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**PROFESSIONALIZATION: ADVANCING MORALLY RESPONSIBLE PRACTICE
WITHIN THE CONTEXT OF MANDATORY MEDIATION, FAMILY LAW &
SPOUSAL ABUSE**

**A THESIS SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND
RESEARCH IN CANDIDACY FOR THE DEGREE OF MASTER OF ARTS**

DEPARTMENT OF LAW

BY

TIMOTHY MICHAEL RIORDAN

OTTAWA, ONTARIO

AUGUST 31, 1999

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**Professionalization: Advancing Morally Responsible Practice
Within the Context of Mandatory Mediation, Family Law &
Spousal Abuse**

submitted by Timothy Michael Riordan, B.A. Hons.
in partial fulfilment of the requirements for

the degree of Master of Arts

Thesis Supervisor

Chair, Department of Law

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August 27, 1999

ABSTRACT

Despite the misgivings of critics, the field of mediation has been swept up in a more general trend toward the professionalization of occupations. One of the benefits of this eventuality is that it proffers a means by which practitioners can extricate themselves from the untenable position they have been placed in by public policy makers determined to mandate the mediation of disputes involving divorce, custody and access, spousal and child support and the division of property. The process of professionalization would allow mediators to collectively challenge the ability of law makers to unilaterally determine the forum in which family law disputes are dealt with. The autonomy that would result from the establishment of a professional association would enhance the authority of the individual professional practitioner, preserve the freedom they currently enjoy to exclude cases at their discretion, and at the end permit family mediators to fulfill their intrinsic need to behave in a morally responsible manner.

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INTRODUCTION

The search on the part of family mediators for some means by which to temper the ability of the state to impede their intrinsic need to behave in a morally responsible manner is urgent. There are four reasons for this. First, research has demonstrated that domestic violence occurs frequently in marriages and common law relationships in this country. The Violence Against Women Survey revealed that “of all women who had ever been married or lived in a common law relationship, 29% had experienced at least one episode of violence by either a current or former partner. This percentage represents more than 2.6 million Canadian women.”¹ Second, although mediation was traditionally conceived of as a voluntary process, this is no longer true. Public policy makers, as part of their ongoing effort to curtail government spending, appear increasingly inclined to divert all manner of family law disputes out of the courts and into mandatory mediation programs. In fact, 28 states in the United States of America currently require mediation of certain family law matters,² and in the mid-1990’s legislators in the Province of Quebec came close to instituting a similar requirement. Hence, as ever greater numbers of women are coerced

¹Nicholas M.C. Bala and others, *Spousal Violence in Custody and Access Disputes: Recommendations for Reform* (Ottawa: Status of Women Canada, March 1998), 4.

²The following states have statutes or local court rules that either mandate the mediation of family law disputes or give judges the discretion to require it: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, Washington, and Wisconsin. Andree G. Gagnon, “Ending Mandatory Divorce Mediation for Battered Women,” *Harvard Women’s Law Journal* 15 (Spring 1992): 272; Christy L. Hendricks, “The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview,” *University of Louisville Journal of Family Law* 32,

into utilizing mediation as a means of resolving family law disputes, so family mediators are becoming increasingly involved in mediations in which domestic violence is a factor. Third, due to the fact that mediation remains as yet an “emerging profession”³ professional values have yet to be clearly articulated. Therefore, family mediators cannot turn to entrenched standards of professional conduct to justify their decisions in these difficult cases. Fourth, the enthusiastic response by the Ontario Ministry of the Attorney General to the preliminary results of the Mandatory Referral to Mediation Pilot Project suggests that mandatory mediation of family law disputes is about to become a reality in this province. If the Government of Ontario decides not to exempt cases involving domestic violence from their mandatory mediation programs, family mediators, as they have in other jurisdictions, may find themselves in a position where they are no longer able to behave in a morally responsible fashion by withdrawing their services in situations they adjudge to be unsuited to mediation methods.

This thesis consists of four chapters. Chapter I includes a description of a variety of examples of mandatory “referral” to mediation programs, mandatory mediation programs, and other forces (e.g. poverty) which obligate women to utilize mediation. The purpose of this part of the thesis is to illustrate that voluntary participation has traditionally been seen to be a vital aspect of the mediation process and that this “right” has been progressively eroded over time. Chapter II consists of an overview of the debate between those theoreticians and practitioners who have long disputed whether mediation

no. 2 (1993): 479.

³Cheryl A. Picard, “The Emergence of Mediation as a Profession,” in *Qualifications for Dispute Resolution*, eds. Catherine Morris and Andrew Pirie (Victoria: University of Victoria Institute for Dispute Resolution, 1994), 157.

should be used to aid in the resolution of family law disputes in which domestic violence is a complicating factor. The purpose of this part of the thesis is to demonstrate that while the debate has most likely served to improve the quality of family mediation services, it has done little to discourage public policy makers from diverting an ever increasing number of cases out of the courts and into mandatory mediation programs. Chapter III is comprised of an exploration of the various options available to family mediators who are asked to provide mediation services where the absence of voluntary participation, coupled with a history or an ongoing pattern of domestic violence, has convinced practitioners that the utilization of mediation methods will most likely result in inequitable outcomes for the women involved. The purpose of this part of the thesis is to convey that mandatory mediation programs can render screening mechanisms, codes of professional conduct and existing frameworks for the analysis of ethical dilemmas ineffective, and that mediators must look to other solutions if they are to find some means of preventing public policy makers from imposing mediation in cases likely to result in unfair outcomes for assaulted women. Chapter IV contains a potential remedy to this important problem. Here, a means by which practitioners can join together to dispute the authority of the state to unilaterally dictate the circumstances in which the mediation of family law disputes is required is set out in detail. The purpose of this part of the thesis is to explore how best to encourage mediators to express their innate desire to conduct themselves in a morally responsible manner by entrenching their right to withhold services in those situations in which mediation is likely to result in unfair outcomes for abused women.

While I acknowledge that on occasion men are victims of domestic violence, and that partner abuse is also a serious problem in same-sex relationships, this thesis will focus

largely on circumstances in which women have been coerced into mediation, and have been, or are currently being subjected to, domestic violence. This is due primarily to the fact that heterosexual women are most often the targets of domestic violence, that women are more likely to be hurt, and that violent men are more likely to cause their female partners to be fearful.⁴ Although I am mindful of the fact that the issue of partner abuse in same-sex relationships has long been overlooked by researchers and would encourage others to investigate this important topic, it would have been impossible to properly consider this issue within the confines of this thesis.

⁴Bala, 6-11.

CHAPTER I

THE RISE OF MANDATORY MEDIATION

Mediation was originally conceived of as a voluntary process. In fact, many theoreticians and practitioners continue to define it as such. For example, Goundry, Peters and Currie describe mediation as “an informal, voluntary process”⁵ and assert that “virtually every definition or description of mediation refers to the **voluntariness** of the parties’ participation as essential to the integrity of the process.”⁶ Sarah Grebe lends her voice in support of this point, arguing that,

The conflict resolution theory underlying mediation is based on the acceptance of human beings as rational, problem-solving entities. Thus, if the third-party intervener coerces one or both parties into an “agreement” he or she is not conducting true mediation.... In addition, such coercion interferes with the client’s right to self-determination, a value held by most mediators.⁷

Also, from a more practical standpoint, voluntariness is seen to be an integral component of mediation in part because the absence of coercion can lead to more lasting agreements.⁸

Barbara Hart noted that,

This is theoretically so because the components of the agreement are selected based on the needs of the participants, not on some third party; because there is no

⁵Sandra A. Goundry, Yvonne Peters, and Rosalind Currie, *Family Mediation in Canada: Implications for Women’s Equality* (Ottawa: Status of Women Canada, March 1998), 18.

⁶*Ibid.*, 19.

⁷Sarah Childs Grebe, “Ethics and the Professional Family Mediator,” *Mediation Quarterly* 10, no. 2 (1992): 159.

⁸Barbara J. Hart, “Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation,” *Mediation Quarterly* 7, no. 4 (1990): 320-321.

arbitrary imposition of terms and conditions by an external source that may create resistance and testing; and because the act of choosing to agree gives the parties greater ownership of the solutions derived.⁹

Despite the emphasis placed on voluntariness by many theoreticians and practitioners, women face growing pressure to utilize mediation as a means of resolving disputes involving divorce, custody and access, spousal and child support and the division of property. This chapter will set out those pressures in detail, and more specifically will include a discussion of the different kinds of mandatory mediation programs, as well as other forces which obligate women to partake of mediation.

Category I—Mandatory “Referral” to Mediation Programs

The first category of mandatory family mediation programs encompasses those programs where the parties are obligated to “try out” mediation, most often by attending a single compulsory “orientation” session. Here, the obligation may take one of two forms. First, a legislature could enact a law which specifically requires that parties attend, or gives judges the power to make such an order either at their discretion, or when faced with a particular set of circumstances. For example, in 1994 Saskatchewan became the first province in Canada to enact this kind of legislation. At that time the *Queen's Bench Act* was amended to provide that parties to a family law action in either Regina or Saskatoon “attend a mediation screening and orientation session upon commencing an action and before any further steps are taken. After the mediation orientation and

⁹Ibid.

screening session, the parties may continue with mediation, or choose to proceed to court.”¹⁰ The legislation allows judges to take action in the event that parties choose not to comply. In the event that a mediator advises the court that either of the parties has failed to attend the screening and orientation session, the judge is given a number of options. He or she may order: (a) that the parties attend the screening and orientation session, (b) that mediation proceed subject to any conditions the court considers necessary and/or appropriate, or (c) that the pleadings be struck out.¹¹

The second way by which parties may be obligated to “try out” mediation is through changes to court rules. Here, judges rely on the powers bestowed upon them by legislators to make rules necessary to ensure the efficient functioning of their courts. For example, Jefferson Family Court Local Rule 612 provides that when custody is in dispute, parents must accede to an “initial referral to mediation.”¹² This rule applies to all disputes involving child custody in Jefferson County, Kentucky. The local rule requires the parties’ attorneys to put the process into motion by filing the necessary forms with the court along with any supporting documentation.¹³ A Family Court support worker will then assign a mediator, and an order signed by the court will be forwarded to the parties advising them: (a) that they must contact this individual within 10 days, and (b) that they are obligated to attend the first mediation session.¹⁴ The court’s permission is required in order for either party to opt out of the obligatory session, and is granted only if the court

¹⁰Goundry, 23.

¹¹Ibid.

¹²Louise Everett Graham, “Implementing Custody Mediation in Family Court: Some Comments on the Jefferson County Family Court Experience,” *Kentucky Law Journal* 81 (1992-1993): 1112.

¹³Ibid.

is satisfied that “good cause” exists.¹⁵ The local rule provides that the presence of domestic violence shall constitute “good cause”.¹⁶ Those persons who fail to attend the first mediation session without having been excused by the court may be assessed either attorneys fees or costs.¹⁷ Rule 612 also sets out in detail what the mediator must convey to the parties during the obligatory session. For example, he or she must:

1. describe the process of mediation and how much it will cost;
2. emphasize that the goal of mediation is to come to an agreement that supports the best interests of the affected children;
3. explain that both parties have to agree to all of the terms of settlement;
4. explain what information will remain confidential and what may be disclosed and to whom;
5. set out the information the parties will have to provide in order that the disputed issues be more clearly defined.¹⁸

Category II—Mandatory Mediation Programs

The second category of mandatory mediation programs encompasses those instances where the parties are obligated to go beyond merely “trying out” mediation, and instead make a determined effort to utilize the process of mediation to resolve their disagreements. As before, this obligation may take the form of either a specific statutory requirement, or a court rule.

Although there are many examples of this, California’s long history of utilizing alternative methods of dispute resolution to solve family law problems has placed it at the fore. The Family Conciliation Court Law of 1939 was to be the first of many attempts by

¹⁴Ibid., 1113.

¹⁵Ibid.

¹⁶Ibid.

¹⁷Ibid.

¹⁸Ibid., 1115.

legislators in this state to emphasize alternatives to the litigation of family law disputes. This legislation “provided for the establishment of conciliation courts to hear domestic relations cases in counties where the superior court determined that the numbers of such cases warranted the new procedures.”¹⁹ This was followed in 1980 by the passage of further legislation that: (a) provided that each county assign one or more judges to adjudicate all family law matters in a family conciliation court, and (b) authorized so-called “counselors of conciliation” to mediate these issues.²⁰ By this time “the court...is not cast simply in the role of arbiter in a controversy; rather, its main function is to provide therapeutic aid to the family unit.”²¹ Finally, in 1981 California became the first state in the USA to enact legislation which mandated the mediation of child custody and access disputes.²² The law provides that when the issue of child custody is in dispute, the matter is to be referred to a mediation unit.²³ It also establishes goals for the participants in any mediation, prescribes minimum qualifications for mediators, and empowers the mediator to exclude lawyers from all mediation proceedings.²⁴ Control over the actual process of mandatory mediation is ceded to local courts, however, as is the decision on to how to proceed if the parties emerge from mediation proceedings without an agreement.²⁵ Since its inception the mandatory mediation law has led to the virtual elimination of litigation in this area of family law as most child custody and access disputes soon came to be resolved

¹⁹Charlotte Germane, Margaret Johnson, and Nancy Lemon, “Mandatory Custody Mediation and Joint Custody Orders in California: the Danger for Victims of Domestic Violence,” *Berkeley Women's Law Journal* 1, no. 1 (1985): 177-178.

²⁰*Ibid.*, 178.

²¹*Ibid.*

²²*Ibid.*

²³*Ibid.*

²⁴*Ibid.*, 179-180.

by the parties in mediation conferences.²⁶ However, the law is not without its critics. In 1987, the California Senate Task Force on Family Equity urged that the legislature exempt those cases which involve a history of family violence.²⁷

Quebec was to have become the first jurisdiction in Canada to make mediation mandatory. In 1996 the Minister of Justice introduced *Bill 65*, which if enacted would have prevented parties to a custody, support or property dispute from applying for a court hearing until they could produce a mediator's report which attested to the fact that an attempt had already been made to mediate the dispute.²⁸ The proposed Bill would have allowed for certain limited exceptions where, for example, there was a history of spousal or child abuse.²⁹ However, the Act which came into force on September 1, 1997,³⁰ was markedly different from the Bill introduced in the National Assembly the year before. The most significant change can be found in the wording of section 814.3 of the *Code of Civil Procedure*. Originally, the Bill provided that this section of the Code should read as follows,

No application that involves, in addition to the interests of the parties, the interests of their children is admissible if there is a dispute between the parties regarding child custody, support due to a party or to the children, the family patrimony or other patrimonial rights arising from the marriage, *unless the dispute has been submitted to a mediator* and the application is accompanied by a copy of the mediation report.

²⁵Ibid.

²⁶Ibid., 175.

²⁷Hart, 326.

²⁸Goundry, 63.

²⁹Ibid.

³⁰*An Act to institute, under the Code of Civil Procedure, pre-hearing mediation in family law cases and to amend other provisions of the Code, Statutes of Quebec, c. 42, sec. 25, 823 (1997).*

The court may, however, if it is warranted by valid cause such as family violence...proceed even though there has been no pre-hearing mediation (emphasis mine).³¹

However, this section was later amended to provide as follows,

Except applications under article 814.9, no application that involves the interests of the parties and the interests of their children may be heard by the court if there is a dispute between the parties regarding child custody, support due to a party or to the children, the family patrimony or other patrimonial rights arising from the marriage, *unless the parties have attended an information session on the mediation process* and a copy of the mediator's report has been filed (emphasis mine).³²

Evidently, in the course of its journey through the National Assembly, the Bill was amended so as to substitute a mandatory "referral" to mediation program in place of the mandatory mediation scheme the Government of Quebec had originally intended to impose. Hence, as yet in Canada no legislation or court rules require parties to family law disputes to utilize the process of mediation to resolve their disagreements.

Category III—"Other" Forces Which Obligate Women to Utilize Mediation

The first two categories deal with specific instances in which legislators or judges rely on their "law-making" powers to force women to utilize mediation as a means of resolving family law disputes. The third category, however, is both broader than its predecessors and infinitely more complex, for it encompasses all of those other more

³¹Quebec National Assembly, *An Act to institute, under the Code of Civil Procedure, pre-hearing mediation in family law cases and to amend other provisions of the Code*, 35th Leg., 2nd sess., (14 November 1996).

³²*An Act to institute, under the Code of Civil Procedure, pre-hearing mediation in family law cases and to amend other provisions of the Code*, sec. 7.

insidious forces which obligate women to partake of mediation. Ability to pay and violence are two examples of the coercive forces which fall into this “catch-all” category.

First, let us consider the issue of poverty. Larry Spain proclaims that “access to a forum for the resolution of disputes for all persons, regardless of their financial circumstances, is essential to accord our system of justice legitimacy.”³³ He does not mean to suggest, however, that it would be acceptable to deny the economically disadvantaged access to a particular forum, such as the courts, on the basis that members of this group already enjoy access to another (e.g. mediation). In fact, Spain warns that,

Care should be exercised to prevent the promotion of ADR as the poor and other disadvantaged groups’ substitute for their right to litigate and enforce, in appropriate cases, constitutional and statutory rights. We should, therefore, be cautious that alternative methods of dispute resolution do not “create a two-track justice system that dispenses informal ‘justice’ to poor people with ‘small’ claims and ‘minor’ disputes, who cannot afford legal services, and who are denied access to courts.”³⁴

Regrettably the practice of allowing ability to pay to dictate which individuals or groups of individuals have access to particular forums has already come to be entrenched. Most individuals lack the skills necessary to represent themselves in court and hence require the assistance of counsel in order to be heard. Therefore, those that cannot afford an attorney and are also ineligible for assistance from provincially-funded legal aid programs are for the most part denied the opportunity to engage in litigation. If ability to pay effectively precludes poor women from going to court, and if the only other forum for dispute resolution available to these women is mediation, then surely any decision on their part to

³³Larry Spain, “Alternative Dispute Resolution for the Poor: Is it an Alternative?,” *North Dakota Law Review* 70, no. 2 (1994): 269.

utilize mediation cannot be said to be voluntary.

Second, let us consider the issue of violence. The deleterious effects of domestic violence on women are well documented. For example, Bala and others found that “an abused spouse often suffers from lowered self esteem, depression, drug or alcohol abuse or may take out feelings of powerlessness by mistreating their children.”³⁵ Domestic violence also has a significant impact on the choices women make with respect to mediation. Hart argues that,

The reality is that the battered woman is not free to choose. She is not free to elect or reject mediation if the batterer prefers it, not free to identify and advocate for components essential for her autonomy and safety and that of her children, not free to terminate mediation when she concludes it is not working. She is ultimately not free to agree or disagree with the language of the agreement. Her apparent consent is under duress. Battered women are trapped in relationships with batterers and therefore cannot be said to voluntarily participate.³⁶

While not necessarily true in all cases, if a history or an ongoing pattern of domestic violence should preclude certain women from electing a method of dispute resolution other than the one chosen by their abuser, then surely any decision on the part of these women to utilize this particular forum cannot be said to be voluntary.

If one examines the effect of varying obligatory forces then one must conclude that poor or abused women involved in family law disputes face potentially the same outcomes as those women who are confronted by either a law or a court-rule which obligates them to utilize mediation. Although the nature of the coercion is different, poverty and violence

³⁴Ibid., 272-273.

³⁵Bala, 12.

³⁶Hart, 321.

have the capacity to deny women the right to choose their preferred forum for dispute resolution just as effectively as either the Saskatchewan *Queen's Bench Act* or Jefferson Family Court Local Rule 612.

Summary

A number of significant changes have unfolded with respect to the practice of mediation in the past 20 years. First, the number and type of family mediation programs has grown exponentially. Second, as the forces which obligate women to utilize these programs to resolve family law disputes have grown increasingly powerful, so the voluntariness which originally characterized the process of mediation has been largely eroded. These changes, propelled by public policy makers determined to reduce the size of government and the costs associated with the administration of justice generally, and law societies eager to expand the scope of their monopolies to include alternate methods of dispute resolution, have spurred a vigorous dialogue between those theoreticians and practitioners who disagree over whether family mediation is appropriate in cases where spousal abuse is a factor. Chapter II will involve an in-depth exploration of this ongoing debate. This inquiry is needed because later it will be argued that although the dialogue between theoreticians and practitioners may have served to generally improve the quality of family mediation services, it does not seem to have dissuaded public policy makers from diverting an increasing number of cases out of other dispute resolution forums and into mandatory mediation programs. Hence, those who seek to halt or reverse this trend, either because they oppose the mediation of family law disputes *per se*, or because they

want to ensure that mediation programs are structured in a manner that would preclude only those cases likely to result in unfair outcomes for women, may find it necessary to expand their search for solutions beyond those that have already been deliberated for some time.

CHAPTER II

MANDATORY MEDIATION & SPOUSAL ABUSE

There is a large and growing body of literature which pertains to the evolution of the debate between those theoreticians and practitioners who disagree over whether family mediation is appropriate in cases where domestic violence is a factor. Opinions with respect to this issue range from those who support an outright ban on the use of mediation, to others who feel that mediation can be used even in those cases where the spousal relationship has involved a lengthy history of serious domestic abuse. However, most theoreticians and practitioners fall into either of two disparate groups: (a) the “anti-mediation” camp which objects to the mediation of family law disputes, and whose members are particularly vehement in their opposition to the mediation of disputes in which domestic violence is a factor, and (b) the “pro-mediation” camp which endorses the mediation of family law disputes, and whose members are generally in agreement that a history of domestic violence should not preclude the use of mediation provided certain established pre-conditions are satisfied. This chapter will identify those characteristics of mediation that members of these camps most often point to in support of their respective positions, and explore the debate surrounding certain groupings of key characteristics of mediation that have consistently sparked fierce debate.

The “Pro-Mediation” vs. the “Anti-Mediation” Camps

The mediation process has a number of characteristics that distinguish it from

other dispute resolution mechanisms. As the debate between the “pro-mediation” and “anti-mediation” camps progressed, certain of these characteristics came to be “claimed” by members of either group as “proof” of the advantageous or disadvantageous nature of mediation.

First, let us briefly summarize those characteristics that are typically held up by the “pro-mediation” camp in support of their position. Proponents of mediation often argue that the process:

1. is generally faster than other dispute resolution mechanisms;³⁷
2. is generally less expensive and/or consumes less of the legal systems limited resources;³⁸
3. provides for a more complete exploration of contentious issues;³⁹
4. results in realistic agreements that are broader in scope;⁴⁰
5. elevates client satisfaction which in turn leads to greater compliance with agreements and less post divorce conflict and relitigation;⁴¹
6. allows the mediator to “model” appropriate methods of communication and, hence, improve the participants communication and problem-solving skills;⁴²
7. is less remote and impersonal than the justice system.⁴³

Second, let us briefly summarize those characteristics that are held up by the “anti-mediation” camp in support of their position. Opponents of mediation often argue that the process:

1. encourages discussion which is future oriented;⁴⁴

³⁷David B. Chandler, “Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation,” *Mediation Quarterly* 7, no. 4 (1990): 332.

³⁸Charles A. Bethel and Linda R. Singer, “Mediation: A New Remedy for Cases of Domestic Violence,” *Vermont Law Review* 7 (1982): 15-16; Chandler, p. 332.

³⁹Chandler, 332.

⁴⁰Ibid.

⁴¹Ibid.

⁴²Bethel, 18; Kathleen O’Connell Corcoran and James C. Melamed, “From Coercion to Empowerment: Spousal Abuse and Mediation,” *Mediation Quarterly* 7, no. 4 (1990): 311.

⁴³Corcoran, 311.

⁴⁴Hart, 318.

2. cannot restore equality of power between abusers and their female partners;⁴⁵
3. may expose battered women to further abuse at the hands of their partners;⁴⁶
4. forces women to sign agreements that contribute to their further subjugation;⁴⁷
5. could force the issue of domestic violence back into the closet;⁴⁸
6. incorporates all of the myths and biases that have caused the justice system to respond to domestic abuse in such an ineffective manner;⁴⁹
7. does not point out to the abuser that his behavior is wrong;⁵⁰

Although an exhaustive review of the literature would likely reveal an effort by members of either camp to refute each and every characteristic held up by their opponents as “proof” of the advantages or disadvantages of mediation methods, much of the debate has focused on four groupings of key characteristics of mediation which continue to be hotly contested.

Category I—Power Imbalances

Barbara Hart asserts that mediation cannot restore equality of power between abusers and their female partners, something which is vital to the ultimate success of the mediation process.⁵¹ Her position is strongly supported by Hilary Astor who declares that “violence creates such a strong imbalance of power that it is generally recognized...that

⁴⁵Hilary Astor, “Violence and Family Mediation: Policy,” *Australian Journal of Family Law* 8, no. 1 (1994): 5-6; Dianna R. Stallone, “Decriminalization of Violence in the Home: Mediation in Wife Battering Cases,” *Law and Inequality: A Journal of Theory and Practice* 2 (August 1984): 510; Hart, 318-320;

⁴⁶Astor, 3, 7-8; Hart, 320, 325; Stallone, 509, 518.

⁴⁷Astor, 8-10; Hart, 320-321.

⁴⁸Astor, 10-11; Stallone, 512.

⁴⁹Stallone, 508.

⁵⁰*Ibid.*, 511.

⁵¹Hart, 318-320.

mediation is not appropriate.”⁵² Astor believes that when violence is a factor, it permeates every aspect of the relationship between the parties making it impossible for women to negotiate effectively.⁵³ She concludes that even in those cases where mediators are aware of the power imbalance between the parties the fact that their power is limited to control over the process of mediation, rather than its content or outcome, makes unfair or even dangerous agreements possible.⁵⁴ Hart’s assertion is also supported by Dianna Stallone who argues that battering relationships, which are often characterized by the targets’ economic dependence on her assailant, leave women unable to advocate for themselves and hence in desperate need of the built-in protections of the justice system.⁵⁵

David Chandler disagrees with Hart’s comments, and endeavors to temper her critique by pointing out that power imbalances are not specific to divorce mediation where domestic violence is a factor, and may arise just as often within the context of lawyers’ negotiations, *pro se* divorce, or permanent separation.⁵⁶ Diane Neumann goes much further, however. She forcefully refutes the notion that mediators are impotent in the face of power differentials between their male and female clients, proposing instead that “the mediation process, the role of the mediator, and the nature of the divorce crisis itself combine to produce fair agreements.”⁵⁷ Neumann believes that the divorce crisis creates a climate in which women are able, often for the first time, to place their own needs above

⁵²Astor, 5.

⁵³*Ibid.*

⁵⁴*Ibid.*

⁵⁵Stallone, 510.

⁵⁶Chandler, 333-334, 345.

⁵⁷Diane Neumann, “How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce,” *Mediation Quarterly* 9, no. 5 (1992): 231.

those of their husbands. She remarks that,

Indeed, “aggressive behavior is encouraged by the country’s legal system” (Trafford, 1982, p.96). Because of this change in expected behavior, the wife’s established, relative powerlessness in relation to her husband can be transformed into relative powerfulness as she looks to her own self-interest.⁵⁸

Neumann concludes that our adversarial system of family law fosters an environment in which women are able to begin to assert their needs, which in turn permits the mediator to utilize their control over the process of mediation to assist the weaker party to use whatever power she may have, inhibit the ability of the stronger party to exploit his advantageous position, and in doing so allow fair resolutions to emerge.⁵⁹ Although she does not specifically address the issue of domestic violence, it would seem that Neumann’s hypothesis could easily be extended to encompass those situations in which spousal abuse is a factor. Afterall, domestic violence is often symptomatic of the chronic power differentials which pervade intimate relationships between men and women.

Category II—Procedural Protections

Astor believes that mediation, particularly if undertaken in the early stages of the postseparation period, may expose battered women to further abuse at the hands of their partners. At page eight she remarks that,

The time when many people will come to family mediation is therefore a time of particular danger. By providing an occasion when the parties meet face to face or when the

⁵⁸Ibid., 234.

⁵⁹Ibid., 230-232.

perpetrator may know the whereabouts of the target, mediation may play into the hands of a perpetrator who wishes to locate or have contact with the target of his violence. This contact may be the occasion of further violence.⁶⁰

Hart concurs, attributing this reality to the fact that “mediation does not provide the strategic planning and legal safeguards essential to protect battered women and their children from postseparation violence.”⁶¹ Also, Goundry, Peters and Currie point to the problems associated with the lack of procedural protections inherent in the mediation process. They argue that mediation methods can lead to unequal property division as well as inadequate spousal and child support payments because: (a) mediators, unlike judges, cannot compel parties to disclose financial information,⁶² (b) the private nature of mediation can lead to the circumvention of laws or common law principles designed to protect those women who decide to leave their spouses from economic exploitation,⁶³ and (c) mediated agreements are often not subject to appellate review.⁶⁴

In contrast, Chandler speaks to this issue by refuting the assertion that mediated settlements are unable to meet the interests of battered women. He wrote that:

The topics and arrangements found to be more common in violence case agreements seem to be precisely what advocates recommend for victims of abuse who, like it or not, have to share future parenting and other relationships with an abusive ex-spouse. The use of experts helps to introduce third-party objective information into communication, both during the mediation and afterward. This may help the victim avoid direct contact with the spouse over informational issues surrounding their child in

⁶⁰Astor, 8.

⁶¹Hart, 325.

⁶²Goundry, 45.

⁶³Ibid., 35-36.

⁶⁴Ibid., 36.

the future. The specific structuring of visitation, controls on conduct, and the control of communication seem to meet the victim's interests in achieving an orderly and complete separation, with any communication conducted on a structured and businesslike basis.⁶⁵

Chandler could look to Corcoran to support his position on this issue. He points out that mediation can be a very useful tool when it comes time for an abused spouse to seek a protection-from-abuse order from the courts because “a mediated consent order can include many customized provisions that judges will not typically order.”⁶⁶ Also, while highly critical of the lack of procedural protections inherent in the mediation process, Goundry, Peters and Currie concede that society's main dispute resolution mechanism—the legal system, despite its many built-in safeguards, often fails to protect women from financial exploitation at the hands of their former partners. For instance, in their discussion of financial disclosure the authors acknowledge that “enforcing the full disclosure of assets has eluded the court system, even with the law supporting full disclosure.”⁶⁷

Category III—Outcomes

Hart maintains that mediation forces battered women to sign agreements that contribute to their further subjugation.⁶⁸ Astor raises similar concerns, arguing that “if the parties are unequal any agreement they reach is likely to reflect that inequality and to be

⁶⁵Chandler, 344.

⁶⁶Corcoran, 313.

⁶⁷Goundry, 45.

⁶⁸Hart, 320-321.

unjust to the weaker party. If the balance of power between the parties is affected by violence, the inequity of any agreement is likely to be severe.”⁶⁹ Astor identifies property settlements and child support payments as two key areas in which mediated agreements tend to disadvantage abused women.⁷⁰ Also, Dianna Stallone is particularly scathing with respect to the manner in which mediation methods can affect the outcomes of family law disputes. At page 511 she pronounces that,

Negotiation means a trade-off. The woman bargains away her personal safety, and possibly her life, in exchange for economic security.... In effect, the process of mediation asks a woman to agree to make dinner ten minutes earlier in exchange for not being punched or beaten.⁷¹

However, proponents of mediation take a decidedly different view. They argue that mediation promotes positive outcomes, not only for women, but also for their families.⁷² For example, the Alberta Law Reform Institute contends that:

- (1) Mediation can help families learn to work together and develop skills to resolve future disputes—in this way, mediation reduces hostility between partners and creates positive family relationships;
- (2) mediation promotes cooperation and compromise—this helps to preserve family trust and dignity...
-
- (4) mediation can be used to educate parents about each other’s needs and the family’s post-divorce needs;...⁷³

Also, in 1993 Meierding reported that her survey “dramatically illustrates the high level of satisfaction of participants in the private, voluntary, and confidential mediation process.”⁷⁴

⁶⁹Astor, 8-9.

⁷⁰Ibid., 9-10.

⁷¹Stallone, 511.

⁷²Goundry, 31.

⁷³Alberta Law Reform Institute, *Court-Connected Family Mediation Programs in Canada* (Edmonton: Alberta Law Reform Institute, May 1994), 12.

She concluded that a high level of compliance with mediated agreements, as well as the fact that changes were achieved either by mutual consent or through further mediation, suggests that disputants were satisfied with the outcomes of divorce mediation.⁷⁵ Five years later, Jones and Bodtker reported similar findings as a result of their study into custody mediation in York County. They found: (a) that disputants were very satisfied with both the process and outcomes of custody mediation, and (b) that those who reached agreements remained content with the outcome some 12 months later.⁷⁶ The authors attributed client satisfaction to the fact that “disputants generally thought mediators helped them clarify issues, explained the mediation process clearly, explained confidentiality, gained their trust, and listened to their concerns.”⁷⁷ Jones and Bodtker concluded that their research affirmed a long established theory that most disputants are pleased with both the process and the outcomes of custody mediation.⁷⁸

Category IV—Compliance

In 1994 Bohmer and Ray released the results of a study they had conducted in New York State which examined the effects of varying dispute resolution mechanisms, including mediation, on the economic well-being of women and children after divorce.

⁷⁵Nina R. Meierding, “Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements,” *Mediation Quarterly* 11, no. 2 (1993): 169.

⁷⁶*Ibid.*, 169-170.

⁷⁷Tricia S. Jones and Andrea Bodtker, “Satisfaction with Custody Mediation: Results from the York County Custody Mediation Program,” *Mediation Quarterly* 16, no. 2 (1998): 199-200.

⁷⁸*Ibid.*, 190.

The authors found that non-compliance with mediated agreements concerning child custody was a significant problem. More specifically, they reported not only that disregard for these types of arrangements occurred approximately four times more often when the parents had used mediation instead of other dispute resolution methods, but also that “all the breakdowns [non-compliance] came from joint legal/joint residential custody arrangements.”⁷⁹ This is particularly problematic because mediators have often been accused of favoring joint custody arrangements,⁸⁰ something which their study confirmed.⁸¹ Also, Bohmer and Ray found that in 70 percent of cases non-compliance with mediated custody agreements meant that women were being compelled to assume additional child care responsibilities. This is troublesome because in these situations additional child care responsibilities would obviously not result in a corresponding increase in child support payments, something which mediated agreements failed to provide for in almost one-third of cases anyway,⁸² and also because according to Ellis,

The greater the number of women whose separation/divorce leaves them poorer and with dependent minors, the greater will be the number of women who become economically dependent on men. The greater the number of women who are economically dependent on men, *ceteris paribus*, the higher the rate of woman abuse. A neutral mediator, one who does not help empower women to help themselves rectify existing or future inequalities, makes an indirect contribution to woman abuse by helping to feminize poverty

⁷⁸Ibid., 198-200.

⁷⁹Carol Bohmer and Marilyn L. Ray, “Effects of Different Dispute Resolution Methods on Women and Children After Divorce,” *Family Law Quarterly* 28, no. 2 (1994): 228.

⁸⁰Goundry, 33.

⁸¹Bohmer, 227.

⁸²Ibid., 228.

among separating and divorcing women.⁸³

However, members of the “pro-mediation” camp would likely question these findings, and draw attention to the problems which have arisen as a result of the fact that most family law disputes continue to be handled by lawyers operating within the boundaries of the formal legal system.⁸⁴ For example, Desmond Ellis, whilst himself not a proponent of mediation, details their often-made claim that “because of the coercive nature of the [legal] system, the parties are more likely to evade, than to comply with, agreements or settlements which adjudication produces.”⁸⁵ Hence, mediation is often held up as an alternative to lawyers’ negotiations or litigation because it “results in agreements with higher compliance rates.”⁸⁶ Differing explanations are proffered as to why this might be the case. For example, Chandler attributes improved compliance to the client satisfaction that stems from crafting self-made agreements,⁸⁷ Bethel and Singer ascribe it to the direct involvement of both parties in the process,⁸⁸ and Hart, as mentioned earlier, credits the voluntariness that has traditionally typified mediation.⁸⁹

Summary

The proliferation of family mediation services, and the growing pressure being

⁸³Desmond Ellis, “Marital Conflict Mediation and Post-Separation Wife Abuse,” *Law and Inequality* 8 (1990): 332.

⁸⁴Ibid., 320.

⁸⁵Ibid., 321.

⁸⁶Goundry, 31.

⁸⁷Chandler, 332.

⁸⁸Bethel, 15.

⁸⁹Hart, 320-321.

applied to women to make use of these programs to solve their problems has sparked a contentious debate between theoreticians and practitioners who differ about whether mediation methods are suitable in cases in which spousal abuse is a consideration.

Unfortunately, while this ongoing debate has likely served to generally improve the quality of family mediation services, it has not dissuaded public policy makers from diverting an ever larger number of cases out of the courts and into mandatory mediation programs, even in those circumstances in which mediation methods have the potential to seriously disadvantage female participants.

Chapter III will explore what options mediators currently have in those situations in which they are being asked to behave in a morally reprehensible manner by providing mediation services where, (a) the woman is subject to forces which obligate her to participate in the process, (b) the relationship is complicated by either a history or an ongoing pattern of domestic violence, and (c) the practitioner is concerned that mediation will likely result in an inequitable outcome. This inquiry is needed because later it will be argued that although screening programs, codes of professional conduct, and existing frameworks for the analysis of ethical dilemmas are available to assist mediators in making these difficult decisions, these “tools” were designed for use by practitioners with the power to exclude cases found to be unsuited to mediation methods, and hence are completely ineffective in those jurisdictions (e.g. California) where the state has instituted mandatory mediation programs that bar practitioners from withholding their services in all but the most extreme circumstances, and heavily penalize disputants who insist on access to the courts as a means of resolving family law disputes.

CHAPTER III

SCREENING “TOOLS” & THEIR LIMITATIONS

It is not uncommon for family mediators to encounter situations in which they are asked to provide services to abused women who are subject to forces which obligate them to utilize mediation. When confronted with this dilemma, mediators are able to turn to screening mechanisms, codes of professional conduct, or frameworks for the analysis of ethical dilemmas to assist in determining whether to withhold their services in those cases deemed likely to result in unfair outcomes for assaulted women, and in doing so to avoid a course of action thought to be morally repugnant. In this chapter, examples of these “tools” will be described in detail. Also, problems generally associated with the use of screening mechanisms, codes of professional conduct, and frameworks for the analysis of ethical dilemmas, as well as the question of whether these “tools” can promote positive outcomes for abused women within the context of, (a) those “other” forces which obligate women to utilize mediation, and (b) mandatory “referral” to mediation programs, will be briefly discussed. Finally, particular attention will be paid throughout to the issue of whether screening mechanisms, codes of professional conduct and frameworks for the analysis of ethical dilemmas can promote positive outcomes for assaulted women in those jurisdictions in which public policy makers, through the institutionalization of mandatory mediation programs, have greatly diminished the discretion practitioners have traditionally enjoyed to exclude these kinds of cases from mediation.

Category #1—Screening Mechanisms

Although there are now a plethora of screening mechanisms available to family mediators, most were designed to serve two basic functions: (a) to allow mediators to detect violence or other variables, either past or present, that have the potential to render mediation methods ineffective, and (b) to provide mediators with some method of determining whether the problems they have identified are sufficient to justify a decision to prevent the parties from proceeding.

The Ontario Screening Tool

The Ontario Screening Tool is a two part mechanism developed by Lorraine Martin and Desmond Ellis for use by all practitioners employed at publicly funded agencies offering family mediation services in this province.⁹⁰ At present agencies operating in Hamilton, Toronto, Kingston, London and Simcoe require that their staff utilize this tool during the intake/screening process.⁹¹

Part I of this “tool” consists of a two part mediation questionnaire. The first section of the questionnaire includes questions which solicit general background information (e.g. respondent’s sex) as well as miscellaneous information about the marriage (e.g. who made the decision to terminate the relationship), and other information about the parties that could serve to identify potential barriers to the utilization of

⁹⁰Goundry, 51-52, 58, 86.

⁹¹Ibid., 52.

mediation methods (e.g. history of substance abuse).⁹² The second section of the questionnaire includes additional questions which request information about violent or controlling behaviors on the part of the respondent's spouse, and inquire about the respondents general ability to assert their needs during an argument.⁹³

Part II of this "tool" consists of a three part "decision guide." The first section of the "decision guide" involves a review of all of those questions which solicit information about abusive behaviors, or other variables (e.g. criminal record) which if present may point to an increased likelihood of this type of behavior occurring in future. The "decision rules" in this section provide that the mediator should,

1. exclude if shot/stabbed during past 6 months or since separated
2. exclude if partner has engaged in any type of violence since separation
3. caution: If no violence since separation, but any one or more types of violence during last six months, consumes 3 or more drinks per day, mental health problems, violence [sic] crime record, does not have permit for gun, caused injuries requiring treatment and uses violence as control. The more frequently a partner has engaged in violence, the more caution should be exercised in reaching a decision to exclude.⁹⁴

The second section of the "decision guide" involves a review of those questions which request information regarding power imbalances within the relationship. The "decision rules" in this section provide that "power unbalances [sic] alone, even if marked, may not necessarily be used to exclude separating couples from mediation. They may suggest a

⁹²Goundry, 135-142.

⁹³Ibid., 143-146.

⁹⁴Ibid., 147-148.

departure from mediation neutrally however.”⁹⁵ The third section of the “decision guide” involves a review of those few questions which inquire about the respondents ability to assert their needs when in conflict with their spouse. The mediator is also asked to indicate whether “observation of couple interaction during first joint mediation session indicates that one partner can stand up for self ‘better’ or equally well.”⁹⁶ The “decision rules” in this section provide as follows,

1. **Exclude** if one partner observed to stand up for self better than the other during first joint mediation session and also reports cannot stand up for self better or equally well at present.
2. **Caution** if information from self-report (Q.21)⁹⁷ and observation of couple during first mediation are contradictory.⁹⁸

The Conflict Assessment Protocol & Triage System

The Conflict Assessment Protocol and Triage System is a two part mechanism developed by Linda Girdner, a dispute resolution consultant, and designed for voluntary use “by mediators in court, community or private practice settings.”⁹⁹ Part I of this “tool” consists of a four step Conflict Assessment Protocol (CAP), which includes: (a) an introduction, (b) a series of questions about patterns of decision making, conflict

⁹⁵Ibid., 148.

⁹⁶Ibid., 149.

⁹⁷Question #21 solicits information about “hurtful acts or behaviors” (e.g. threats, verbal, sexual and/or physical abuse, injuries sustained, etc.) perpetrated by the respondent’s spouse, and when/how often these behaviors occurred. Goundry, 142.

⁹⁸Goundry, 149.

⁹⁹Linda K. Girdner, “Mediation Triage: Screening for Spouse Abuse in Divorce Mediation,” *Mediation Quarterly* 7, no. 4 (1990): 366.

management, and the expression of negative feelings in the relationship, (c) questions that are specific to a history or an ongoing pattern of abusive behavior(s), and (d) closure of the separate screening session.¹⁰⁰ Step I allows the mediator to explain what mediation involves, to answer questions about the process, and in doing so to develop rapport with the client.¹⁰¹ Step II lets the mediator acquire information about specific behavior patterns and to gauge “the clients’ expectations of the relationship and their views of the power dynamics.”¹⁰² Step III permits the mediator to probe for information about: (a) physical/psychological abuse and control, (b) potential dangerousness, (c) alcohol and drug use/abuse, and (d) abuse of the children.¹⁰³ Step IV enables the mediator to shift the client’s focus from past problems to present day concerns, as well as future aspirations. Here, an effort is made to draw out and address fears about the mediation process, including any concerns the client may have with respect to working collaboratively with their spouse.¹⁰⁴

Part II of this “tool” involves the triage system. The mediator uses the information they have acquired through the administration of the CAP to locate the case within one of three categories: “(a) Those likely to benefit with mediation conducted as usual; (2) those likely to benefit from mediation conducted with specific ground rules; resources, and skills; and (c) those more likely to experience harm, who should be excluded from mediation.”¹⁰⁵ If instances of abusive or controlling behaviors were either infrequent or of

¹⁰⁰Ibid.

¹⁰¹Ibid., 367.

¹⁰²Ibid., 368.

¹⁰³Ibid., 369.

¹⁰⁴Ibid., 371.

¹⁰⁵Ibid., 365.

a minor nature, occurred in the early days of the relationship, and have not caused the target to be fearful, then “as usual”¹⁰⁶ mediation is appropriate. Cases involving a pattern of abusive behaviors point to the need for very specific ground rules, resources and skills,¹⁰⁷ but do not warrant automatic exclusion unless any of the following is true:

1. either party is unable to negotiate effectively;
2. target has disclosed abuse but instructs mediator not to tell abuser that she has revealed this;
3. target is unable to identify or promote her needs;
4. abuser frustrated by notion that mediation will not result in a favorable outcome for him (i.e. he will not get all that he desires);
5. abuser does not acknowledge responsibility for past violence or other controlling behaviors;
6. abuser remains incessantly jealous when this behavior has resulted in past violence;
7. abuser continues to find it necessary to attempt to control his spouse;
8. abuser has a criminal record for assault;
9. abuser appears capable of doing physical harm to his spouse
10. abuser has acquired, is attempting to acquire, or has used a weapon to harm others;
11. abuser is suicidal or has threatened suicide in response to the separation/divorce proceedings;
12. abuser has attempted to kill his spouse or children or admits to fantasizing about doing this.¹⁰⁸

Problems with Screening Mechanisms

There are a number of difficulties associated with screening mechanisms. First, in

¹⁰⁶Girdner defines “as usual” mediation so as to include, when needed, the use of standard power-balancing techniques (e.g. enforcing ground rules about name calling/interrupting, or referring parties to lawyers or other “experts” for independent legal/financial advice). Girdner, 372.

¹⁰⁷Girdner would include the following under this heading: (a) clearly articulating the terms under which the mediator will assist the disputants (e.g. past abuse must be acknowledged), (b) establishing a safety plan for the target, and (c) making full use of mediation intervention strategies (e.g. caucuses). Girdner, 373-374.

order for this particular “tool” to be effective it has to be used. Currently, mediators are under no obligation to screen for domestic abuse and in the absence of a consensus that screening is necessary in all cases they may choose to avoid doing so for a variety of reasons. For example, if a mediator believes that domestic violence is not a bar to the utilization of mediation methods he or she would likely see no reason to screen for it. Also, mediators may be employed by an organization that lacks the resources to implement screening procedures, even if doing so is believed to be highly desirable.¹⁰⁹ Second, in order for a screening mechanism to work properly it has to be well designed and administered by individuals who are well trained. The problem with many of the existing screening mechanisms is that they, like Girdner’s Conflict Assessment Protocol and Triage System, have yet to be empirically tested.¹¹⁰ Without appropriate research it is extremely difficult to adjudge whether any particular screening mechanism is working properly, if at all. Also, with respect to the issue of training those who administer the screening mechanisms, again there is often no obligation on the part of mediators to undergo the necessary training, and a lack of resources may preclude organizations from dispatching their employees to participate in such programs. Third, even a well trained mediator utilizing an expertly designed and empirically tested screening mechanism cannot compel disputants to disclose abuse. Both assaulted women and the men who beat them are likely to deny these behaviors, or at the very least to minimize their severity.¹¹¹ Hence, mediators can easily find themselves in the very uncomfortable position of having to make

¹⁰⁸ Girdner, 374-375.

¹⁰⁹ Astor, 13.

¹¹⁰ Girdner, 366.

¹¹¹ Astor, 13; Bala and others, 6; Corcoran, 307; Girdner, 370, 372.

a decision to exclude based on unspoken evidence of abuse, intuition or guesswork.

Fourth, in order for screening mechanisms to be effective practitioners must have the power to exclude those cases they find to be unsuited to mediation methods. Hence, this particular “tool” is of little value within the context of mandatory mediation programs that deny practitioners the right to withhold their services even if the screening mechanism they have chosen to employ indicates that exclusion is desirable.

Category II—Codes of Professional Conduct

Codes of professional conduct are now as common as the “professional” associations that have sprung up across North America, and to which an increasing number of family mediators belong. Although they go by a variety of different names and take a number of different forms, these codes were designed and adopted by “professional” associations to promote a high standard of practice within the field by providing an enforcement mechanism that can, if needed, be invoked to ensure that their members, (a) behave in a “competent” manner, and (b) adhere to certain prescribed rules of procedure for the conduct of mediations.

The Family Mediation Canada Code of Professional Conduct

The Family Mediation Canada (FMC) Code of Professional Conduct is a fifteen part compilation of rules “intended to govern the relations of family mediators with their

clients, their professional colleagues, and the general public....”¹¹² However, for the sake of expediency I will make reference only to those provisions of the Code which might be referred to by family mediators who are engaged in the process of determining whether to withhold their services in order to prevent cases likely to result in inequitable outcomes for abused women from proceeding.

Three different articles of the Code emphasize the importance of voluntariness.

First, Article II provides that,

1. For the purpose of this Code, “family mediation” is defined as a cooperative, problem solving process in which a qualified and impartial third party neutral, the mediator, assists mediation participants to resolve their disputes by mutual agreement. The resolution is to be *voluntary* and based upon sufficient information and advice for each person involved in the dispute (emphasis mine).¹¹³

Second, Article III, which sets out the objectives of the mediation process and details the responsibilities of the respective participants provides that, “3. The mediator’s role is that of a facilitator, i.e., to assist the participants to reach an informed and *voluntary* agreement that meets their mutual needs, interests and concerns, and those of other persons affected by the dispute (emphasis mine).”¹¹⁴ Third, Article IX, which deals with the issue of fairness provides that, “1. A mediator must endeavor to ensure that the participants reach agreement freely, *voluntarily*, without undue influence, and on the basis of informed consent (emphasis mine).”¹¹⁵

In addition, two separate articles of the Code set out the conditions under which

¹¹²Family Mediation Canada, *Code of Professional Conduct* (23 October 1996), 1.

¹¹³*Ibid.*

¹¹⁴*Ibid.*

¹¹⁵*Ibid.*, 2.

the mediator may be obligated to suspend or terminate mediation. First, Article IX provides that,

3. A mediator must explore whether the participants are capable of engaging in the mediation process. If a mediator believes that the participants are unable or *unwilling* to participate meaningfully in the process, the mediator may suspend or terminate mediation and should encourage the participants to seek appropriate professional help (emphasis mine).¹¹⁶

Second, Article XIII provides that, “1. It is the duty of the mediator to suspend or terminate mediation whenever continuation of the process is likely to harm or prejudice one or more of the participants....”¹¹⁷ Incidentally, violation of the aforementioned rules, or any other provision of the Code for that matter, may result in the revocation of any certification conferred on the mediator by FMC, and/or the suspension or termination of their membership in the association.¹¹⁸

Society of Professionals in Dispute Resolution (SPIDR): Ethical Stands of Professional Responsibility & Model Standards of Conduct for Mediators

The Ethical Standards of Professional Responsibility are a set of compulsory guidelines designed “to promote...ethical conduct and a high level of competency among SPIDR Members, including honesty, integrity, impartiality and the exercise of good judgment in their dispute resolution efforts.”¹¹⁹ Regrettably, the guidelines offer little that

¹¹⁶*Ibid.*, 2-3

¹¹⁷*Ibid.*, 3.

¹¹⁸*Ibid.*, 1.

¹¹⁹Society of Professionals in Dispute Resolution, *Ethical Standards of Professional Responsibility* (June 1986).

would be of assistance to practitioners involved in the process of deciding whether to withhold their services in order to prevent cases likely to result in unfair outcomes for assaulted women from being mediated. Fortunately, however, these vague guidelines were supplemented in 1995 by a compilation of rules entitled the Model Standards of Conduct for Mediators (Model Standards).

No fewer than four different parts of the Model Standards stress the significance of voluntariness. First, the preface defines mediation as “a process in which an impartial third party — a mediator — facilitates the resolution of a dispute by promoting *voluntary* agreement (or “self-determination”) by the parties to the dispute (emphasis mine).”¹²⁰ Second, Article I provides that “self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a *voluntary*, uncoerced agreement. Any party may withdraw from mediation at any time (emphasis mine).”¹²¹ Third, the “comments” appended to this Article provide that “the primary role of the mediator is to facilitate a *voluntary* resolution of a dispute (emphasis mine).”¹²² Fourth, the “comments” appended to Article VI, which is generally concerned with the quality of the process of mediation, provide that “the primary purpose of a mediator is to facilitate the parties’ *voluntary* agreement (emphasis mine).”¹²³

In addition, two different parts of the Model Standards establish the conditions under which mediation may be suspended or terminated. First, Article VI provides that “the parties decide when and under what conditions they will reach an agreement or

¹²⁰ American Arbitration Association; American Bar Association; Society of Professionals in Dispute Resolution, *Model Standards of Conduct for Mediators* (1995), i.

¹²¹ *Ibid.*, 1.

¹²² *Ibid.*

terminate mediation.”¹²⁴ Second, the “comments” appended to this Article provide that “a mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.”¹²⁵ The latter section might be of assistance to the practitioner in-so-far as he or she could use it to justify a decision to withhold mediation services in cases where the process is being used by the batterer to gain access to his spouse in order that he might continue to subject her to abuse.

Problems with Codes of Professional Conduct

There are a number of difficulties associated with codes of professional conduct. First, in order to be bound by these codes mediators have to belong to a “professional” association. Unfortunately, these kinds of organizations have yet to be established in many North American jurisdictions, and those associations (e.g. SPIDR) which currently recruit practitioners regardless of their place of work tend to have fairly stringent admission criteria. Hence, not all those who are willing to join a “professional” association are able to, and given the absence of any legal requirement to the contrary, those that are reluctant to join are under no obligation to do so. Second, these codes tend to provide only general guidelines. Hence, mediators who go in search of direction with respect to a very specific ethical dilemma (e.g. should I mediate family law disputes involving a history/ongoing pattern of domestic abuse) are not likely to find the concrete

¹²³Ibid., 5.

¹²⁴Ibid., 4.

answers they are looking for. Third, these codes often draw a somewhat precarious distinction between process and content. As such, they tend to be structured in a way that requires the member to intervene aggressively when procedural fairness is at risk, while simultaneously discouraging him or her from interfering in matters of content.¹²⁶ Kandel finds this to be problematic because,

The theoretically clear cut distinctions among the familiar categories of process and content; facilitation and evaluation; and information, advice, and suggestions are necessarily blurred and inextricably intertwined in the real world of mediation practice and hence inadvisable as the defining criteria of a supercode such as the Model Standards.¹²⁷

However, the separation of process and content that has come to be enshrined in many codes of conduct is far more troublesome than Kandel suggests. While some codes of conduct (e.g. the Model Standards) are clear that voluntary agreements or outcomes are desirable, they often do not speak to the issue of voluntary participation. Hence, implicit within their structure is a questionable assumption that disputants forced to utilize mediation methods can still achieve voluntary settlements. Also, while most of these codes of conduct (e.g. FMC Code of Professional Conduct & the Model Standards) mandate procedural fairness, few are similarly concerned with the attainment of equitable outcomes. Again, this suggests either that their creators believe that fair process will ultimately result in equitable outcomes, or that unfair outcomes are acceptable provided that they are the product of an impartial process. Needless to say, both of these beliefs are

¹²⁵Ibid., 5-6.

¹²⁶Ibid., 312.

problematic. Fourth, these codes may be difficult to enforce because, (a) a lack of consensus over their content may lead to non-compliance on the part of disaffected members, and (b) mediators can eschew disciplinary proceedings by simply withdrawing from the association. Also, in the event that a breach of the code is found to have occurred, the harshest penalty any association can impose is to strip a member of any credentials conferred by the organization and terminate their membership. This action may serve to embarrass the offender, but it will not prevent them from continuing to work in the field. Hence, while the existence of disciplinary procedures may strengthen the credibility of “professional” associations generally, at-the-end an unwitting public may continue to be served by an incompetent practitioner. Fifth, as with screening mechanisms, in order for codes of conduct to be effective mediators must be free to observe them. Hence, this particular “tool” is of little use within the context of mandatory mediation programs that strip practitioners of the right to withhold their services even if the code of conduct they are supposed to heed suggests that a particular case be excluded from mediation.

Category III—Frameworks for the Analysis of Ethical Dilemmas

Over the years theoreticians and practitioners from a wide variety of disciplines have designed a number of decision-making guides. These models can be divided into two groups: (a) “general” decision-making guides that can also be used to resolve ethical

¹²⁷Randy Frances Kandel, “Situating Substantive Expertise: An Ethnographic Illustration and A Proposed Standard of Practice for Mediators,” *Mediation Quarterly* 15,

dilemmas, and (b) models that are specifically tailored to assist practitioners in the resolution of these kinds of problems which tend to emerge during their daily interchanges with supervisors, colleagues, clients, and others. For the sake of expediency I will only discuss examples of guides that fall into Group B.

The Ethical Assessment Screen

Frank Loewenberg and Ralph Dolgoff have developed a number of models designed to aid in the resolution of ethical dilemmas. Although their frameworks were originally intended for use by clinical social workers, their potential utility within the context of mediation practice has since been demonstrated by theoreticians such as Allan Barsky.¹²⁸ The first of their models to be discussed here, the Ethical Assessment Screen, involves the following steps,

1. Identify your own relevant personal values in relation to the ethical dilemma which faces you.
2. Identify any societal values relevant to the ethical decision to be made.
3. Identify the relevant professional values and ethics.
4. Identify alternative ethical options that you may take.
5. Which of the alternative ethical actions will protect to the greatest extent possible your client's rights and welfare as well as the rights and welfare of others?
6. Which alternative action will protect to the greatest extent possible society's rights and interests?

no. 4 (1998): 303-304.

¹²⁸ In this instance, Loewenberg and Dolgoff's basic decision-making model is brought into play when a client divulges, in caucus, an ongoing pattern of domestic violence that precludes her from negotiating on a fair basis. Frank M. Loewenberg and Ralph Dolgoff, *Ethical Decisions for Social Work Practice*, 2nd ed., cited by Allan Edward Barsky, "Issues in the Termination of Mediation Due to Abuse," *Mediation Quarterly* 13, no. 1 (1995): 22-34.

7. What can you do to minimize any conflicts among 1, 2, and 3? What can you do to minimize any conflicts between 5 and 6?
8. Which alternative action will result in your doing the “least harm” possible?
9. To what extent will alternative actions be efficient, effective, and ethical?
10. Have you considered and weighed both the short-term and long-term ethical consequences of alternative actions?¹²⁹

The Ethical Rules Screen & Ethical Principles Screen

The second of Loewenberg and Dolgoff’s models is somewhat more complicated, for unlike the Ethical Assessment Screen it consists of two distinct parts. The second part, the Ethical Principles Screen (EPS) only comes into play if the first part, the Ethical Rules Screen (ERS) does not proffer a solution to the dilemma at hand. The ERS entails the following steps,

1. Examine the *Code of Ethics* to determine if any of the Code rules are applicable. These rules take precedence over the worker’s personal value system.
2. If one or more Code rules apply, follow these.
3. If the Code does not address itself to the specific problem, or if several Code rules provide conflicting guidance, use the Ethical Principles Screen.¹³⁰

The EPS is founded on the premise that it is possible to articulate the ethical principles of a particular profession.¹³¹ This tool also presupposes that members of the profession are able to reach a consensus with respect to the order of priority of these principles.¹³²

Lowenberg and Dolgoff argue that social workers would likely embrace the following

¹²⁹Frank M. Loewenberg and Ralph Dolgoff, *Ethical Decisions for Social Work Practice*, 5th ed. (Itasca: F.E. Peacock Publishers Inc., 1996), 61.

¹³⁰*Ibid.*, 62.

¹³¹*Ibid.*

¹³²*Ibid.*

rank ordering of the ethical principles of their profession,

1. Principle of the protection of life
2. Principle of equality and inequality
3. Principle of autonomy and freedom
4. Principle of least harm
5. Principle of quality of life
6. Principle of privacy and confidentiality
7. Principle of truthfulness and full disclosure¹³³

The operating principle of the EPS is that those who apply it must always ensure that in the event that two or more of the ethical principles of the profession come into conflict, the highest-order principle will always be given priority.¹³⁴

Problems With Frameworks for the Analysis of Ethical Dilemmas

There are a number of difficulties associated with frameworks for the analysis of ethical dilemmas. First, these guides are designed to be used by mediators, acting alone, in the course of their day-to-day interaction with others. Given the manner in which these frameworks are structured (i.e. the practitioner is required to answer a series of open-ended questions) it is highly unlikely that different mediators, albeit faced with similar fact situations, would arrive at comparable decisions. In fact, it is even possible that a particular practitioner could come to a different decision (e.g. about the fairness of a prospective outcome) in cases involving very similar fact situations. Second, some of the models (e.g. the ERS) presuppose the existence of a code of ethics. Not all mediators belong to “professional” associations, however, and hence may not be bound by such a

¹³³Ibid., 63.

¹³⁴Ibid., 62.

code. Although practitioners who find themselves in this position could simply opt to voluntarily adhere to one of any number of codes of ethics, this too is problematic as reference to one code might suggest a particular decision while regard for another may prompt a second, entirely different course of action. For example, if a mediator were to rely on the FMC Code of Professional Conduct they might be inclined, for reasons discussed earlier, to withhold their services if either of the parties had been coerced into participating in the process. However, practitioners who chose to rely on the Code of Ethics of the Arbitration and Mediation Institute of Ontario would probably see no reason to withdraw as these guidelines do not suggest that voluntary participation is necessary or even desirable.¹³⁵ Third, some of the models (e.g. the ERS) presuppose, (a) that it is possible to articulate the ethical principles of a particular profession, (b) that mediators have already undertaken this exercise, and (c) that a consensus has emerged with respect to the order of priority of these principles. While Grebe would likely argue that family mediators have already made some attempt to articulate the ethical principals specific to their profession,¹³⁶ she would likely concede that the matter of ordering these principles remains as yet undecided.¹³⁷ Fourth, as with all of the other “tools”, frameworks for the analysis of ethical dilemmas are useful only if practitioners are permitted to stick to the course of action the model in use prescribes in a particular fact situation. Hence, there is little reason to utilize any framework for the analysis of ethical dilemmas within the context of mandatory mediation programs that force practitioners to

¹³⁵ Arbitration and Mediation Institute of Ontario Inc., Code of Ethics, 1.

¹³⁶ Grebe, 160-162.

¹³⁷ Ibid., 164.

mediate all cases irrespective of whether the model they are using indicates that exclusion is the preferable course of action.

Summary

There are many problems associated with the use of screening “tools.” However, despite their limitations screening mechanisms, codes of professional conduct, and frameworks for the analysis of ethical dilemmas should not be dismissed without reservation. Afterall, there have been instances in which empirical research has demonstrated that particular “tools” are serving the function for which they were intended. For example, preliminary data from the Hamilton Court Mediation Service indicates that approximately 50% of prospective cases are being excluded as a result of the utilization of the Ontario Screening Tool by staff working at that agency.¹³⁸ Also, not all of the problems previously associated with the use of screening mechanisms, codes of professional conduct, and frameworks for the analysis of ethical dilemmas should be seen to be insurmountable. For example, many limitations can be directly attributed to the voluntary nature of these “tools.” Hence, if some means could be found to guarantee that a screening mechanism was consistently employed by properly trained personnel, or to ensure that all practitioners were bound by a code of professional conduct, then some of the problems might be sufficiently assuaged to allow these “tools” to be effective, at least within the context of those “other” forces (e.g. poverty) which obligate women to utilize mediation, as well as mandatory “referral” to mediation programs, where the practitioner

retains the discretion to exclude those cases found to be likely to result in unfair outcomes for abused women. Screening mechanisms could allow the family mediator to identify those factors that might give rise to an ethical dilemma on their part, and codes of professional conduct as stipulated by Loewenberg and Dolgoff, could then be utilized in conjunction with existing frameworks for the analysis of ethical dilemmas to enable the practitioner to make a determination as to whether mediation is appropriate in any particular case, and to justify a decision to exclude it. It should be clear, however, that while efforts to improve the utility of screening “tools” and to ensure their employment are to be encouraged, no amount of tinkering will alter the fact that screening mechanisms, codes of professional conduct, and frameworks for the analysis of ethical dilemmas are ineffectual within the context of mandatory mediation programs. This is due to the fact that here the practitioner is required by either legislation or court rules to proceed despite the fact that having made use of the “tools” at their disposal they have concluded that the case at hand is not suited to mediation.

Chapter IV will attempt to set out a method by which mediators can collectively challenge the power of public policy makers to unilaterally determine the forum in which family law disputes are dealt with. The purpose of this endeavor is to create a “space” that will give practitioners the “room” they need to satisfy their intrinsic desire to behave in a morally responsible fashion by withholding their services in those circumstances in which mediation is likely to result in inequitable outcomes for assaulted women, even if in doing so they increasingly frustrate government policy and deny service to a large number of disputants.

¹³⁸Ibid., 86.

CHAPTER IV

ADVANCING MORALLY RESPONSIBLE PRACTICE

The insistence on the part of law-makers that practitioners make their services available in those situations in which screening “tools” suggest that mediation methods are inappropriate may force these individuals to behave in a way that they find to be morally reprehensible. Hence, it should be expected that mediators would be anxious to find a means by which to extricate themselves from this untenable position. Professionalization has long been looked upon with disfavor by many in the field. However, the resolute desire on the part of attorneys and the associations that represent them to monopolize the provision of mediation services, particularly when viewed in light of the rapidly intensifying debate amongst theoreticians and practitioners with respect to this issue, as well as the more general trend toward the professionalization of occupations that has been apparent since the mid-twentieth century, makes this outcome inevitable. Therefore, it will be suggested that notwithstanding the many valid criticisms thereof, and in light of the fact that it could offer practitioners the opportunity to forge a “space” in which they might be free to behave in a morally responsible manner, professionalization is a remedy that warrants further exploration. It will also be suggested that the autonomy that results from the process of professionalization would give mediators the capacity to collectively challenge the ability of the state to unilaterally prescribe the circumstances in which mediation is imposed. This in turn will enable practitioners to express their innate need to conduct themselves in a morally responsible manner by preserving their existing capacity

to withhold mediation services in those situations in which unfair outcomes for abused women are likely to result from the employment of mediation methods.

Moral Responsibility and the Mediator

As discussed earlier, practitioners are increasingly being compelled by legal means to provide mediation services in those situations in which screening “tools” suggest that exclusion would be a more appropriate course of action. This, in spite of a sustained effort to persuade public policy makers that the discretion, on the part of mediators, to withhold their services in certain circumstances is essential if disadvantageous outcomes for abused women are to be avoided. While any decision to disregard a legislative pronouncement is fraught with peril, the practitioner may be so inclined particularly in those cases in which they are confronted by a “cry for help” from assaulted women who do not wish to utilize mediation methods to resolve family law disputes.

Kenneth Melchin argues that when an individual is asked for help, he or she is most often “moved into action by a sense of [moral] responsibility.”¹³⁹ The author describes this “process” as follows: (a) a request for assistance causes the recipient to undergo an internally driven metamorphosis that alters the way in which they experience things;¹⁴⁰ and (b) that this transformation results in a “state of action” characterized by a desire to ascertain the nature of the problem, and to set in motion a means by which to

¹³⁹Kenneth R. Melchin, *Living with Other People: An introduction to Christian ethics based on Bernard Lonergan* (Collegeville: The Liturgical Press, 1998), 18.

¹⁴⁰*Ibid.*, 18-19.

resolve it.¹⁴¹ Also, the author believes that the entire operation is rife with feelings of moral responsibility toward the party in need.¹⁴²

Melchin maintains that the initial “transformation,” the “state of action” that results from it, as well as the “motion” that propels the individual through the “process” described above is for the most part instinctive.¹⁴³ However, he does not entirely discount the role of free will because,

While this dynamism of [moral] responsibility arises in us spontaneously, before conscious choice, and is quite universal, shared by most people throughout much of life, it is by no means fully automatic or guaranteed. There is an element of learning or acquired habit that plays a crucial role in determining if and when responsibility will arise in us, how strongly it will affect us, and what form it will take. If we really work at it...our feelings of responsibility towards others can be dulled. By contrast, we can play a role in developing habits of caring and discernment in ourselves...so that...the motions dynamizing responsible action arise consistently and vigorously.¹⁴⁴

In sum, Melchin leads us to conclude that a “cry for help” would likely compel the practitioner to go in search of some means by which to respond to the plight of abused women who, contrary to the will of public policy makers, do not wish to partake of mediation. If one presumes that the spontaneous dynamism of moral responsibility experienced by family mediators is likely to be augmented by a conscious desire on their part to give these women an “out,” even if the remedy they select reserves to them, rather than their clients, the power to determine which cases are to be excluded, then one might expect a concerted effort on the part of practitioners to find some means by which to

¹⁴¹Ibid., 19.

¹⁴²Ibid., 19-20.

¹⁴³Ibid.

challenge the authority of the state to unilaterally impose mediation in cases where they find that it is likely to result in inequitable outcomes for assaulted women.

The Specter of Professionalization

Professions were first manifested in the guilds and the crafts centuries ago,¹⁴⁵ but did not become the focus of intense scrutiny by sociologists and others until much later. Traditional theorists, such as Talcott Parsons, define “profession” as,

A category of occupational role which is organized about the mastery of and fiduciary responsibility for any important segment of a society’s cultural tradition, including responsibility for its perpetuation *and* for its future development. In addition, a profession may have responsibility for the application of its knowledge in practical situations.¹⁴⁶

The task of determining whether a particular kind of work can properly be classified as a profession is a somewhat more laborious undertaking than might be expected, and one which Ronald Pavalko considers entirely improper. Instead, he proffers an “occupation-profession continuum” designed to determine to what *extent* a specific work activity is professional in character.¹⁴⁷ Pavalko enunciates eight characteristics of work that distinguish occupations from professions, and argues that “the degree to which

¹⁴⁴Ibid., 20.

¹⁴⁵Eliot Freidson, “Professions and the Occupational Principle,” in *The Professions and Their Prospects*, ed. Eliot Freidson (Beverly Hills: Sage Publications, 1973), 22.

¹⁴⁶Richard H. Hall, *Occupations and the Social Structure* (Englewood Cliffs: Prentice-Hall Inc., 1969), 73.

¹⁴⁷Ronald M. Pavalko, *Sociology of Occupations and Professions* (Itasca: F. E. Peacock Publishers Inc., 1971), 16.

each is possessed by a particular work activity determines where that activity belongs on the continuum.”¹⁴⁸

The first of these characteristics is theory or intellectual technique. According to the author the professions are grounded in a well-organized “body of theory and esoteric, abstract knowledge. The second characteristic is relevance to basic social values. Pavalko submits that the professions seek to foster key societal values and to utilize their knowledge to aid in the resolution of “crucial, recurring human problems.” The third characteristic relates to the training period. The author asserts that the professions are typified by a prolonged period of training designed to encourage, (a) a high degree of specialization, (b) the capacity to work with ideas and symbols, and (c) adherence to very specific norms and values. The fourth characteristic pertains to motivation. Pavalko maintains that the professions are dominated by practitioners who accord priority to their clients “best interests” rather than the pursuit of monetary gain or other personal rewards, and that this fact is generally recognized by members of the public. The fifth characteristic is autonomy. The author contends that the professions have control over who can work in their field, and that the resulting monopoly ensures that their members are largely impervious to external control. The sixth characteristic is a sense of commitment. Pavalko believes that the ranks of the professions are filled with highly dedicated individuals who see their work as a life-long calling. The seventh characteristic is a sense of community. The author suggests that the professions nurture a sense of shared identity or culture as well as a common destiny. This contributes to a communal atmosphere which serves to constrain the behavior of members. The final

¹⁴⁸Ibid., 17-18.

characteristic is the existence of a code of ethics. The author notes that the professions are usually set apart by the existence of a code of conduct that governs most, if not all, of their members' working relationships.¹⁴⁹

The latter half of the twentieth century has been characterized by a heretofore unseen drive to recast various occupations as professions,¹⁵⁰ a trend that in 1973 led Eliot Freidson to pronounce that “virtually all prophets—or as they are now called, futurologists—seem agreed that the future will see ever-increasing reliance on specialized knowledge and skill, and on applying that knowledge to the solution of practical problems by specially trained men [sic].”¹⁵¹ He went on to describe the phenomenon of professionalization as,

A process by which an organized occupation, usually but not always by virtue of making a claim to special esoteric competence and to concern for the quality of its work and its benefits to society, obtains the exclusive right to perform a particular kind of work, control training for and access to it, and control the right of determining and evaluating the way the work is performed.¹⁵²

One might have expected that the field of conflict resolution would also have moved in this direction. However, in 1991 after investigating whether persons engaged in this particular kind of work should be categorized as professionals, Scimecca concluded that “although conflict resolution has had a tremendous growth in the United States in the past quarter century, and despite the claims of its practitioners that it has achieved the status of

¹⁴⁹Ibid., 17-25.

¹⁵⁰Freidson, 35.

¹⁵¹Ibid., 27.

¹⁵²Ibid., 22.

a profession, professionalism still eludes the field.”¹⁵³

Scimecca’s findings would no doubt have come as a relief to the many critics of professionalization who have long argued that this phenomenon:

1. could result in inappropriate barriers to entry into the field which in turn could limit the diversity of practitioners;¹⁵⁴
2. is premature given the reality that mediation is still in its infancy;¹⁵⁵
3. is a remedy to a problem that some argue doesn’t even exist;¹⁵⁶
4. could lull prospective clients into a false sense of security with respect to mediator competence;¹⁵⁷
5. could result in the co-optation of mediation by the justice system;¹⁵⁸
6. could result in the loss of the social justice component of mediation;¹⁵⁹
7. could lead to a monopolization of the field by experts that would drive out volunteer mediators who currently provide services to the poor;¹⁶⁰
8. could place the interests of members of the profession ahead of the interests of the public;¹⁶¹
9. could see qualifications being set by persons who lack the necessary expertise;¹⁶²

¹⁵³Joseph A Scimecca, “Conflict Resolution in the United States: The Emergence of a Profession?,” in *Conflict Resolution—Cross-Cultural Perspectives*, eds. Kevin Avruch, Peter W. Black, and Joseph A Scimecca (New York: Greenwood Press, 1991), 34-35.

¹⁵⁴Teresa V. Carey, “Credentialing for Mediators—To Be or Not to Be?,” *University of San Francisco Law Review* 30 (Spring 1996): 636; Michelle LeBaron Duryea, “The Quest for Qualifications: A Quick Trip Without a Good Map,” in *Qualifications for Dispute Resolution*, eds. Catherine Morris and Andrew Pirie (Victoria: University of Victoria Institute for Dispute Resolution, 1994), 110, 117-120; Eric B. Gilman and David L. Gustafson, “Of VORPs, VOMPs, CDRPs and KSAOs: A Case for Competency-Based Qualifications in Victim Offender Mediation,” in *Qualifications for Dispute Resolution*, eds. Catherine Morris and Andrew Pirie (Victoria: University of Victoria Institute for Dispute Resolution, 1994), 93, 95; Picard, 142-143, 157, 159, 161; Andrew Pirie, “Manufacturing Mediation: the Professionalization of Informalism,” in *Qualifications for Dispute Resolution*, eds. Catherine Morris and Andrew Pirie (Victoria: University of Victoria Institute for Dispute Resolution, 1994), 187-188.

¹⁵⁵Carey, 636; Duryea, 110-112; Gilman, 95; Picard, 142.

¹⁵⁶Carey, 636; Picard, 160-161.

¹⁵⁷Carey, 636, 644.

¹⁵⁸Duryea, 119; Gilman, 94; Pirie, 166.

¹⁵⁹Gilman, 106; Picard, 141, 157; Pirie, 188.

¹⁶⁰Gilman, 93-94; Picard, 142, 157, 159.

¹⁶¹Duryea, 109, 112, 120; Gilman, 94, 106; Picard, 157.

¹⁶²Gilman, 93; Picard, 161.

10. could distance mediators from those they serve.¹⁶³

However, while the shortcomings enumerated by critics suggest that professionalization should not be embraced without reservation, nor advanced at the expense of other potential solutions to the problem resulting from the erosion of voluntariness, the fact remains that at least to date the efforts of social activists, theoreticians, mediators and others to halt or even slow the implementation of mandatory family mediation programs have been largely unsuccessful.

In 1994 Cheryl Picard challenged Scimecca's earlier conclusions, asserting that "mediation is emerging as a new profession."¹⁶⁴ Picard's findings were based on a survey of various dispute resolution activities that she undertook in an attempt to locate the field of mediation on the "occupation-profession continuum."¹⁶⁵ After a meticulous review of each of the characteristics of work that Pavalko used to distinguish occupations from professions Picard found that "mediation has advanced considerably in all...but to varying degrees. When placed on his continuum, four of the eight traits (relevance to basic social values, motivation, sense of commitment and community) clearly fall along the professional end."¹⁶⁶ Although she did concede that "less clear are the remaining four traits,"¹⁶⁷ Picard reminds us that even Pavalko did not expect that any "one profession would exhibit all of the dimensions to a high degree and that it is difficult to determine which of these traits are more important."¹⁶⁸ Hence, the fact that theory, training,

¹⁶³Gilman, 93.

¹⁶⁴Picard, 157.

¹⁶⁵Ibid., 145-157.

¹⁶⁶Ibid., 156.

¹⁶⁷Ibid.

¹⁶⁸Ibid., 156-157.

autonomy, and codes of ethics fall towards the non-professional end of the “occupation-profession continuum” should not preclude her argument that the field of mediation is at the very least a profession “in the making.”¹⁶⁹

Although Picard’s conclusions likely generated considerable anxiety in certain quarters, they are hardly surprising. Notwithstanding the trend toward the professionalization of occupations generally, theoreticians such as Bobby Harges have begun to forcefully promote this eventuality, arguing that if public policy makers are going to mandate the mediation of family law disputes they have an obligation to find some means “to ensure mediator competence.”¹⁷⁰ Also, attorneys and the associations that represent them have been somewhat less than coy with respect to their desire to monopolize the provision of mediation services, something Picard alludes to, noting that “the Law Societies of British Columbia and of Upper Canada have [already] begun to introduce formal rules permitting lawyers to act as family mediators.”¹⁷¹

In sum, Picard leads us to conclude that regardless of the misgivings expressed by certain critics, the field of family mediation has been caught up in a more general trend toward the professionalization of occupations. If practitioners begin to presume that professionalization is inevitable then it follows that they would be prepared to explore the potential benefits of this process particularly if it would facilitate the expression of their intrinsic need to conduct themselves in a morally responsible fashion by safeguarding their

¹⁶⁹Ibid., 157.

¹⁷⁰Bobby Marzine Harges, “Mediator Qualifications: The Trend Toward Professionalization,” *Brigham Young University Law Review* (1997): 712.

¹⁷¹Picard, 152.

existing capacity to withhold mediation services in cases where they have adjudged that unfair outcomes for abused women are a distinct possibility.

Professionalization & the Path to Morally Responsible Practice

At present, it appears that the trend toward institutionalizing mandatory mediation threatens to preclude practitioners from laying down the ethical rules governing their own conduct. Hence, the journey toward morally responsible practice ought to begin with an attempt, on the part of these individuals, to preserve their capacity to make decisions about what kinds of cases are suitable for mediation. As a first step, practitioners must endeavor to acquire some degree of power. However, at the present time mediators are clearly not in a position to wrest this power from governments. Instead, they must utilize the political process to persuade public policy makers to cede it to them.¹⁷² This is necessary because,

Insofar as privilege is deliberately organized on a legal basis, it has a political foundation. It is the power of government which grants the profession the exclusive right to use or evaluate a certain body of knowledge and skill. Granted the exclusive right to use knowledge, the profession gains power. It is in this sense that the professions are intimately connected with formal political processes.¹⁷³

The appropriation of power is vitally important because it culminates in autonomy, or the right to self-rule. Autonomy can be either collective or individual.¹⁷⁴ Collective autonomy, however, is what enables the individual professional practitioner to resist

¹⁷²Hall, 380.

¹⁷³Freidson, 29.

attempts by outsiders to exercise administrative authority over their work, including the efforts of managers,¹⁷⁵ legislators and judges, by providing,

The framework for formal organization and control, the character for what, in his seminal work, Hughes (1958) called “license and mandate.” It sets up the legal authority for the profession to recruit, train, examine, license and review performance, and establishes the formal limits of its *exclusive* jurisdiction (emphasis mine).¹⁷⁶

The ability to resist external influences gives the individual professional practitioner control over his or her work and its outcome,¹⁷⁷ and contributes to the expansion of their authority. Parsons spoke of a “very important sense in which the professional practitioner in our society exercises authority,”¹⁷⁸ even over those “who are, or are reputed to be, his superiors in social status, in intellectual attainments or in moral character.”¹⁷⁹ This is key because the authority which emanates from superior technical competence can preserve the capacity of the individual professional practitioner to exercise discretion by “denying the possibility and propriety of formal rules.”¹⁸⁰

Mediators have traditionally been accorded the discretion to select which cases they are going to handle, and existing screening “tools” were conceived with this in mind. This freedom has not been compromised by those “other” forces which obligate women to utilize mediation, or mandatory “referral” to mediation programs, as neither have substantively limited the capacity of the practitioner to exclude cases at their discretion.

¹⁷⁴Pavalko, 22.

¹⁷⁵Freidson., 23-24.

¹⁷⁶Ibid., 32.

¹⁷⁷Ibid., 33.

¹⁷⁸Talcott Parsons, “The Professions and Social Structure,” in *Essays in Sociological Theory*, Revised Edition (New York, 1954: The Free Press of Glencoe), 38.

¹⁷⁹Ibid.

Mandatory mediation programs, however, represent a clear and present danger in that they would expunge this discretion, deny individual practitioners the capacity to withhold their services even in those cases where screening “tools” suggest that inequitable outcomes for assaulted women are likely to result from the utilization of mediation methods, and force them to behave in a morally repugnant manner.

Those practitioners who wish to retain the discretion to exclude should be keen to embrace professionalization because it can serve to counter the threat posed by the advent of mandatory mediation programs. Once public policy makers cede control to an autonomous professional organization consisting of individual professional practitioners who possess the authority necessary to preserve their capacity to exercise discretion, any attempt to interfere with their lawful claim to jurisdiction would quickly become very difficult indeed. Training, improved pay, and the prestige that stems from the process of professionalization would encourage mediators to infiltrate the political system.¹⁸¹ This direct involvement in government by practitioners would advance their interests by providing an avenue through which they might influence the formulation of public policy from within. Also, for the first time mediators would be able to speak with a collective voice. Further, “once an occupation is accepted as a profession, then by definition it is knowledgeable.”¹⁸² This imputed expertise would serve to persuade others that only mediators are fit to practice in the field and render public policy makers largely impotent in the face of a practitioners decision to withdraw their services.

¹⁸⁰Ibid., 34, 38.

¹⁸¹Hall, 371.

¹⁸²Freidson, 30.

Summary

Public policy makers have placed practitioners in an inauspicious position by demanding that they mediate cases in which screening “tools” indicate that exclusion is preferable. Despite the many problems associated with professionalization, mediators are encouraged to embrace this eventuality because it is thought that the capacity to self-rule manifested in the autonomy of the professional association would serve to promote their authority, preserve the discretion they are currently free to exercise, and ultimately facilitate the expression of their innate desire to conduct themselves in a morally responsible fashion.

CONCLUSION

In the past two decades the voluntariness which traditionally characterized the process of mediation has dwindled, a reality attributable to the increasing abundance of family mediation programs as well as the growing strength of forces which obligate women to utilize them. While the ensuing debate between theoreticians and practitioners over whether family mediation is appropriate in cases where domestic violence is a factor has likely served to improve the quality of these services, it has done little to discourage public policy makers from diverting an ever larger number of cases out of the courts and into mandatory mediation programs.

Screening mechanisms, codes of professional conduct and frameworks for the analysis of ethical dilemmas are “tools” that practitioners can employ to determine whether it is inadvisable to proceed with mediation in cases where coerced participation in conjunction with a history or an ongoing pattern of spousal abuse indicate that unfair outcomes for assaulted women are likely. However, screening mechanisms, codes of professional conduct, and frameworks for the analysis of ethical dilemmas were designed for use by practitioners with the authority to exclude cases they adjudged to be unsuited to mediation. Hence, while these “tools” can be effective within the context of those “other” forces (e.g. poverty) which oblige women to utilize mediation, as well as mandatory “referral” to mediation programs, they are completely ineffective in those jurisdictions where law makers have implemented mandatory mediation programs that preclude practitioners from withholding their services except in those extremely limited circumstances specified by the state.

It would appear that despite the misgivings of critics, the field of mediation has been swept up in a more general trend toward the professionalization of occupations. One of the potential benefits of this eventuality is that it proffers a means by which practitioners can extricate themselves from the untenable position they have been placed in by public policy makers determined to mandate the mediation of disputes involving divorce, custody and access, spousal and child support and the division of property. The process of professionalization would allow mediators to collectively challenge the ability of law makers to unilaterally determine the forum in which family law disputes are dealt with. The autonomy that would result from the establishment of a professional association would enhance the authority of the individual professional practitioner, preserve the freedom they currently enjoy to exclude cases at their discretion, and at the end permit family mediators to fulfill their intrinsic need to behave in a morally responsible manner.

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