolution of the issues.
- [am. B.C. Reg. 75/2000, s. 5.]

PROVINCIAL COURT (FAMILY) RULES

Rule 7 — Family Case Conference

Family case conferences for contested guardianship, parenting arrangements or contact with a child

- (1) If guardianship, parenting arrangements or contact with a child are contested, a judge may order the parties to attend a family case conference.

[am. B.C. Reg. 132/2012, s. 11 (a).]

Who must attend the family case conference

- (2) The following persons must attend the family case conference:
 - (a) the parties;
 - (b) each lawyer representing a party or a child.

Other persons may attend with court's permission

- (3) With permission of a judge, a child or person who is not a party may

attend the family case conference.

What happens at the family case conference

(4) The judge at the family case conference may do one or more of the following:

- (a) mediate any of the issues in dispute;
- (b) decide any issues that do not require evidence;
- (c) make a conduct order under Division 5 of Part 10 of the [Family Law Act](#), including an order
 - (i) requiring the parties to participate in family dispute resolution within the meaning of the [Family Law Act](#), or
 - (ii) requiring one or more parties or, with or without the consent of the child's guardian, a child, to attend counselling, specified services or programs;
- (d) if the regional manager has advised the court in writing that the person or program is readily available to the parties, refer the parties to a family justice counsellor or to a person designated by the Attorney General to provide specialized support assistance;
- (e) adjourn the case for the purposes of paragraph (c) or a referral under paragraph (d);
- (f) make an order to which all of the parties consent;
- (g) direct that any or all applications must be made within a set time;
- (h) direct the parties to attend a further family case conference, setting a date for that conference;
- (i) set a date for a trial preparation conference under rule 8;
- (j) make any order that may be made at a trial preparation conference under rule 8 (4);
- (k) if the judge does not set a date for a further family case conference or for a trial preparation conference, set a trial date for

the matter or set a date for a trial that is restricted to issues defined by the parties;

(l) make an interim or final order requested in an application, reply or notice of motion;

(m) without hearing witnesses, give a non-binding opinion on the probable outcome of a hearing or trial;

(n) make any other order or give any direction that the judge considers appropriate.

[am. B.C. Reg. 132/2012, ss. 6 and 11 (b) and (c).]

Judge may make order on failure to attend

(5) If the judge presiding at the family case conference considers that the circumstances justify it and that it is fair to do so in the person's absence, the judge may make an order referred to in subrule (4) (l) even though one or more of the persons required to attend the family case conference under subrule (2) fails to attend.

SUPREME COURT FAMILY RULES

Rule 7-1 — Judicial Case Conference

Requirement for Judicial Case Conference

Requesting a judicial case conference

(1) A party may request a judicial case conference at any time, whether or not one or more judicial case conferences have already been held in the family law case.

Requirement to hold judicial case conference

(2) Subject to subrules (3) and (4), unless a judicial case conference has been conducted in a family law case, a party to the family law case must

not serve on another party a notice of application or an affidavit in support.

Exceptions

Applications that may be brought before a judicial case conference

(3) A party to a family law case may file and serve a notice of application and supporting affidavits in respect of any of the following applications even though a judicial case conference has not been conducted in the family law case:

- (a) Repealed. [B.C. Reg. 133/2012, Sch. s. 10 (a).]
- (b) an application for an order under section 91 of the [Family Law Act](#) restraining the disposition of any property at issue;
- (b.1) an application for an order under section 32 or 39 of the [Family Homes on Reserves and Matrimonial Interests or Rights Act \(Canada\)](#) or a First Nation's law made under that Act with respect to an equivalent matter;
- (c) an application for a consent order;
- (d) an application without notice;
- (e) an application to change, suspend or terminate a final order;
- (f) an application to set aside or replace the whole or any part of an agreement;
- (g) an application to change or set aside the determination of a parenting coordinator.

[am. B.C. Regs. 133/2012, Sch. s. 10 (a) to (c); 249/2014, s. 4.]

Court may relieve party from requirement of subrule (2)

(4) On application by a party, the court may relieve a party from the requirement of subrule (2) if

- (a) it is premature to require the parties to attend a judicial case conference,
- (b) it is impracticable or unfair to require the party to comply with

- the requirements of subrule (2),
- (c) the application referred to in subrule (2) is urgent,
- (d) delaying the application referred to in subrule (2) or requiring the party to attend a judicial case conference is or might be dangerous to the health or safety of any person, or
- (e) the court considers it appropriate that the party be relieved from that requirement.

How to apply for relief

- (5) To bring an application for relief under subrule (4), a party must file
 - (a) a requisition in Form F17, and
 - (b) a letter signed by the party or his or her lawyer setting out the reasons why the relief is sought.

Powers of the court

- (6) On an application for relief under subrule (4), the court may do one or more of the following:
 - (a) require that further material be provided;
 - (b) require that the party or lawyer appear in person to speak to the application;
 - (c) make the order without requiring the party or lawyer to appear to speak to the application;
 - (d) refuse to make the order;
 - (e) make any order the court considers will further the object of these Supreme Court Family Rules.

Arranging the Judicial Case Conference

How to request a judicial case conference

- (7) To request a judicial case conference, a party must file a notice of

judicial case conference in Form F19.

What must be served if judicial case conference is requested

(8) The party requesting a judicial case conference must serve on all parties, at least 30 days before the date set for the judicial case conference,

- (a) a copy of the filed notice of judicial case conference, and
- (b) a copy of the Form F8 financial statement, if any, required under Rule 5-1, along with the applicable income documents referred to in section B of Part 1 of the Form F8 financial statement.

Court may require a judicial case conference

(9) At any stage of a family law case, the court may direct that a judicial case conference take place and may order a party to

- (a) file a notice of judicial case conference, and
- (b) serve a copy of the filed notice of judicial case conference along with any financial documents required under subrule (8) (b) in accordance with subrule (8).

Form F8 financial statement must be filed before judicial case conference

(10) A party serving a notice of judicial case conference in accordance with subrule (8) or (9) must, at least 7 days before the date set for the judicial case conference, file the original of the Form F8 financial statement, if any, required under Rule 5-1 along with the applicable income documents referred to in section B of Part 1 of the Form F8 financial statement.

Other parties must file and serve Form F8 financial statement

(11) At least 7 days before the date set for a judicial case conference, a party who has been served with a notice of judicial case conference in accordance with subrule (8) or (9) must

- (a) serve on the party who served the notice of judicial case conference and on every other party a copy of the Form F8 financial statement, if any, required under Rule 5-1 along with the applicable income documents referred to in section B of Part 1 of the Form F8 financial statement, and
- (b) file the original Form F8 financial statement along with the applicable income documents referred to in section B of Part 1 of the Form F8 financial statement.

Conduct of Judicial Case Conference

Judicial case conference must be conducted by judge or master

- (12) A judicial case conference must be conducted by a judge or master.

Who must attend the judicial case conference

- (13) Unless the court otherwise orders, if a judicial case conference is held, each of the parties and his or her lawyer must attend that judicial case conference.

Absent parties must be available and accessible by telephone or other means

- (14) If the court orders that a party need not attend a judicial case conference, the party must be readily available and immediately accessible for consultation during the judicial case conference, either in person or by telephone.

What happens at the judicial case conference

- (15) The court may do one or more of the following at a judicial case conference:
 - (a) identify the issues that are in dispute and those that are not in dispute and explore ways in which the issues in dispute may be resolved without recourse to trial;
 - (b) make orders to which all the parties consent;

- (c) mediate any of the issues in dispute;
- (d) with the consent of the parties, refer the parties to a family dispute resolution professional, within the meaning of the [Family Law Act](#), other than a family justice counsellor;
- (e) refer the parties to a family justice counsellor, or to a person designated by the Attorney General to provide specialized support assistance, if the court has received written advice from the regional manager that the family justice counsellor or designated person is readily available to the parties;
- (f) direct a party to attend the Parenting after Separation program operated by the Family Justice Services Division (Justice Services Branch), Ministry of Justice;
- (g) make orders respecting amendment of a pleading, petition or response to petition within a fixed time;
- (h) make orders requiring that particulars be provided in relation to any matter raised in a pleading;
- (i) make orders respecting discovery of documents;
- (j) make orders respecting examinations for discovery;
- (k) direct that any or all applications must be made within a specified time;
- (l) reserve a trial date for the family law case or reserve a date for a trial that is restricted to issues defined by the parties;
- (m) set a date for a trial management conference under Rule 14-3;
- (n) make any orders that may be made at a trial management conference under Rule 14-3 (9);
- (o) without hearing witnesses, give a non-binding opinion on the probable outcome of a hearing or trial;
- (p) without limiting any other orders respecting timing that may be made under this subrule, make orders respecting timing of events;
- (q) adjourn the judicial case conference;

(r) direct the parties to attend a further judicial case conference at a specified date and time;

(s) make any procedural order or give any direction that the court considers will further the object of these Supreme Court Family Rules.

[am. B.C. Regs. 133/2012, Sch. s. 10 (d); 27/2013, Sch. 2, s. 15.]

Non-attendance at judicial case conference

(16) Without limiting any other power of the court under these Supreme Court Family Rules, if a party fails to appear at a judicial case conference, the court may

(a) proceed in the absence of the party who failed to appear,

(b) exercise any of the powers of the court under subrule (15) of this rule, and

(c) order that the party who failed to appear pay costs to the other party.

Judge or master may be seized of further applications

(17) At a judicial case conference, or at any other time, a judge or master may order that all applications in the family law case be heard by that judge or master.

Other judges or masters may hear applications

(18) A judge or master who has made an order under subrule (17) may at any time direct that any or all applications in the family law case may be heard by another judge or master.

Proceedings must be recorded

(19) Proceedings at a judicial case conference must be recorded, but no part of that recording may be made available to or used by any person without court order.

[en. B.C. Reg. 95/2011, Sch. B, s. 1.]

Rule 7-2 — Settlement Conferences

Settlement conference

(1) If, at any stage of a family law case, the parties jointly request a settlement conference by filing a requisition in Form F17 or a judge or master directs the parties to attend a settlement conference, the parties must attend before a judge or master who must, in private and without hearing witnesses, explore all possibilities of settlement of the issues that are outstanding.

Proceedings must be recorded

(2) Proceedings at a settlement conference must be recorded, but no part of that recording may be made available to or used by any person without court order.

When judge must not preside

(3) A judge who has presided at a settlement conference must not preside at the trial, unless all parties consent.

APPENDIX B

QUESTIONNAIRE PROVIDED TO JUDGES

Judicial Mediation in British Columbia

Questions Pertaining to My Master's Thesis on This Subject

by Clayton Miller

May 1, 2012

I am a Master's student at the University of Saskatchewan, College of Law and am studying in the area of Alternate Dispute Resolution. For the purpose of completing my Master's Thesis I wish to obtain the valuable opinions of practising judges on how they perceive judicial mediations, the usefulness of these mediations, their role in these mediations, and benefits and pitfalls of these particular mediations.

Please answer the following initial questions and provide examples wherever possible. By answering these questions before the in-person interview, the in-person interview will be completed within the scheduled time frame.

Definitions

judicial mediations: Processes within the Provincial Court or Supreme Court of British Columbia that include a judge acting mediating a dispute between the parties. These include Judicial Case Conferences, Family Case Conferences, and Settlement Conferences.

Questions:

1. In which court do you preside? (Circle the applicable response)
 - the Supreme of British Columbia
 - Provincial Court of British Columbia

2. How long have you been a judge with this court? _____

3. Have you ever been a judge with another court in British Columbia or elsewhere in Canada? If so, where?

4. Including time spent presiding in another court in Canada, how long have you been a judge? (Circle the applicable response)

- (a) Less than 5 years
- (b) 5-10 years
- (c) 10-15 years
- (d) 15-20 years
- (e) longer than 20 years

5. Before becoming a judge how long did you practice law? (Circle the applicable response)

- (a) Less than 10 years
- (b) 10-15 years
- (c) 15-20 years
- (d) longer than 20 years

6. During your last 5 years of practising law approximately what percentage of your practice involved practising family law?

7. During your last 5 years of practising law approximately how many mediations did you attend

(a) as counsel _____

(b) as a mediator _____

8. Before becoming a judge what type of formal mediation training did you have?

9. a) Since becoming a judge what type of formal mediation training have you had?

10. b)On a monthly basis approximately how many and what type of judicial mediations do you take part in? (judicial mediations include Judicial Case Conferences, Family Case Conferences and Settlement Conferences)

I thank you sincerely for taking the time to complete this initial questionnaire and I am looking forward to our in-person interview.

APPENDIX C

STANDARD SET OF QUESTIONS ASKED IN INTERVIEWS OF JUDGES

Judicial Mediation in British Columbia

Questions Pertaining to My Master's Thesis on This Subject

by Clayton Miller

May 1, 2012

I am a Master's student at the University of Saskatchewan, College of Law and am studying in the area of Alternate Dispute Resolution. For the purpose of completing my Master's Thesis I wish to obtain the valuable opinions of practising judges on how they perceive judicial mediations, the usefulness of these mediations, their role in these mediations, and benefits and pitfalls of these particular mediations.

Please answer the following questions regarding the purpose of Judicial Mediation. Please provide examples wherever possible.

Definitions

judicial mediations: Processes within the Provincial Court or Supreme Court of British Columbia that include a judge acting mediating a dispute between the parties. These include Judicial Case Conferences, Family Case Conferences, and Settlement Conferences.

judicial process: the course from someone starting a claim in court to finishing that claim at a hearing of some sort, which may include a trial, to obtain a remedy.

Questions:

1. What sort of input do you have on how many judicial mediations you take part in? Can you refuse to take part in mediations completely or in a particular mediation? If so, under what circumstances can you make such a refusal?

2. What benefit do you perceive in judges having some say over whether or not they participate in

(a) judicial mediations in general? and

(b) particular judicial mediations?

If you do not see a benefit, please state so and explain.

3. What do you believe judges offer to the mediation process that private mediators do not offer?

4. In your opinion, how, if at all, does the one hour time limit placed on some judicial mediations affect their efficacy?

5. What benefits do parties receive from judicial mediations?

6. How do judicial mediations assist or hinder the flow of the judicial process?

7. Are Judicial Mediations really necessary

(a) to the parties? Why or why not? and

(b) to the court process? Why or why not?

8. How do judicial mediations add value?

9. How can the value of judicial mediations be maximized?

10. What specific things could judges do to accomplish this?

11. What specific things could counsel do to accomplish this?

12. What specific things could the parties do to accomplish this?

13. How can judicial mediations be made more financially cost effective?
14. What role do you think lawyers should play in judicial mediations?
15. What role do you think lawyers *are* playing in judicial mediations?
16. Would you describe the judicial mediations you preside over as facilitative, evaluative, or some combination of the two?
17. Does the facilitative/evaluative aspect change if one or both parties are represented by a lawyer? If so, how?
18. How important is it that a judge participating in a judicial mediation not take part in any subsequent hearing between the parties unless the parties agree? Why?
19. What value do judges bring to judicial mediation?
20. Does the requirement for judicial mediation have any undesirable effects on the family justice system? If so, what are these effects?
21. Might there be value in judicial mediations being replaced by mediations performed by professional, qualified mediators who are not part of the active judiciary?
22. (a) What might be the difference between an active judge conducting a judicial mediation and a former judge or non-judge conducting a similar mediation?
(b) Do you think the parties would perceive a difference? If yes, what would be the possible effect of the parties' perception?
(c) How might this manifest differently in an urban community from a rural community?

- 23.** In some jurisdictions outside of British Columbia parties must attend free mediation with a non-judicial, government-assigned mediator before proceeding to court. Then the parties are able to choose whether to attend further mediation with a mediator, who may be a judge or a private mediator, or they can choose not to attend further mediation before proceeding to court. Further mediation is voluntary. What benefits and detriments might such a system present?
- 24.** (a) What is the benefit of requiring parties in the Provincial Court of British Columbia to attend Family Justice before heading to court where they will then be required to attend judicial Mediation?
- (b) What might be the policy reasons behind this requirement of the law?
- (c) What might be the reason why this step is not required in the Supreme Court of British Columbia?
- (d) Should parties be required to attend such non-judicial mediation before heading to Supreme Court?

I thank you sincerely for taking the time to complete this questionnaire.

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