Transformative Mediation: Is it Possible in a Numbers Game?

by

Kimberly Cork

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ABSTRACT

Government programs advancing mediation to resolve disputes as an alternative to more formal and adversarial processes have become the norm across Canada. Beyond focusing on efficiency measures such as cost, timeliness, and outcome to define success, these programs also implicitly pursue cultural and systemic transformation, goals that are less tangible and harder to measure. These non-efficiency goals are worthy of attention when considering the unique opportunity mediation provides; however, there is concern whether mediators practicing in these programs fully understand the different styles and approaches needed to support such goals.

Since the early piloting and adoption of government-implemented mediation programs, an abundance of opinions, theories and debates surrounding the ideal style or approach have created a dichotomous teaching, learning and practicing environment. The focus of the debates mainly concerns the more commonly referenced styles and approaches: facilitative, evaluative, and transformative. The discourse has created confusion about the application of these theoretical styles and approaches at best and the complete avoidance of them at worst. The response to opposing views has resulted in mediators who lack knowledge of the different styles and approaches available to them for achieving program goals beyond efficiency.

Through a qualitative analysis of interviews with 15 mediators from Manitoba, Ontario, and Saskatchewan practicing within the civil litigation system or analogous administrative law programs, this research study uncovers the current state of mediator knowledge of different styles and approaches to practice. Further, drawing from stories shared by the mediator

participants, this research study explores additional synthesis and discourse between what these mediators value and the style and approach they claim to practice.

The results of this exploratory study uncovered two interconnected findings illuminating the tension between theory and practice. Firstly, many mediators lack clarity and understanding of the different theoretical styles and approaches to mediation. Secondly, this study suggests that many mediators are oriented toward core elements of transformative mediation yet practice in a manner focused on efficiency. These findings emphasize a double standard for mediators who value self-determination or encourage disputing parties to make informed decisions. Unless or until mediators are making informed decisions about how and why they practice, important non-efficiency goals are not likely to be achieved.

"Peace cannot be kept by force. It can only be achieved by understanding."

Albert Einstein.

"…I am a part of all that I have met …"

Ulysses by Alfred Lord Tennyson

"Hope is a passion for the possible."

Søren Kierkegaard

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The idea for this research started first as a curiosity in the early 2000s, over 20 years ago. That curiosity remained until the decision was made in 2018 when I finally decided to embark on this journey to answer my many questions. This journey would not have been possible without the support and guidance of countless individuals. My fellow practitioners, clients, and the academic community helped keep me focused on the task. My thesis advisor, Dr. Jessica Senehi, respected my experience as a practitioner and thoughtfully guided me while still allowing me to struggle with the tension of theory and practice, not to mention the mystery of academia. My committee members, Dr. Bruce Curran and Dr. Stephanie Stobbe, were also valuable to the process. Bruce helped me translate the language of Peace and Conflict Studies into the legal environment where I practice. His insightful feedback and seemingly endless hours of dedicated support were instrumental in helping me shape and refine this thesis. Stephanie's presence ensured I remained grounded in the field I am most passionate about. This incredible team cannot be thanked enough for keeping me in pursuit of that, which, at times, I did not think was possible.

I am eternally grateful for my friend and mentor, Cliff Hendler. His early support of my passion ignited my journey into this fulfilling vocation where I've been privileged to meet renowned practitioners and academics in the field. And, thanks to Cliff's many introductions, I was fortunate to have met Jeff Krivis during the early years of the ABA Dispute Resolution Section conferences. I had the opportunity to meet and speak with Jeff several times at industry conferences and I always walked away with a new appreciation of our practice. Sadly, Jeff passed away while I was writing this thesis. Having benefited from many of Jeff's contributions

to the scholarly literature, I hope this thesis, in some small way, reflects the values and insights he brought to our field.

Gratitude also needs to be extended to the participants in my research. All with busy practices and full lives, they gave up time to create and form the basis of my research. I am a grateful recipient of listening to them share their insights, engage deeply with my questions, and explore unchartered territory—an experience that provided a front-row seat to the transformation that unfolded from our interaction. Clearly, without my participants, there would be no thesis.

I would be remiss if I didn't acknowledge my student peers, those who started with me but finished much sooner, yet actively supported and encouraged me throughout this journey. I also want to express my sincere gratitude to my family and my incredible network of friends, both in and outside the practice and academia, who formed my cheerleading squad every step of the way. Finally, I also want to thank a few special people who will remain anonymous due to their modest ways. They managed to keep me sane in this process, providing the support and encouragement to "just write," and helped me work through repetitive edits, never criticizing my work regardless of how rough it was. You know who you are, and I could not have completed this mountain of an undertaking without you.

It truly took a village to get me to this point, and I thank every person in my village!

DEDICATION

I dedicate this work first to my daughter Payton. Her earliest memories are of me being both a working mom and a student mom. “Don’t all moms work *and* go to school?” she once asked an elementary school friend when sharing the prior evening’s event of colouring in the back row of a lecture hall. She has been my motivation and inspiration since before she could talk and every day since. Payton has been my most vocal cheerleader and supporter, reminding me all too often, “You’ve got this, Moma.” Offers of support, including proofreading and neck massages, were always available even when she was preparing for exams, writing a paper, or trying to rest and refuel in preparation for the next stage of her own academic pursuits.

This work is also dedicated to my husband Jay, who supported my desire to pursue this undertaking, even when life delivered unexpected curve balls.

A line I borrowed from a dear friend so aptly and eloquently describes my feelings: *“I realize now that those who share our lives ensure we are never truly alone in anything we manage to accomplish.”*

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PREFACE

This story began in the late 1990s. At that time, I worked for a large national financial institution. Like most large corporations in Canada, it had a dedicated business area focused on defending civil lawsuits, and it was my role, together with in-house or external counsel, to manage them. With the rising trend of mediation as a means of resolving civil cases more efficiently and with legal jurisdictions across Canada implementing mandatory mediation programs, I became both a consumer of and a participant in mediation. Throughout the course of a year, I could attend anywhere from 12 to 36 mediations, working alongside counsel and being exposed to the styles and approaches of a variety of mediators across Canada. With the cities of Toronto, Ottawa, and Windsor all requiring mediation for the types of civil cases I helped manage, most of my experience with mediation occurred in Ontario. By the early 2000s, with a Major in Conflict Resolution Studies from Menno Simons College at the University of Winnipeg and having attended a considerable number of mediations, I found myself comparing the various styles and approaches of the mediators I was working with against the theories I had studied and the methods in which I had been trained.

Admittedly, I found myself assessing the mediators we hired and, in conversation, would explore options with them on the premise that perhaps, despite the process's efficiencies and successful outcomes, there was more that could be done – maybe there were other goals or objectives that could positively impact the parties. I saw the opportunity for all parties to learn or refine skills to avoid the time and expense of litigation, as well as an opportunity to enhance communication and conflict resolution skills that could be relied upon after the mediation session; maybe even a reduction in litigated disputes. My curiosity extended beyond the opportunities presented by the dispute bringing the parties together. In any mediation, I saw a

web of relationships at play, even if just for the day, but often ongoing because mediators, counsel, and defence clients would work with each other regularly.

One evening, following a particularly long and challenging mediation, I was left feeling as if there had been a disservice to the other party even though the case had been resolved by way of an agreement. In this case, the plaintiff was an older woman who was quite emotional and distraught over what had happened to her. Despite her feelings, a settlement was achieved through multiple rounds of negotiations, with the mediator leading the effort - "working their magic," counsel would say. From a business perspective, the settlement was reasonable, and the plaintiff seemed satisfied with this aspect; however, throughout the process, I had the impression she felt powerless, misunderstood, dismissed, and at times suppressed by the entire process, including her counsel and the mediator. Everyone in the room was experienced and comfortable with the process, hired to do a job, except for the one who was personally invested – the plaintiff.

That day, I decided something was missing, perhaps even flawed, in the process. Important elements I had studied and aspects I valued were left out. Having worked with the mediator several times before and feeling comfortable debriefing the process in light of my educational background and interests, I shared my feelings about the day. This mediator did not share my observations or sentiment, seemingly proud of the work and especially the outcome – a settlement. When I pushed a little harder, the mediator respectfully suggested that the process was doing what it should, saying, and I am paraphrasing here – "it's not broken, why fix it?"

I never forgot that mediation, the woman I sat across the table from and certainly not the discussion with the mediator afterwards. After deciding to leave my role at the large corporation and start practicing, I vowed not to lose sight of all the important goals of mediation. I learned early on in my practice that the numbers are the easy part; the rest is far more difficult. Six years

into my practice, I continuously searched for opportunities in the process for parties to gain a new understanding of themselves and others, an appreciation for a perspective or a skill they could take with them – an unexpected gift for the future. The environment in which I practiced praised efficiency and settlement, and while I recognized their importance, I remained curious about other goals and objectives, including their capacity to extend beyond the mediation setting. I wondered if government mediation programs sought to achieve additional goals, whether my fellow practitioners recognized those goals, and how they might be accomplished through the different styles and approaches to practice. In short, I had far more questions than answers. Finally, in 2018, I decided it was time to return to my studies, to my roots, so to speak, and venture more deeply into the world of Peace and Conflict Studies. Through my research I hoped to answer these questions and gain a deeper understanding. Such an understanding would not only inform my mediation practice but could also be shared with other mediators to engage them in a deeper reflection of their practice. Ultimately, though, I sought to improve the experience of mediation participants. From my journey and curiosity, I offer the gift of this thesis.

CHAPTER 1 - INTRODUCTION

In many respects, this research began over 25 years ago. Informally, it flowed from a first-hand experience with government-initiated mediation programs, an education in Conflict Resolution Studies, and a natural curiosity. Along with this curiosity came an unrelenting pursuit of mediation's untapped potential, particularly in contexts where mediation is often thought of or referred to as a "numbers game." This numbers game mindset frequently measures mediation success by the value of cases closed or settlements reached, a mindset that prioritizes efficiency and the negotiation of quantifiable outcomes. This mindset, however, raises questions about the true potential of mediation, questions I have returned to time and time again. Some of those questions solidified the formal research that informed this thesis.

Motivated by these questions, this research examines how mediators practicing in government-implemented programs in Saskatchewan, Manitoba, and Ontario understand the different styles and approaches to mediation. Saskatchewan's program is rich in history and Ontario's experience with significant volume provides foundational experience for other programs. Manitoba's program, more recently implemented than those in Saskatchewan and Ontario, incorporates aspects of each, despite being offered through a different legal system. Notwithstanding the differences when comparing these programs and their goals, there is a common thread of seeking more than simply efficiency goals such as cost savings, timeliness, and outcome. These programs also seek goals labelled as "cultural change" (Schulz, 2018), referring to a change in beliefs or knowledge based on increased understanding and "systemic transformation" (Keet, 2005), meaning a change in the environment in which it occurs through the creation of an improved, more positive process and experience. To achieve such goals, the different styles and approaches to mediation are embedded with fundamentally different

principles and based on purpose (Bush, 2023). Therefore, in considering these different purposes along with the more complex program goals, it is crucial that mediators have a comprehensive understanding of the different styles and approaches to mediation.

Having articulated the core research focus and the importance of mediator understanding, this chapter provides a roadmap for this thesis. This section introduces the purpose and key contributions of each chapter, aiming to clarify the relevance of the context in which this research took place, the challenges confronting the field due to the abundance of informing literature, and the significance and implications of the research findings. However, prior to introducing this research, an explanation for how this research will be presented is necessary.

As will be presented throughout this thesis, mediator styles and approaches can be defined in various ways; however, regardless of any definitional differences and resulting dissonance, some common elements include exploration, fact-finding, testing, and probing. These elements are also consistent with a broad definition of research. Fundamentally, the mediator's role is congruous with that of a researcher, and therefore the practical aspects of this research were situated ideally with my experience and skills as a mediator. However, while the practical aspects of this research felt familiar, understanding the underlying and informing theory proved more challenging.

For a non-academic, the number of qualitative research theories can be overwhelming at best and utterly confusing at worst. Navigating this vast and complex landscape of theoretical choices likely mirrors the experience of students of mediation, who also face a choice of theoretical styles and approaches, some of which are at odds and others seemingly indistinguishable, amidst a profusion of terms and definitions used throughout the extensive literature. The connection between research and mediation, specifically the shared emphasis on

understanding subjective experiences and meaning-making, informed the choice of methodological approach used in this research. An approach with a focus on reflexivity, the ability to be aware of beliefs and experiences that can influence the research process and respond appropriately, is yet another similarity between research and mediation practice. While careful consideration of potential biases offers a valuable lens for gaining deeper insights into the perspectives and interpretations of the mediator participants, as a relatively inexperienced researcher, I acknowledge that my perspectives and interpretations may influence the research process.

I aim to present this thesis in a way that is both informative and accessible to a diverse audience. In my view, one of the most important roles of the mediator is to navigate the tension that is conflict. This involves facilitating the exchange of information, including facts, processes, perspectives, and emotions, with a goal to increase the parties' knowledge and awareness beyond their initial understanding. Mediators must communicate effectively to succeed in this aspect of facilitation, specifically to increase or exchange knowledge. Summarizing, rephrasing, or reframing are all key; however, most important is the language used. In essence, mediators act as translators, even when working within the same language. The goal is to find the right words and the most meaningful language to ensure all parties – including the mediator – feel confident in understanding each other.

Just as mediators strive to find the right words to facilitate understanding, I aim to do the same in presenting this research while acknowledging that my values, shaped by my experience as a mediator, influence how I communicate its findings. This influence is particularly relevant because, like many fields, mediation often reveals a tension between theory and practice. This tension can even be found within academic circles. For example, a legal educator and mediator I

recently spoke with at an industry conference surprised me by asserting, “I’m not a theoretician, I am a practitioner.” This statement highlights for me a common perception that theory and practice are distinct, even oppositional, domains. Because I believe that integrating theory and practice is crucial for the practice of mediation, I have written this thesis, as much as possible, with a focus on clear and accessible language, aiming to bridge the gap between theory and practice and make the information relevant to students, researchers, educators, program administrators, lawyers, and practitioners alike. While some chapters may resonate more with different audiences, my intention is for this thesis to be accessible, meaningful, transferable, and most importantly, understandable.

While this thesis presents an exploration of *how* mediators understand the different styles and approaches to mediation within a specific context, it is important to delimit certain areas that remain outside of the scope of this work. In particular, this thesis does not delve into the broader questions of evaluating the suitability or practical applicability of any one specific style and approach for different contexts. Additionally, this thesis does not propose new models, structures, or designs for mediation practice based on different styles and approaches. Finally, this study does not address broader ethical considerations, codes of conduct, or certification processes related to mediation practice and the different styles and approaches.

Thesis Outline

The field of mediation is characterized by a vast and confusing array of terms to describe mediator styles and approaches, not to mention an even greater number of words and phrases intended to describe what mediators do. Because these terms and phrases permeate the context, literature, and analysis of this research, Chapter 2 attempts to establish a foundation of key

definitions and descriptions. These definitions of terms are offered to provide clarity and assist the reader in understanding and navigating the complexities of mediation terminology.

Having established a shared understanding of the key terms in Chapter 2, a summary review of the context for this research will follow. Chapter 3, laying the groundwork for the contextual foundation of this research, explores my personal and professional experience giving rise to this research and examines government-implemented mediation programs, one each from Manitoba, Saskatchewan, and Ontario. Particular attention is paid to the evolution of the Saskatchewan and Ontario programs, underscoring their respective objectives while also distinguishing between efficiency and non-efficiency goals.

Following the overview of the provincial mediation programs in Chapter 3, this thesis turns to a comprehensive and chronological examination of the relevant literature. From the mid-1990s to the early 2000s, an abundance of scholarship focused on various aspects of mediation; however, the most prominent debates centred around mediator styles and approaches. Chapters 4 and 5 explore the foundational debates between the most common theoretical styles and approaches – facilitative, evaluative and transformative – tracing their evolution and highlighting the key points of contention. By the mid-2000s, enthusiasm for the debates appeared to fade until more recently when a new debate emerged in response to a proposed solution for abandoning the individual theoretical styles and approaches, giving attention to and creating options to combine them. Chapter 6 covers this latest debate, along with empirical research supporting a general lack of understanding of the different styles and approaches in the field and ends with a brief discussion concerning the role of directiveness in mediation.

With the context and informing literature well established, Chapter 7 details the qualitative research design and methods used to gather and analyze empirical data on mediators'

perspectives and practice. This chapter provides a detailed account of the research design and methodology employed in this exploratory study, explaining the rationale behind the chosen approach and the specific steps taken to gather and analyze the data. An interpretivist phenomenological approach, which seeks to understand the lived experiences and meaning-making processes of individuals, is well-suited to exploring the subjective experiences of mediators and how they interpret their role and practice. Covering the participant selection and interview processes, Chapter 7 also outlines the thematic analysis of the data to identify key themes in mediators' understanding of the different styles and approaches. By providing a transparent and rigorous account of the research methodology, this chapter strengthens the validity of the findings presented in this thesis.

Following the detailing of the research design and methodology, Chapter 8 presents the key findings that emerged from the analysis of the interview data. Specifically, the findings revealed a lack of consistency in how mediators define and describe the different styles and approaches, suggesting a potential gap between theoretical understanding and practical application. While similar inconsistencies have been found in other research (Charkoudian et al., 2009; Hanycz, 2005; Picard, 2002), those studies are limited by a narrow provincial or program scope, are now dated and neglect the nuances of mediators' subjective experiences and interpretations, particularly how mediator values inform their self-reported style and approach. In contrast, this study, specific to cross-provincial programs, offers new insights into the complex dynamics of mediator practice and challenges the often accepted disconnect between theory and practice. Despite the limitations of other research, the similarities are still noteworthy; in keeping with specific research concerning mediator power (Hanycz, 2005), the findings in this study confirm that mediators believe they have significant influence on the parties and the process,

underscoring the importance of their understanding and application of the different styles and approaches. By shedding light on these complex dynamics, Chapter 8 lays the necessary foundation for the deeper discussion of the findings and their meaning to follow.

Building on the research findings, Chapter 9 delves into a deeper discussion of the significance – the complex dynamic between mediators' understanding of theory against their personal values and claimed practice. This chapter also explores the gap between theory and practice through a comparison to the literature. It considers possible explanations for inconsistencies in mediators' definitions and descriptions of the different styles and approaches, and examines the potential disconnect between their espoused values and their self-reported style and approach. Additionally, Chapter 9 examines mediator motivations and values, analyzing how such factors influence their practice and the potential for aligning their values with Bush and Folger's (1994, 2005) transformative mediation based on empowerment and recognition. Further, this chapter highlights the significant influence mediators hold within the mediation process, underscoring the importance of their understanding and application of the different styles and approaches to achieve diverse program goals. By analyzing these complex dynamics, Chapter 9 provides valuable insights into the challenges and opportunities for the practice in achieving important government mediation program goals.

This thesis is not intended to be the end of this research but rather a starting point for reflection and further exploration. Chapter 10, the final chapter of this thesis, details the plausible implications of this study for the field of mediation, identifying opportunities for future research and offering concluding thoughts based on the key insights gathered throughout this research journey. Finally, this chapter returns to the overarching question of this thesis—*Transformative Mediation: Is it Possible in a Numbers Game?*—and offers a final reflection on the findings.

CHAPTER 2 – DEFINITIONS OF TERMS

Echoing the sentiment that terms in the fields of conflict resolution and mediation have been "very broadly and loosely defined" (Scimecca, 1993, p. 212), an exploration of mediator styles and approaches needs more than context. It requires an understanding of the language in which the topic unfolds. To better understand the starting point for this thesis, it is important to recognize the diversity among the terms and definitions for mediation, encompassing not only the purpose but also the specific role, style and approach, and goals of the mediator. One author, while making a point with an extreme statement, jests, "there are as many definitions of mediation as there are mediators" (Hanycz, 2005, p. 820).

This chapter will identify the many terms used when discussing mediation, focusing on those most referenced in Western practice, the backdrop of this research study. This is intended to assist the reader in understanding the literature that has informed the research and provide additional clarification. More narrative definitions will be offered due to the different use of common words and phrases along with those that will be used interchangeably throughout this thesis. I invite the reader to think of this chapter as an opportunity for a preliminary understanding of the process and, for those with more practical knowledge, consider it a pre-mediation session of sorts.

In the context of this research, the following terms are most commonly used and referred to. It is recognized that there are a significant number of terms and definitions offered here; however, they are intended to provide the reader with a good understanding of what each means. Providing the terms alphabetically is the general format for a definitions of terms chapter; however, to guide the reader through the material as presented, the terms are offered in the order they are introduced.

Definitions

Practice

Throughout this thesis, the word *practice* is used specifically to refer to a mediation practice. Any reference to a law practice will be stated explicitly.

Mediation

In international conflict resolution spheres, mediation has been defined most simply as "a process undertaken by an outside party to bring or maintain peace" (Crocker et al., 2003, p. 7) or as robust as "a process of conflict management, related to but distinct from the parties' own negotiations, where those in conflict seek the assistance of, or accept an offer of help from, an outsider … to change their perceptions or behaviour, and to do so without resorting to physical force or invoking the authority of law" (Bercovitch, 1997, as cited in Crocker et al., 2003, p. 8). In restorative justice, victim-offender mediation is described as "a process which allows crime victims to meet face-to-face with the offender to talk about the impact of the crime and to develop a restitution plan" (Umbreit, 1998, Abstract). Academics and practitioners of community mediation tend to define mediation by focusing on the goals of empowering individuals and communities by equipping them with new skills to resolve their conflicts with confidence outside of the oppressive legal system, thus creating more peaceful communities (Hedeen & Coy, 2000; Ries & Power, 2020). A succinct definition which could capture a range of disputes, from interpersonal to international, including victim-offender and community mediation, is offered as "an intervention that is intended to resolve disputes and manage conflict by facilitating decision making" (Folberg & Taylor, 1984, p. xi). Three definitions more commonly accessed in the context of this research are presented next.

Christopher Moore (1996), in the book titled *The Mediation Process*, defines mediation as follows:

> The intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute. In addition to addressing substantive issues, mediation may also establish or strengthen relationships of trust and respect between the parties or terminate relationships in a manner that minimizes costs and psychological harm. (p. 15)

Another definition of mediation is offered by Menkel-Meadow et al. (2011) in *Dispute Resolution: Beyond the Adversarial Mode* as "a process in which an impartial third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship" (p. 223). Lastly, Weinstein (2018) in a book written for consumers of mediation, defines mediation as a "confidential process in which an impartial third party supports the parties to come to a solution that works for them without giving advice or opinions (p. 17).

This is not an exhaustive list of definitions; however, it demonstrates a range of options within a similar theme, albeit with some differences. Throughout this thesis, opinions will be shared, considering the different definitions and corresponding practices; however, for purposes of this thesis, **the definition of mediation can be considered a process wherein an independent third party – the mediator- assists disputing parties in reaching a resolution of their choice.** This definition, albeit brief compared to Moore's and Menkel-Meadow's, purposely omits the descriptors "voluntary" and "neutral" in defining the process due to the different theoretical styles and approaches referred to in this thesis and the structural models of

mediation that form the context of this research. This definition also purposely does not include the *type* of resolution, such as being mutually agreeable and/or settlement, to allow for any outcome that may be decided by one or all parties. While some may argue that a lack of a settlement agreement (a type of outcome) suggests a failed mediation, it is important to recognize that not settling is also a form of resolution,[1] and supports party self-determination.[2] Lastly, this definition very specifically omits goals or outcomes that are directly related to, or the direct or indirect result, of the style and approach of the mediator.

Style and Approach

A number of authors, when referring to the role of the mediator, will separate a mediator's *orientation* from their specific actions. In these cases, orientation is often intended to capture the overarching theoretical paradigm or assumptions about the role of the mediator, including their goals, strategy or plan for the process. Whereas the specific behaviours or actions used by the mediator are referred to using a host of words including techniques, tactics, moves, or steps (Alexander, 2008; Herrman et al., 2003; Riskin, 1994).

The words "style" and "approach" in this thesis are used to identify 1) a mediator's overarching view about or towards mediation and 2) the specific tactics, strategies, and actions that support the overarching view. In this thesis, style can be interpreted as synonymous with orientation (Riskin, 2005), worldview (Alexander, 2008), philosophical map (Kovach & Love, 1998), or ideological framework (Alberstein, 2007). Approach is used here to refer to specific mediator behaviour, techniques, strategy, actions and tactics, including the degree or level of intervention. Typically, style and approach will be used together as a complete term when

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[1] Defined on page 16.
[2] Defined on page 16.

referring to a common theory intended to encompass *all* aspects of the mediator's *role*; however, at times, they may be used intentionally separate or to mirror the use in any literature referenced. Due to the quantity of terms and lack of consistent usage, the word or term may be intended to mean something different when referencing other literature. In those cases, effort will be made to clarify meaning in keeping with the terms in this chapter.

Since mediation's early inception, different mediator styles and approaches have been written about and taught. While the following is not an exhaustive list from the last 30 years, it is a comprehensive one intended to highlight the considerable number of options available to mediators:

- facilitative (Riskin, 1994)
- evaluative (Zumeta, 2018)
- directive[3]
- bargaining (Silbey & Merry, 1986)
- therapeutic (Silbey & Merry, 1986)
- transformative (Bush & Folger, 1994)
- problem-solving (Bush & Folger, 1994)
- narrative (Winslade & Monk, 2000)
- humanistic (Umbreit, 1997)
- restorative (Umbreit, 1998)
- strategic (Kressel, 2007)
- insight (Picard & Melchin, 2007)

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[3] Directive is often used synonymously with Evaluative mediation and is defined on page 19 and will be explored in Chapter 6.

- communicative (Kolb, 1983 as cited in Picard, 2004)
- settlement (Boulle, 2005 as cited in Alexander, 2008)
- neutral (Chan-Serafin & Wall, 2010)
- pressing[4] (Chan-Serafin & Wall, 2010)

Before the mid-nineties, Folberg and Taylor (1984), in their book titled *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, highlight there were a variety of different types of mediation styles and approaches. Even then, the field was characterized by various terms, which, with the exception of therapeutic mediation, is demonstrated in a distinct set of terms from the list above. Folberg and Taylor 's book includes the following:

- labour
- lawyer
- supervisory
- muscle[5]
- structured
- court-connected
- community
- shuttle
- crisis
- celebrity
- team

[4] Stemming from a research study wherein these were terms used by the mediator participants and became coded categories (Chan-Serafin & Wall, 2010).

[5] An early label for what later became known as Evaluative mediation.

While Folberg and Taylor (1984) title the applicable chapter in the book "Diverse Styles and Approaches to Mediating Conflict," their list presents more as a combined list of dispute types or environments along with specific mediator interventions or structural models. For example, their "team" mediation is specific to a co-mediation practice, the use of two mediators in one mediation session, and "celebrity" mediation does not mean disputes involving celebrities but rather where a well-known public or political figurehead intervenes in the role of mediator (1984, p. 140).

Notwithstanding the seemingly endless options available to mediators in their practice, most recent and related literature typically refers to three or four different styles and approaches (Birke, 2000; Brooker, 2007; Bush, 2023; Charkoudian et al., 2009; Cloke, 2001; McDermott & Obar, 2004; Menkel-Meadow et al., 2011; Reimer et al., 2015; Riskin, 2005). The three styles and approaches most commonly included in any list are facilitative, evaluative, and transformative, although not necessarily all together, and occasionally, additional options like those in the first list above will be presented alongside these popular three. Four options were presented in recruiting participants for this research, first in the participant recruitment survey and later in the interviews, which were evaluative, facilitative, directive, and transformative. These options will be defined briefly in the following section and expanded upon in the chapters dedicated to the literature informing this research. Similar to the various definitions of mediation, alternative definitions for these four can also be found; however, for purposes of this thesis, the following definitions can be relied upon.

Facilitative

Not unlike other terms mentioned here, there are numerous definitions of facilitative mediation; however, this style and approach is often referred to as *pure* mediation.

Riskin (1994, 2005) provides detailed definitions made up of mediator assumptions about the parties, combined with specific actions of facilitative mediation, such as helping parties to understand issues and interests and assisting in developing options and proposals focused on problem-solving. A more succinct version, according to Menkel-Meadow (1995), is "[a] third-party neutral helps the parties to arrive at their own solution" (p. 228). This is a very vague definition and could arguably be applied to a host of different styles and approaches of mediation. Perhaps a more thorough way to define facilitative mediation is that offered by Kovach and Love (1998):

> [Facilitative] mediation is 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. A mediator facilitates communication, promotes understanding, focuses the parties on their interests, and seeks creative problem-solving to enable the parties to reach their own agreement. (p. 76)

This definition emphasizes the focus on understanding and protecting the parties' role and participation in the process.

None of these definitions or explanations may be more useful than another; however, they demonstrate the plethora of definitions, including variations and cause for debate around defining mediator styles. For purposes of this thesis, except for when highlighting contrary opinions in the debate section of the literature review, **facilitative mediation is defined as a problem-solving style focused on participant communication in order to uncover and understand interests, resulting in a mutually agreed upon resolution**.

Self-determination

This term is central to much of the literature concerning mediation and, in addition to being used in some definitions in this chapter, will be referenced frequently when covering the debates surrounding the different styles and approaches in the upcoming literature review chapters. In short, self-determination should be considered the principle in which the parties voluntarily and independently decide on the process and outcome. This has been identified as the very foundation on which mediation is based (Carter & Watts, 2016; Keet et al., 2020, p. 24; Weldon, 2012). I recognize this may be viewed as a somewhat simplified definition of an essential and foundational concept in many fields; however, it is not intended to minimize its importance or complexity but instead to allow readers from different fields interested in the topic to understand the concepts covered here.

Resolution

Defined simply by Merriam-Webster (n.d) as "the act of determining" and other than when referencing specific literature or quotes, this thesis will most often refer to an outcome of mediation as a resolution rather than a settlement. I argue that the word settlement has negative connotations, such as "settling" on something, giving up something, or conceding and I concur with one other author who shares the opinion that the word settlement "suggests an element of imposition or coercion" (Mitchell et al., 1998, p. xvii).

Evaluative

According to an article intended to support more use of transformative mediation in legal and non-legal environments, the evaluative style is referred to as the most "widely adopted style" (Aiwazian, 2008, p. 34) and relies on an extensive definition provided as:

Evaluative mediation is a process modeled on settlement conferences held by judges. An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases and predicting what a judge or jury would be likely to do. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues. Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests and evaluate based on legal concepts of fairness. Evaluative mediators meet most often in separate meetings with the parties and their attorneys, practicing "shuttle diplomacy."[6] They help the parties and attorneys evaluate their legal position and the costs vs. the benefits of pursuing a legal resolution rather than settling in mediation. The evaluative mediator structures the process and directly influences the outcome of mediation. Evaluative mediation emerged in court-mandated or court-referred mediation. Attorneys normally work with the court to choose the mediator and are active participants in the mediation. The parties are most often present in the mediation, but the mediator may meet with the attorneys alone as well as with the parties and their attorneys. There is an assumption in evaluative mediation that the mediator has substantive expertise or legal expertise in the substantive area of the dispute. Because of the connection between evaluative mediation and the courts, and because of their comfort level with settlement conferences, most evaluative mediators are attorneys. (Zumeta, 2018)

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[6] Shuttle diplomacy is when the mediator moves between the separated parties delivering messages and offers.

I have included this extensive definition here as it highlights a number of different mediator techniques that form much of the debate about evaluative mediation in the literature review - in particular, initiating and engaging in risk assessments, projecting outcomes at trial (or other similar adjudicative processes), recommendations for settlement,[7] and considerable use of a caucus[8] only mediation structure.

Transformative

Over the years, since transformative mediation was introduced first in *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (Bush & Folger, 1994), several iterations of the original definition have been shared. These definitions were often based on the writer's interpretation or understanding of what the authors of transformative mediation intended. For purposes of accuracy and clarity, Bush and Folger (1994) define transformative mediation as a style an approach whereby the mediator focuses their efforts on "fostering empowerment and recognition [thus] empowering parties to define issues and decide settlement terms for themselves … [through] helping the parties to better understand one another's perspectives" (p. 12). To understand Bush and Folger's (1994) definition and the central goals of a transformative style and approach, it is perhaps more important to define what is meant by both empowerment and recognition in the context of mediation. According to Bush and Folger (1994), the empowerment "dimension" (p. 20) is centred on party self-determination, specifically building, and supporting the capacity for informed decision-making in the present situation and in the future. This empowerment focus results in "a greater sense of self-respect,

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[7] The combined effort of projecting outcomes and considering risk of tangible (legal fees and expenses) and intangible (reputation, stress, etc.) costs has been referred to as "litigation interest and risk assessment" (Keet et al., 2020). Throughout this thesis it will simply be referred to as a risk assessment in the context of mediation.

[8] Caucus refers to private separate meetings with the parties.

self-reliance, and self-confidence" (p. 20) by the parties. Recognition is specifically the act of empathizing with others through an increased understanding of the present circumstances and the resulting challenges (pp. 1, 21). The result, according to Bush and Folger (1994), is summarized as "when both of these processes are held central in the practice of mediation, parties are helped to use conflicts as opportunities for moral growth, and the transformative potential of mediation is realized." (p. 2). More simply put, the definition of **transformative mediation can be considered a relational[9] style and approach focused on empowerment and recognition, supporting the parties in a process and outcome of their choice**.

Directive

While frequently referenced by both theoreticians and practitioners, a directive approach to mediation is not considered a primary or independent style according to most. Instead, it is understood as more of a subset of a style pertaining to mediator tactics, behaviours or even their general nature (Alexander, 2008).

Regardless of where directive exists theoretically or practically, it is commonly referenced in the literature and discussed amongst practitioners and consumers alike often specific to the level of intervention. In this context, directive can be defined as **mediator control using various tactics based on the mediator's opinion of the goals and objectives over the process, content, or outcome.** As mediators may be bound by the structural model of specific programs, such as the use of pre-mediation sessions, time limitations, or ownership of administrative tasks, any reference to process control specifically pertains to actions taken within the expected program structure.

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[9] The relational view of transformative mediation will be explored fully in Chapter 5.

Model

For purposes of this thesis, outside of reference to specific literature, the word model is used to reference the framework or structure of the mediation process. This includes the process for selecting or assigning a mediator, time limitations, location of the mediation, use of co-mediators, pre-mediation session, joint session, or caucusing—as either promoted or required by the program in which it exists. Model is *not* used to refer to the approach, actions or behaviours of a mediator that are shaped by their style or orientation. The definition here is also contrary to the notion of a "metamodel," which organizes and compares the various styles and approaches to mediation, including the impact or influence of the mediator on the process and its participants (Alexander, 2008).

This chapter provides a more extensive review of key terms than is typically found in a definitions of terms chapter. There are two primary reasons for such an in-depth approach. One reason is to familiarize the reader with the multitude of definitions encountered both in practice and in the literature, including the varying meanings and the challenges this presents for understanding. The challenges of navigating varying definitions are highlighted in the aptly named article "Mediation by Any Other Name Would Smell as Sweet – or Would it? The Struggle to Define Mediation and Its Various Approaches" (Charkoudian et al., 2009). In this article, the authors highlight that it can be challenging for a reader to follow the literature review against the authors' research findings given there are many variations of the same vocabulary, reinforcing their conclusions that "there is no universal agreement on the language used to describe mediation" (p. 294). While the quote introducing this chapter stems from a far more extensive study, both quotes underscore a critique of the field regarding terminology.

The second reason, related to the first, yet a far more practical reason for including this chapter, is to help prepare the reader to understand the context in which this research occurred. By establishing an appreciation for the variations in terminology and a shared understanding of key terms, this chapter also aimed to highlight the challenges with terminology facing the field and facilitate a smoother navigation of the concepts and debates underpinning this research. Relying on the definitions provided, the following chapter will explore the personal and professional experiences that inspired this research, followed by an analysis of three government-implemented mediation programs that set the context for this study.

CHAPTER 3 - CONTEXT

This chapter provides the necessary context for this research. It begins by recounting my personal and professional experiences with mediation and briefly explores the mediation landscape before the introduction of government mediation programs dedicated to general civil matters[10] in Canada. Next, the chapter reviews the historical development of Canada's two pioneering provinces in government-implemented mediation: Saskatchewan and Ontario. It examines the evolution of these programs, including their implementation, key features, and evaluations. This review establishes the structure for understanding the more recent program in Manitoba, which will be explored fully through an evaluative report and includes a comparison to the programs in Saskatchewan and Ontario. Finally, this chapter concludes with a targeted critique of the potential shortcomings of these programs and their evaluations concerning their stated objectives and potential. This contextual framework provides the foundation for understanding the research questions explored in this thesis.

Being a Conflict Resolution Studies major, I studied conflict theory and was trained in facilitative and transformative mediation. The knowledge I gained, as well as the training, proved to be beneficial in my role as a Litigation Specialist with a large corporation. As a consumer of mediation services and an active participant, I was drawn to mediators who seemingly shared my values. I viewed each mediation as an opportunity to build a strong basis of knowledge and understanding through fostering open communication, collaboration, and ensuring all perspectives were heard and considered. My focus extended beyond simply resolving an immediate dispute; I aimed to create a positive and productive experience for all parties, one they

[10] Mention of general civil matters, litigation, or issues in this thesis refers to any non-family matter such as a commercial, property, tort, personal injury, or contract dispute.

could carry over into other aspects of their lives. I believed this approach was crucial not only for informed decision-making but also for building ongoing relationships with those I would encounter regularly in my role. However, I observed a trend in my experience where mediators prioritized settlements and the speed at which they could be achieved rather than focusing on the process and relationships. This emphasis on efficiency and outcomes, reminiscent of a numbers game carried out by shuttle diplomacy, often felt like simply facilitated negotiation passed off as mediation.

As my experience increased through a variety of volunteer roles focused on effective mediation advocacy, combined with my education, training and experience, I began to challenge the mediators whom I hired. While there were numerous responses to my critique, the one that had the most significant impact on me was, “Kimberly, it’s not broken; why fix it”? My explanation fell on deaf ears, presumably because the goal of mediation appeared to have been replaced by monetary settlements alone. Efforts to explore elements of transformative mediation were also ignored as mediators practicing in the civil litigation environment had decided that this mediation style was too time-consuming and was only meant for other types of practices like family law and community mediation because of a misconception of a relationship-only focus. There was no appetite to examine how other approaches or techniques might permeate the civil litigation mediation practice.

In 2012, when I began my practice in this area, I knew I wanted to have some impact. The challenge in building a new practice is being careful not to upset the status quo – change must come slowly, especially in an area that, over time, has become more of an extension of the

litigation process rather than true mediation. As a student of Dr. Julie Macfarlane's[11] many books and articles, I was drawn by her assertion that "mediation is much more than simply the introduction of a non-partisan third party into disputing contexts; it represents a paradigm shift in how disputants think about the resolution of their conflict" (1997, p. 8).

These ideals, combined with my education and experience with mediation, highlighted a disconnect between theory and practice. This disconnect also fuelled a desire to better understand the factors that have shaped the development and implementation of mediation programs in Canada. To fully appreciate Canada's foray into the different government programs, it is essential to note that it was preceded by what has been considered a success by similar efforts in the United States and other Western societies. As such, the following section will briefly cover the historical context and key developments that paved the way for the introduction of government-implemented mediation programs in Canada.

Setting the Stage

Before the inception of mandatory mediation for general civil matters in Saskatchewan and Ontario, the popularity of mediation had been experiencing what has been described as a "movement" (Mackie, 1997, p. 371) for over 15 years in the United States, the United Kingdom, and elsewhere internationally. Domestically, labour relations in Ontario and British Columbia, seeking to avoid the more adversarial means to settle disputes, helped set the stage by introducing mediation into collective bargaining agreements. Mediation became so common in this environment that some suggest it was impossible to think of a labour dispute without mediation (McCormack & Lanyon, 1997). Opt-in or voluntary programs in the Family Law

[11] As a law professor, teacher, researcher and writer, Dr. Macfarlane's work in ADR and mediation, is informed by a deeper commitment to understanding and fostering change.

context were also rising in popularity across Canada at the same time (Walker, 1997). Community and neighbourhood mediation programs in the United States and the United Kingdom enjoyed rapid expansion and success in the 1980s (Hedeen & Coy, 2000; Liebmann, 1997) preceded by mandatory court-connected[12] mediation for civil cases in the United States that had already entered the movement in the late 70s and really created a stronghold on mediation practice as a successful alternative to the courts (Alfini, 1991; Clarke et al., 1995; McEwen & Maiman, 1981; Scimecca, 1993; Wissler, 2002). Seen as improving access to justice, the overall popularity and the rise of the public and legal consciousness of mediation, including the success of court-connected mediation in the United States, set the stage and created the framework for programs that surfaced in Canada in the mid-90s for general civil matters.

Saskatchewan, Ontario, and Manitoba Programs

Building on the success of court-connected mediation programs in the UK and the United States, jurisdictions in Saskatchewan and Ontario formally embraced mediation as part of the general civil litigation process in 1994 (Keet, n.d.; Macfarlane 1995). While motivated by increased access to justice for litigants, Saskatchewan was also focused on other objectives concerning the quality of the experience by participants and the overall effect on the litigation culture.

Ontario, which has elicited some debate over program objectives, appeared to be mostly motivated by efficiency goals in order to improve access to justice for litigants, not unlike the motivations in the United States where the focus was primarily to address backlogs in the courts and improve the experience for participants from a timing and cost perspective. Notwithstanding

[12] Court-connected is a common term used in the literature from the United States and Canada to refer to mediation programs implemented by the courts. This term will be used depending on the context and can be considered synonymous with government-implemented mediation programs as used in this thesis.

the unique objectives identified in Saskatchewan, early evaluations of both programs focused on settlement (outcome) rates, the impact on court dockets, and the cost (or savings) to clients (Keet, 2005; Macfarlane, 1995). However, the Saskatchewan program was more focused on the experience and contributions of all involved, the overall effectiveness, particularly by counsel and their client. Presumably, an effective procedural process would equate to higher settlement rates.

Manitoba on the other hand, where mediation services were being used to address community disputes as well as victim offender and family law matters, did not formally introduce a mediation program to address civil litigation like matters,[13] until 2012, some 17 years after Saskatchewan and Ontario. Manitoba's program sought to address a time-consuming and expensive process and a significant backlog; however, like Saskatchewan, it outlined also goals focused on cultural change. These goals were highlighted in a published evaluative report following the completion of the pilot program in 2013 (Schulz, 2018).

Saskatchewan – Rich in History - Motivated by Change

While most people believe Ontario was the first province to pilot and introduce mandatory mediation into their general civil procedures, Saskatchewan actually led the way, albeit by only a few months. However, before the inception of the Saskatchewan Queen's Bench Mediation Program[14] pilot in 1994 (Canadian Forum on Civil Justice, n.d.), what separated Saskatchewan from Ontario was that the province already had an established "mediation culture" (Macfarlane & Keet, 2005, p. 6). The mediation culture in Saskatchewan was characterized by a

[13] Personal injury cases involving automobile accident benefits under the Manitoba Public Insurance Corporation Act. These cases are more commonly litigated as general civil cases in other Canadian jurisdictions; however, in Manitoba they are addressed through an administrative law process. Due to the analogy of these Manitoba cases, they are being studied and classified for purposes of this study as "general civil matters."

[14] Now referred to as the Saskatchewan King's Bench Mediation Program.

well-developed voluntary family mediation program, a pre-trial settlement program, and a unique and invaluable experience stemming from a farmland crisis in the 1980s (Keet & Salamone, 2001).

Due to a significant number of foreclosure cases being litigated, in response to the farmland crisis, Saskatchewan successfully built mediation into the process to keep the main interests of the parties intact while at the same time negotiating a resolution in a less adversarial, more respectful manner. The existing mediation culture in the province, along with the positive experience of the farm debt initiative, which achieved high settlement rates ranging from 70% to 80%, had fostered a considerable reservoir of experience and expertise in the design and implementation of mediation programs, not to mention a pool of experienced mediators (Keet, n.d.; Keet & Salamone, 2001). This prior experience provided a successful framework upon which to build, and eight years after introducing the pilot of the first general court-connected mandatory mediation program, recognizing the range and types of goals, a mixed methods research study was used to evaluate the program (Macfarlane & Keet, 2005).

Macfarlane and Keet (2005) utilized focus groups and interviews to gain a full and meaningful understanding of the program's experience. They found that overall, the program was largely successful, with client participants being quite satisfied with the process and lawyers and judges increasing their acceptance of mediation as a required alternative. The study reinforced the decision to implement the program and identified improvement opportunities. Areas of improvement focused mainly on procedural issues that could be addressed by counsel with support from the mediator.

In particular, more proactive measures could be taken to provide information in advance of the mediation to help ensure successful outcomes focused on resolution. The evaluation

focused on the integral role of counsel in the process, orientations of counsel towards mediation as well as ensuring their clients were adequately knowledgeable and prepared to participate actively in the mediation. It is noted that while lawyers were determined to be an integral part of the process and clients required their support, it was also felt that the lawyers may have stood in the way of their client's participation and the potential for a successful resolution.

In addition, a more pro-active and directive mediator approach was encouraged, although an evaluative mediator was not (Macfarlane & Keet, 2005). Here, it is important to highlight that the program in Saskatchewan is different from Ontario, as well as other mandatory court-connected programs in the United States, in that most mediators were, and still are, non-lawyer mediators. This was an element carried over by the earlier program for addressing farmland debt foreclosures and because of the familiarity of the program, there was no objection by the provincial bar to non-lawyer mediators; however, there was an interest in having a more evaluative process in place if the mediation did not result in a resolution.

As mentioned above, the evaluation, while including mediators in the study, focused more on counsel, process, and procedural aspects of the program. This focus was reinforced in the questions posed to the mediators in the interview process, where only two of the 14 questions explored mediator style, behaviour or approach. Considering the stage in which the evaluation was taking place, this was likely appropriate; however, a deeper dive into the program objectives may have uncovered additional opportunities on the part of the mediator. This opportunity is highlighted again in a deeper analysis offered in the same year by way of a master's thesis.

Building on the findings of the formal evaluation, Keet's 2005 master's thesis, *Developing Frameworks for the Evaluation of Mandatory Mediation: Considering Systemic Transformation in Saskatchewan,* explores the same data through a wider lens. Keet concludes

that fundamental flaws or issues existed in the evaluation method and the program. Further, Keet (2005) argued that if left unacknowledged and unaddressed, these flaws would not bring about the "meaningful change" (p. 2) required to meet the program's most important goals. A brief departure from the general context presented is required here, an important perspective that should not be ignored: the personal story and connection to the research.

Keet, prior to the master's thesis research, worked as a civil litigator before the inception of the mandatory civil program and then worked in the office of the Minister of Justice during the development and legislation of the program. Further, Keet worked as a mediator in the program and also had a principal role in the evaluation of the program. This experience, combined with the dual involvement, provided a unique perspective, allowing for observation from all sides and, importantly, from a position of oversight. From this vantage point, Keet's (2005) focus was on exploring the measurement of alternative outcomes in keeping with the program's loftier goals outlined as "broadening the parameters of the dispute, returning control to the parties, and paying respect to relationships" (p. 4). Ultimately, the emphasis was placed on the less tangible, more relational elements, the "systemic and cultural goals" (p. 4) that the program was intended to address.

Before arriving at any conclusions and recommendations, Keet provided an extensive analysis of the same data used in the program evaluation and formed a solid argument for taking the time to thoroughly understand the underlying factors at play. Keet reinforced the importance of this task by using the analogy of writing a prescription in the absence of a diagnosis, identifying such a practice as risky and calling the initial evaluation insufficient for the program's greater goals. This was not a critique of the evaluation process so much as a recognition that existing frameworks, with their "efficiency-related characteristics" (Keet, 2005,

p. 9) used for evaluating programs, built on surveys and quantitative analysis, were simply too narrowly focused and not up to the task of evaluating Saskatchewan's unique program objectives. Keet emphasized that "in Saskatchewan, access to justice (efficiency) concerns that have tended to drive other parts of Canada have played a backseat role … the quality of peoples encounters figure more prominently in original objectives" (p. 4). Perhaps most meaningful is Keet's message that "it is only once we understand the program's transformative objectives that we can move to a meaningful assessment of the program's effect" (p. 30) and reinforcing that unless or until change is recognized *outside* of the mediation context, there is no transformation.

Keet concluded that the study revealed a lack of systemic and cultural change at the time of the evaluation and focused on lawyers and the litigation culture as significant barriers to this change. Of the opinion that better evaluation needs to occur along with a change in how parties viewed the mediation process, Keet identified a systemic shortfall in reaching these alternative goals and highlighted numerous opportunities for lawyers to shift from the traditional litigation mindset to a more collaborative approach – in essence, a change in identity. Concluding with a message for *all* stakeholders (program administrators, lawyers, clients, and mediators) to work together, Keet's focus on change for supporting the important alternative goals fell mainly with the lawyers. Similar to the initial evaluation, this last and only follow-up study did not examine whether mediators in the program were practicing in a manner that would help support lawyers and their clients in facilitating lasting change, which was argued to be the more important goal. It also failed to assess whether mediators were also focused on the more procedural or quantitative goals, such as settlement rates and cost savings. Keet is both purposeful and even unapologetic about this omission by acknowledging the power and influence of lawyers in delivering on the

objectives, suggesting that the objectives can be met, the transformation attained, despite the mediator or program models.

Ontario – Troubled by Backlog - Ripe for change

On the heels of Saskatchewan and motivated almost exclusively by a significant court backlog impeding access to justice, in 1994, Ontario introduced the Civil Justice Review. It announced an intention to pilot a mediation project in their general civil procedures for two jurisdictions, Toronto and Ottawa, scheduled to commence early in 1995. Following the pilot's commencement, multiple iterations occurred in both jurisdictions before the program was conditionally adopted in 1999.[15] At that time, Rule 24.1 of the Rules of Civil Procedure created the requirement for all non-family civil cases to participate in mediation as part of the litigation process.

Prior to the conditional adoption of the program, the branches of the government responsible for it, touted mediation as "essentially … 'assisted negotiation', in which an impartial third party (the mediator) assists the parties in resolving their dispute by facilitating communications between the parties." (Macleod et al., 1998, p. 389) and the program's success being heralded by the supporting numbers in claims such as "the value of early referral to mediation in the civil justice system has been demonstrated by the positive results achieved" (p. 391).

In this same release, the office of the Attorney General shared that expansion throughout Ontario could be expected in "the next several years" (p. 393). In light of the apparent continued success, in 2002 the program was extended to Windsor but to date, despite an interest expressed

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[15] The condition being that a further evaluation would be completed within 2 years prior to permanent adoption. This condition was in fact met with the 2001 Evaluation and Rule 24.1 was permanently adopted.

on behalf of other provincial jurisdictions, there has not been any further expansion (Ontario Bar Association, n.d.). Prior to the adoption and expansion of the program, and in keeping with the commitment to assess the effectiveness of meeting the intended objectives, the Ontario program was formally evaluated on two occasions. In consideration of the extent of the impact on the Ontario courts, not to mention the legal culture, the program also became a focus and backdrop of academic study.

Unlike Saskatchewan, where evaluation occurred almost 10 years after the introduction of the general civil mandatory mediation program, Ontario evaluated its pilot program in relatively quick succession following the inception of the first pilot in 1994. Macfarlane (1995) conducted the first evaluation 12 months after the pilot program began, and six years later, Haan et al. (2001) conducted the second and final evaluation. With the odd exception, both evaluations focused almost entirely on numbers—settlement rates and cost savings.

While Macfarlane's evaluation provides analysis of the types of cases, barriers to settlement, complexity of cases, and party satisfaction, there was no reference to, or measurement of, goals like those of the program in Saskatchewan. The evaluation did, however, seek feedback from participants that related to the key responsibilities of the mediator as well as the general goals and benefits of the mediation process. For example, the evaluation found that participants recognized the benefit of having a face-to-face discussion with the other side and having the mediator present to help deal with emotions and narrow or focus the issue for increased understanding and discussion. One of Macfarlane's (2005) participants applauded the mediator for summarizing the strengths and weaknesses coming from each side *and* not providing their opinion of those assessments (1995, p. 29).

On the other hand, there was no lack of critical feedback concerning the mediators, with the lawyer participants expecting or desiring the mediators to be more positional, directive, and evaluative where the merits of the legal case were concerned. Macfarlane suggested that the lawyer participants claiming to have experience with mediation as a type of alternative dispute resolution (ADR) were likely overstating the level of knowledge and training. Opining that those participants likely needed more education on the purpose and process of mediation, including the role of the mediator, and more specifically, that mediation was not intended to be an early case evaluation or a pre-trial exercise. The apparent desire to position the mediation process into the lawyers' comfortable framework of the more adversarial system they were familiar with was not just focused on the mediator.

Like the lawyer participants in Saskatchewan's evaluation, Macfarlane's (1995) participants in the first evaluation also complained of opposing counsel not preparing for or engaging in the process as the cause of either a negative experience or a lack of resolution. While there were other complaints made, including the quality of the coffee available at the centre where all the pilot mediations took place, most of the participants supported the general idea of the process and the benefits as they understood them. What participants *understood* of the process, including the mediator's role, despite the clarity of the program's intended purpose will present itself as a theme throughout this thesis.

As mentioned, the evaluation included recommendations that focused on the mediator's role, including training, which may have been alluding to the relevancy of mediator styles and approaches. Further, and perhaps more interestingly, despite the focus on numbers and efficiency, Macfarlane appeared to have an eye on other important and long-term objectives. These long-term objectives were positioned towards the end of the report in the exclusions

section and were introduced as one factor which would need to follow, above and beyond the efficiency-based process, to ensure ongoing success. Macfarlane (1995) referred to one of these objectives as “longitudinal” questions for consideration (p. 62).

To fully understand the longitudinal questions, the assumptions laid out by Macfarlane in the evaluation are important. Not only because they were introduced in a stand-alone section, but important because they were listed specifically as “the mediator as a variable in evaluation” (p. 63). Later in the report, offering an explanation, Macfarlane shared:

> It is assumed from early studies and from personal experience that the skill of individual mediators engaged is critical to the success of any pilot project. The personal style of each mediator is a variable throughout any evaluation process. However, the evaluation was not designed to include a performance review of individual mediators and this report does not comment on the work of individual mediators. Data from user interviews and completed questionnaires can however identify some of the key concerns expressed by ADR Centre users about the general role of the mediator. (1995, p. 63)

Macfarlane is pointing to and recognizing feedback from the users, while at the same time recognizing the importance and impact of the mediator to the process.

This purposeful exclusion for the first evaluation seems completely reasonable at this early stage; however, Macfarlane’s recommendations included having the government program take accountability for the oversight of the mediator role to ensure quality services aligned with the objectives. This may have provided some insight as to what Macfarlane believed were equally important objectives of the program and that, without the inclusion of the mediator role, there would be no true success that aligns with the fundamental goals of mediation, above and beyond the efficiency goals. I would argue that in absence of quality control there would be no

exploration of mediator styles and approaches and how they would align with all program objectives. This theme of quality of ADR services to be provided to litigants was less obvious in the follow up evaluation approximately six years after Macfarlane's evaluation and recommendations.

The 2001 (Haan et al.) evaluation, similar to Macfarlane's (1995), assessed the same narrow objectives around quality of outcomes - faster and cheaper, and the procedural operation of the mediation process. Once again, Haan et al. (2001) paid particular attention to comparing the perceptions of users, but this time, included the mediator. Regardless of this inclusion, however, the focus remained on numbers – cost, time, and settlement rates.[16] Even the types of cases were broken down to the number of plaintiffs or defendants. Types of mediators were categorized into roster,[17] vs. non-roster number of completed mediations, and first-hand experience, namely the number of mandatory mediations conducted under Rule 24.1.

The evaluators seemed particularly focused on how mediators (roster or not) were selected in the two pilot jurisdictions and the cause of differences in selecting – none of which suggested a difference in the style and approach of the mediator. This isn't completely unexpected given how inexperienced users were; however, there were no recommendations for users learning about differences and how those may meet their needs depending on the type of case. Further, as users were interested in understanding more about a mediator's background and experience, even if they were unlikely to understand anything other than what they may consider

[16] Like most jurisdictions in Canada, the majority of cases settle before trial. In this case, the settlement rate was specific to the percentage of cases that settled at the mediation or because of the mediation.

[17] A roster mediator is one who is selected by the program and maintained on an official list based on certain qualifications and is typically paid in accordance with a set fee schedule. Roster mediators in Ontario can be appointed to a case or chosen by the parties.

directive or evaluative, understanding the different styles and approaches and the impact on the process or goals was not highlighted as a future area of opportunity.

Interestingly, several recommendations focused on sharing information with users to promote program success and address any negative perceptions of its impact. Nowhere in the report is there mention of the style and approach of the mediator, simply the assessment of skill based on their ability to present as fair, neutral, and address power imbalances. Skill of the mediator was seen as positive by the users if the mediator was able to "understand the facts and the legal issues," and "move the parties towards an agreement" along with being capable of engaging in *determining* the outcome (Haan et al., 2001, p. 16).

Like the conclusions and recommendations of Macfarlane's 1995 evaluation, there is a recommendation to revisit the criteria for accepting mediators onto the roster as well as recognition of the importance of training. However, this recommendation is specific to predictions of outcome based on the mediator's prior experience with the program, whether or not the case settled, and not any reference to a particular style and approach. It is worth noting that the report does attribute an entire section related to the benefits of mediation *beyond* any settlement or partial settlement of the case. Here the evaluators list several benefits of the process from the more practical, such as a narrowing or prioritizing of the issues and the information that may be required to move forward, to more general knowledge and skill development such as the process in understanding risk, including one's own case as well as the other's. Included as a benefit was the impact on any pre-existing relationship. Other than the relationship aspect, all other benefits were identified in more than half of the participant users' feedback.

The focus on a practical aspect may have been influenced by either a lack of relationship or lack of suitable process for improving an ongoing relationship. Here, however, Haan et al.

(2001), like Macfarlane (1995) suggested these other goals are worthy of attention, despite not being specific to settlement outcomes. Haan et al. (2001) concluded:

> In summary, although there are some areas in which expectations were not realized, these results also support the contention that attempts to measure the benefits of mediation should go beyond measurement simply of whether a complete settlement is achieved. (p. 96)

This is not to suggest that Hann et al. did not emphasize the more practical nature of the evaluation's focus and the positive results, but to support that even they recognized the existing literature regarding mediation, including court-connected programs, to expect more than just efficiency benefits from the process. This perspective aligns with Macfarlane's (1995) assessment, which similarly emphasized the importance of considering a wider range of factors in evaluating mediation effectiveness beyond efficiency measures.

In consideration of Hann et al.'s (2001) observation and suggestion, one recommendation made specific reference to additional indicators of a "broader scope" other than settlement as a success "must be [adopted]" (p. 15). Notwithstanding the suggestion and recommendation, to date, there is no indication that this has been carried out. Had it been, it is quite likely that a mediator's style and approach would have been thoroughly evaluated thus giving rise to increased information and understanding of approaches, both on the part of users and mediators. The lack of follow-through may have been an indicator that these goals are less important than the efficiency goals or simply more difficult to measure. Macfarlane (2002) also recognized the complexity around implementing and evaluating specific mediator actions, which could present innumerable variables.

Directly related to the focus on settlement, however, once again like the 1995 evaluation there continued to be a desire to have mediators be more directive and evaluative, and this too was highlighted as a recommendation for convening mediation committees intended to "share best practices" and address "issues related to selection, training, professional development opportunities, monitoring of mediators – and other key issues related to attracting and maintaining the appropriate quality of mediators on the roster." (Haan et al., 2001, p. 18). What was behind this desire was explored more thoroughly by Macfarlane (2002) in what was not a formal evaluation of the program but a study to understand the underlying culture of counsel in Toronto and Ottawa at the time of the pilot and both evaluations.[18] Macfarlane's study, like Keet's (2005) research, provided insights into the reactions and opinions of counsel regarding Rule 24.1 and the potential impact they would have on its success and the mediation process.

Relying solely on face to face interviews with 80 commercial litigators, evenly split between Toronto and Ottawa, Macfarlane (2002) sought to gain a better understanding as to the general response to mediation, noting that in the vast number of cases of this nature, self-representation is rare , and therefore counsel and the underlying "professional cultures" (p. 4) would significantly impact the mediation practice. Commercial litigators were seen as the most aggressive type of legal practitioners and typically represented corporate or business clients who may be more comfortable in the mediation setting than general members of the public.

Based on what the litigators had to say about mediation and mediators, Macfarlane (2002) categorized them into five different paradigms of mediation participants: 1) the pragmatist, 2) the true believer, 3) the instrumentalist, 4) the dismisser and 5) the oppositionists.

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[18] Interviews were conducted in Macfarlane's study between September 2000 and February 2001, which overlapped with the period in which evaluation/questionnaire forms, surveys, interviews, and focus groups were occurring as part of the 2nd evaluation reported in March 2001.

These categories capture the spectrum of lawyer attitudes, ranging from those who view mediation as a strategic tool (pragmatists and instrumentalists) to those who wholly embrace it (true believers) and finally to those who dismiss its impact (dismissers) or actively and vehemently oppose mediation as a complementary process (oppositionists). These paradigms, according to Macfarlane (2002), led to assumptions that could be made about "assimilation, acceptance, rejection or integration" (p. 4), referred to as the different stages of cultural change regarding mediation.

Here, Macfarlane (2002) emphasizes that access to justice is not just about speeding up the process and making it less expensive, but also about party satisfaction, *including* a right to self-determination. Perhaps fuelling Macfarlane's emphasis on party satisfaction and self-determination was the reported experience unfolding in the United States. An experience generating concerns voiced by Alfini (1997) and Wissler (2002), where mandatory court-connected mediation was beginning to reveal shortcomings, highlighting the departure from the more traditional objectives of mediation, like collaboration and joint problem-solving, and a move toward the familiar and more adversarial nature of civil litigation.

Despite the importance of party-satisfaction, Macfarlane (2002) points out that while there may be good reasons to focus on the different styles and approaches of mediators, government programs, notwithstanding their rhetoric, may not be concerned with how mediators practice if the efficiency goals are being met. Reflecting on the potential implications and a nod to the longitudinal questions raised in the early evaluation of the program, Macfarlane (2002) raises a concern, wondering "whether via court-connected programs such as Rule 24.1 or increasing numbers of private commercial mediations, might lead to the tainting or perhaps the co-option, of the transformative goals of mediation" (p. 5). Perhaps intentionally making the

connection between access to justice, self-determination, and the transformative potential of mediation.

Macfarlane goes on to suggest that the diversity of understanding specific to the goals of mediation suggests a lack of consensus and ultimately a potential challenge for the success of the mandatory mediation program. In recognizing the potential problem, Macfarlane points to the underlying culture of the lawyer participants as a significant hurdle to be overcome. However, Macfarlane notes that adoption of the process will come with the acceptance or proven legitimacy as determined by counsel, while at the same time, questions "what does mediation become once it is incorporated within a traditionally adversarial model of lawyering?" (Macfarlane, 2002, p. 7). A warning perhaps, considering the experience in the United States and the potential risks associated with the different stages of cultural change specific to mediation.

According to Macfarlane (2002), once the lawyer participants were identified according to the five paradigms mentioned above, they were sorted into stages of cultural change. This was, at times, a challenging exercise as Macfarlane notes there were several incidences of one lawyer reflecting multiple attitudes that could suggest different paradigms depending on the context. Before exploring the various stages of cultural change according to Macfarlane, some observations specific to the mediation process and mediators are worth attention.

A specific observation stemming from Macfarlane's interviews surrounded that of the negotiation skill. A skill Macfarlane (2002) noted as being at the heart of "lawyering." In one particular interview, Macfarlane highlights a concern of the research participants that the mediation process may result in a reduction in negotiation skills as lawyers could "become over-dependent on the intervention of a mediator to develop a negotiated solution" (2002, p. 41). The theme of the mediator as the negotiator will come up throughout this thesis and is an interesting

observation as it relates to the program goals or objectives as well as the mediator's style and approach. Therefore, a brief exploration of this specific concern is warranted at this point.

The lawyer's concern in the interview with Macfarlane (2002) was to become a concern expressed by mediators of the overuse, or sole use, of caucusing in mediation. The question as to who was really negotiating and whether it (negotiation) was even the responsibility of the mediator, not to mention whether it would even be considered ethical, was an important topic to raise.

In a 2018 article documenting a dialogue with an experienced mediator, the dependency and expectation on mediators to act as the parties' negotiator was a cause for consternation, and while lawyers were a potential cause of this, mediators were identified not just as passive enablers but also as leaders in this evolution. According to Panter (2018), the cause for this self-imposed role was suggested to be a mediator's tendency to focus more on the result, or expected outcome, "because they [were] comingling their own interests with the parties' interests" combined with the overuse of caucus in mediation (para. 5). Panter emphatically states that everyone in the field would agree that the mediator is not a judge and equally emphatically states that the mediator is also not intended to be either party's negotiator. This article stems from dialogue between two mediators, and one emphasizes that at some point in the mediation process, the lawyer who is either dependent on or allowing the mediator to negotiate on their behalf is not providing the legal services they were hired to do and ethically required to deliver.

The concerns expressed by Macfarlane's (2002) lawyer participants and Panter (2018) remind me of an American Bar Association, Section of Dispute Resolution conference I attended in 2015. During this event, an eminent academic and practitioner in community mediation stood up and declared that they were "no one's jackass," emphasizing that as a mediator, they were not

there to merely transport numbers and arguments back and forth between the parties, stating further, “any donkey could do that.” Building on this sentiment, Panter (2018) shares the view of the mediator in their dialogue who suggested that if offers are either unreasonable or potentially inflammatory, they will suggest a return to the joint session. This return to joint session was to not just be a deterrent to poor negotiation tactics but also a reminder that the responsibility for the negotiation lies with the lawyer and their client.

Returning to Macfarlane’s (2002) study, an interesting finding was that participants voiced concern about the potential for mediation to negatively impact the legal system by replacing traditional legal processes with a “touchy-feely mediation philosophy” (p. 41). Ironically, the concern that one system might somehow taint or dilute the pureness of another is presented from the opposite perspective in the next chapter on the debate between facilitative and evaluative mediation. In the debate, attention is focused on the legal system as a threat to the pure nature of mediation. Either way, Macfarlane (2002) suggests that fuelling this type of sentiment is likely a contest of values specific to the fundamental differences between mediation and the more adversarial and familiar court processes.

These fundamental differences were brought to light through numerous criticisms of the mediator’s role, some quite negative and extreme, with Macfarlane (2002) picking up on “a real sense of threat or danger” surrounding the mediator’s role (p. 44). This threat, I argue, could have reinforced a conflict, based on perceived or real differences in values, between the unsuspecting mediator and one of the key players in the process – the parties’ legal representative. This conflict, however, was focused on the more facilitative mediator rather than an evaluative one, with the lawyers being more comfortable with and supportive of the latter. They perceived evaluative mediators as not only more helpful but also more aligned with the

pure legal objectives, thus fostering a greater sense of ease. This stands in stark contrast to the lawyer participants in Saskatchewan's program evaluation, where an evaluative process, separate from the mediation, was welcomed; however, evaluation was not what they wanted from the mediator.

The lawyers in Macfarlane's (2002) study were quite particular, maybe even fickle, concerning what they wanted the mediator to be. While in some cases a facilitative style and approach was considered valuable, albeit with conditions, and in most cases, they wanted the more facilitative mediator to also be a lawyer. They preferred an evaluative style as they ultimately though the mediation was best used for case assessment purposes, while at the same time, preferred the mediator not be a judge. According to these lawyers, judges were not skilled at facilitating discussions focused on compromise. Of course, there was also the concern noted earlier that the mediator would take over the role of negotiator thus causing them to lose the much coveted, and required, skill of negotiation. Lastly, perhaps given their inexperience with the process, the lawyers preferred a mediator that would direct the process in a step by step manner, moving parties between joint-session and caucus as needed and even to provide a game plan for the negotiations. While there were concerns about the loss of control over the matter in a system they were most familiar with, when it came to being in the mediation, the lawyers wanted a mediator who could control that process. According to Macfarlane, this notion of control also informs the different stages of cultural change.

Based on Macfarlane's (2002) research, one of the fundamental differences distinguishing mediation from adversarial dispute resolution processes is the emphasis on interests rather than principles based on legal values, concepts that will be explored in greater detail in the literature review chapters. In the context of this overview, Macfarlane opined that

while values are generally considered non-negotiable, interests are responsive to negotiation and compromise; however, emphasized that these differences are not mutually exclusive or contradictory, but when combined "will inevitably change the character of each" (p. 68). It is from these changes that Macfarlane introduces four separate cultural indicators of change where the response to mediation by counsel was concerned.

Macfarlane (2002) describes the four responses as convergence, assimilation, divergence, and transformation. In the case of assimilation and divergence, we see either consumption of the more powerful one over the other (assimilation) or each operating at odds with the other (divergence). In contrast, with convergence, we see a marriage of the two under a belief that they come together, and each is better for it. On the other hand, transformation creates a new system, a child, so to speak, of a successful marriage. Here, Macfarlane emphasizes, however, that with transformation, the new creation would not hold any recognizable traits of the prior two systems. I remind the reader here that it was this idea of systemic transformation that Keet (2005) explained was starting to occur in Saskatchewan following the introduction of mandatory mediation in general civil cases but emphasized that more work was needed to meet the program's objectives. While Macfarlane (2002) separated assimilation and divergence, Keet (2005) chose to abandon the separation and simply refer to both as "rejection" (p. 41). This distinction, or rejection, underscores a potential reason for limited change that was occurring in Saskatchewan according to Keet.

Concerns about assimilation of the process were being voiced in the United States given the more years of experience, as shared by Macfarlane (2002), and that overall, there was a lack of separation between the more adversarial court procedures and the court-connected mediation. In particular, there was an opinion that "court-connected mediation of non-family civil cases is

developing an uncanny resemblance of the judicially hosted settlement conference," which Macfarlane suggested was also indicated in some of the themes identified from the interviews with the lawyer participants, albeit with key differences (p.69). Such differences included flexibility in process and outcomes, which are not aligned with more adjudicative processes, at least at the time. Overall, Macfarlane (2002) concluded that Ontario, based on the study sample of commercial litigators, was more reflective of a convergence stage rather than the American experience of assimilation; however, there were some apparent indicators of Keet's (2005) rejection, and, while less obvious, a suggestion that transformation might be possible at some point in the future. Some of this potential transformation stemmed from an unlikely source.

Macfarlane (2002) discovered that the unique needs of the commercial business client aligned with the transformative stage, wherein the business environment saw an opportunity to create a whole new way to resolve disputes focused on business interests under the protection of confidentiality. This desire will be discussed more thoroughly in the literature, where opponents of mediation frame it as part of an oppression story, or an extension of game theory used by the rich and powerful. In the more theoretical thinking of transformation, in the context of Macfarlane's study, the data did not suggest such an outcome. While some minor indicators towards transformation stemmed from Ottawa lawyers versus Toronto lawyers, overall, there was more evidence supporting either divergence or assimilation, which would cause the deterioration of mediation's potential for transformative change.

In concluding, Macfarlane (2002) suggests that increased experience with mediation in Ontario could lead to cultural changes across the four types. However, Macfarlane highlights the difficulty in assessing the experience based on a number of variables, including the diversity of mediator styles and approaches. Some common factors that one may turn towards in seeking

indicators of hope such as younger lawyers whose legal education included alternatives to the more adversarial approach, or an increase in the number of female lawyers in commercial litigation practice were not actually supported by Macfarlane's study. Interestingly, Macfarlane points out that considering the range in the lawyer types (of the participant sample), and the fact that the stages of culture change were reflected throughout the study sample, there were no patterns or themes suggesting gender or recency of their legal education had any significant impact.

Like others (Keet & Salamone, 2001) recognizing the shortfall in legal education and attempting to address the necessary shift in mediation advocacy, Macfarlane (2002) notes that the lack of theory or "absence of conceptual framework" (p. 80) related to mediation advocacy could contribute to the lack of understanding as to the lawyer's role in the process. This could be construed as a contradiction; however, I think the point is simply that regardless of recent legal education pertaining to dispute resolution, it may be lacking in tested theory to provide a solid foundation for learning.

Macfarlane (2002) clearly stated, based on the data, the existing culture of the legal environment and experience with mediation were the number one factors for influencing lawyer type and categorization on the continuum of system change as it related to the instruction of the mandatory mediation program. Furthermore, Macfarlane opined there was evidence of mediation impacting the litigation environment and only with time and experience would the potential for change be seen. Macfarlane expressed hope that productive debate and guiding theory would flow from the increased opportunity and experience stemming from the introduction of mandatory mediation in Ontario. Notwithstanding the omission of the mediator's voice in this

study, Macfarlane reinforced the role of the mediator, noting they are an integral part of the dispute resolution environment that will determine the shape of the mediation process.

While not explicitly stated, this can be interpreted in at least two ways. One is that mediators have the power to influence the process, and two, mediators are simply another tool for the lawyer who ultimately decides how the mediator will be used. Despite the differences identified between Ontario and Saskatchewan, this conclusion - though at a different level, according to Keet – was similar. However, this emphasis on convergence is completely absent when exploring what has transpired in Manitoba.

Given the era in which Saskatchewan and Ontario ventured into the somewhat untested Canadian waters of government-initiated mediation programs, the significant focus on efficiency goals of each does not seem surprising, nor does the influence of the legal culture on the process. Further, in consideration of the differences in population (Saskatchewan's smaller population versus Ontario's larger one) and leading economic drivers (Saskatchewan's agriculture-based economy versus Ontario's more diversified economy), backlog as a main motivator for Ontario also is not unexpected. Situated in the middle of these two, literally and figuratively, is Manitoba - not just a confluence of the Red and Assiniboine rivers, but also of experience, drawing on the lessons and practices of both Saskatchewan and Ontario. While Saskatchewan and Ontario focused mainly on efficiency and backlog reduction, Manitoba's unique blend of experience from both provinces could potentially offer a more holistic approach to mediation, incorporating elements of both efficiency and addressing backlog while also considering other factors relevant to the needs of its residents.

Manitoba – Highlighting Cultural Change

Heralded as a better process producing better results (Owen, 2010) in response to challenges similar to those faced by the civil courts in Ontario, the Manitoba government initiated a mediation pilot project in 2011. The project allowed all residents to mediate Manitoba Public Insurance (MPI) appeals made to the Automobile Injury Compensation Appeals Commission (AICAC).[19] Due to a significant backlog, the wait time for an appeal to be heard was well over two years. The project, which created the Automobile Injury Mediation (AIM) program, was not only intended to address the backlog but also to improve the experience of Manitoba residents in both the claim and appeal processes. This latter objective is like that of Saskatchewan's notwithstanding the difference in the opt-in[20] component for the claimant.[21]The pilot project, carried out over two years and in two distinct stages, ran from July 1, 2011, to September 20, 2013. The first stage focused on the significant number of existing backlog of appeals waiting for a hearing and the second stage, pro-actively offered mediation to claimants upon filing for an appeal to AICAC. The program was evaluated throughout the pilot and the results were submitted in 2014 and released in 2017. In 2018, *Evaluating Manitoba's Automobile Injury Mediation Pilot Project* by Jennifer L. Schulz was posted in the Manitoba Law Journal. Similar to evaluations in Saskatchewan and Ontario, the evaluation focused on decreasing appeal numbers, the duration of appeals and the cost. However, in addition to these quantitative goals,

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[19] In 1994, the public insurer moved to a "no-fault" insurance regime requiring all disputed claim appeals to go before an administrative tribunal for adjudication. Tribunal decisions can be brought before the Court of King's Bench as a general civil matter.

[20] Opt-in refers to the voluntary nature of the process for the claimant. MPI, the government insurer, however, does not have the option of declining to mediate except for very specific types of claims or circumstances.

[21] Claimant is being used in place of appellant to be consistent with the terminology in the program evaluation.

like Saskatchewan's evaluation, there was a component of participant satisfaction which focused on cultural or attitudinal change (Schulz, 2018).

The results of the pilot project overwhelmingly supported that mediation decreased the number of appeals to AICAC, that it was a much faster process, and far less expensive than proceeding, thus satisfying the access to justice or efficiency goals like the programs in the neighbouring provinces. The report, however, focusing on "Findings about People" (p. 34), delved into party satisfaction with all parties involved in the process. Party satisfaction focused on several key aspects of the mediator's demeanour and skills, including courtesy, politeness, professionalism, fairness, knowledge and respect for the process, and being a good listener and seemingly neutral. As the mediation model in this program includes a pre-mediation session, similar to Saskatchewan's program, satisfaction was sought separately as between the pre-mediation and mediation sessions. Overall, feedback on both sessions reflected that the parties were highly satisfied, with an overwhelming 91% of participants feeling heard by the mediator in the pre-mediation session. Feedback specific to the mediation session indicated that the mediator was extremely helpful in assisting the parties reach a resolution. On this last point, Schulz highlights that resolution encompasses various outcomes and that success, as perceived by the parties, may involve achieving closure of the issue, even without a monetary settlement.

The evaluation report also covers party satisfaction with the program administration by the AIM office staff; however, because this is outside the scope of my research and, therefore not relevant here, I have not included that feedback. It is noted that the neighbouring program evaluations in Ontario and Saskatchewan were mostly silent on the administration of the programs. What is relevant, however, is the types of representatives available to the claimants,

the pool of mediators used in the program, and what participants felt about one another when sitting across the table.

In the AIM program, claimants have the option of being self-represented, represented by a friend or family member, or represented by a lawyer or a Claimant Advisor.[22] This latter option is a free service offered by the Government of Manitoba and consists of representatives of various professional backgrounds, including government administration, social work, and law. As of the evaluation report, based on the number of cases reviewed in both stages of the pilot project, over 80% of claimants accessed the services of the free Claimant Advisor and an equally high percentage viewed the assistance of the Claimant Advisor to be extremely helpful. Interestingly, Schulz found that the Claimant Advisors, like the lawyers in Saskatchewan and Ontario, initially voiced concern that the mediation was occurring too quickly thus creating an unmanageable timeline for preparing and supporting the claimant (Macfarlane, 2002; Macfarlane & Keet, 2005; Schulz, 2018). This concern was not shared by the claimants in the Manitoba pilot project who viewed the speed in which they could access the mediation process to be very important. As indicated above, the claimants also valued the opportunity for closure, whether through agreement or a better understanding of the issues. The mediators in the program were seen as actively facilitating mutual understanding, regardless of the outcome.

The AIM program utilizes a roster of mediators who are retained on a contract basis for each individual case. The roster of independent mediators consists of highly experienced non-lawyer and lawyer mediators with a range of professional backgrounds and practice. Mediators are assigned to cases by the AIM office based on their background, expertise, and case

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[22] Claimant advisors are employed by the Claimant Advisor Office (CAO), and while the CAO is a government office, it is independent of MPI and the AIM office.

complexity. The mediators are required to invoice for their services, and the cost is covered by the Government of Manitoba.

There can be no question that the Manitoba program supports an increase in access to justice, especially with a process that carries no cost to the claimant unless they seek independent counsel to represent them. Despite having no "money in the game," there was no indication stemming from the evaluation to suggest that the process was not taken seriously, that the claimant was not invested, or that they had little in terms of expectations. This was supported in the findings, where the majority felt that the process should be taken as seriously as an appeal hearing and that it was an important step in the available options for disputing such issues. Where there was less applause for the program was between the disputants.

As the disputants in these cases are the claimant and a representative[23] from MPI, also quite relevant is the expectation and satisfaction of those parties where each other is concerned, both in and outside of the mediation process. Here is where the results are not as positive as the more quantitative goals (numbers, time, cost, etc.). An issue of perceived lack of seriousness was felt on the part of participants in almost 25% of all the cases mediated. On this topic, more feedback was sought from the MPI representatives concerning their belief of the claimants' satisfaction with the working relationship overall than from the claimants directly. However, when asked, claimants made it overwhelmingly clear that expectations were not met, and more than half believed they did not receive what they were entitled to. Notwithstanding this opinion, mediation seemed the preferred route and, fundamentally, was believed to be fairer than proceeding to AICAC. Not surprisingly, in keeping with the well-known benefits of mediation,

[23] Unless an appellant chooses to be represented by counsel, the MPI representative attends the mediation without representation (Schulz, 2018).

the parties felt strongly about and experienced the benefits of being listened to by the mediator and the other party. Outside of the quantitative factors, this was the most important and widely shared aspect of how a successful mediation was defined (Schulz, 2018).

In addition to party satisfaction Schulz also took considerable time and effort to review whether cultural change occurred directly because of the mediation pilot project. Schulz acknowledged that the "indicia of success for a mediation program are broader than merely 'resolution'. They include changed and improved understandings, greater public awareness, the discovery of new information, and enhanced reputation of stakeholders" (p. 60). Schulz refers to Macfarlane and Keet's (2005) opinion regarding the need to evaluate "impact of the local cultural context, historical factors and the nature of any systemic changes including the consciousness of [stakeholders] (p. 702)". Based on Schulz's (2018) in-depth research of the pilot program, notwithstanding an acknowledgment of room for improvement and prefaced on a theme of respect, they opine "important initial attitudinal and cultural changes have begun" (p. 65). Schulz goes so far as suggesting that the cultural changes occurring because of this program have the potential to "flow beyond Manitoba Public Insurance" and be "used as a model for dispute resolution by other government agencies" (p. 65).

Like the evaluations in Saskatchewan and Ontario, a list of recommendations, primarily procedural, were included in the report. One recommendation worthy of additional attention here is specific to the role of the mediator. Schulz's evaluation and subsequent report highlighted many aspects of the mediator role and for the most part, as previously outlined, was very positive. Aspects of procedural knowledge, fairness, communication skills, neutrality, and resolution focus, among others, were all mentioned at length concerning the mediator role.

Notwithstanding the positive feedback, mediators were included in the list of participants who would benefit from further training. The purpose or type of training being proposed was focused on supporting claimants through more active listening and promoting independence in their sharing, whether they are represented or not. I think this is an important reminder of the benefits of the mediation process – for the participants and about the participants – a common theme in the development of all three programs.

Beyond the commonalities identified between the three programs, the differences are also worth noting as they may provide evidence or explanation behind the research data from this study. Table 1 provides a high-level comparison of the programs just covered.

Table 1

Program Characteristics

	Saskatchewan	Ontario	Manitoba
Year of inception	1994	1994	2011
Motivation	Access to justice; change goals	Backlog; access to justice	Backlog; access to justice; change goals
Choice	Mandatory	Mandatory	Voluntary hybrid[24]
Cost to parties	None	Shared	None
Mediator selection	Program	Parties[25]	Program
Mediator types	Mostly non-lawyer	Mostly lawyer	Non-lawyer and lawyer
Pre-mediation session	Yes	No	Yes
Initial evaluation year	2003	1995	2013
Subsequent evaluations	n/a	2001	n/a

[24] Claimants voluntarily choose mediation at which point MPI is *required* to attend.
[25] Parties can choose a roster or non-roster mediator or choose to have the program assign a mediator.

Given the debate out of Ontario as to the motivations or goals and objectives of Rule 24.1, combined with the different opinions as to what is embedded in access to justice, Table 1 uses "change goals" to articulate the emphasis on non-efficiency goals differentiating the programs.

Despite Saskatchewan and Ontario piloting their respective programs in the same year, significantly more analysis and study has occurred in the Ontario context, much of which will be covered in the literature informing this study. The attention Rule 24.1 garnered, however, including the recommendations of the last evaluation, seems to have dropped off the radar of both users and academics in the last almost 15 years. The reasons for this could include complacency with the program's perceived success and prioritization of case closure gratification over long-term systemic change.

Regardless of any decline in interest, and while some goals may not be entirely explicit or without debate, the material explored here suggests that all three programs have a goal or at least an expectation to accomplish more than simply measurable efficiency goals such as cost, time and monetary outcomes. All formal evaluations and subsequent studies highlight the non-efficiency goals and give attention to the more complex goals that mediation is in a unique position to address.

Such goals, I argue, must flow from the role of the mediator as the keeper of the process. While I agree with Keet and Macfarlane that legal counsel have a significant role in the Ontario and Saskatchewan civil mediation environment, if changes in the culture are to occur in a manner required or expected, the mediator is in the best position to inform and support such change. This, of course, holds true in Manitoba, where legal representation is not the norm, and therefore, this aspect of influence is removed, thus leaving the mediator in the key position to influence the achievement of the more complex goals. Mediator styles and approaches vary, and some may

lend themselves better to efficiency goals while others may be better suited to the non-efficiency goals highlighted by Macfarlane, Keet and Schulz .

If these more complicated non-efficiency goals are important, and I argue that they are equally, perhaps more important, we need to uncover what mediators working within these programs understand about the different styles and approaches as well as their capacity to achieve these types of goals. Macfarlane (2001) acknowledges the conflicting information concerning the Ontario objectives that existed in the early 2000s, describing it as "a matter of intense debate" (p. 5) and highlighting the diverse interpretations of those objectives. A review of the literature in the following chapters will reinforce Macfarlane's assertion and more thoroughly explain the evolution of thought and debates leading to the current practice environment. The following chapter will continue to help set the stage for how some mediators view and understand the most common styles and approaches to mediation.

CHAPTER 4 – THEORY IN DEBATE: PART 1

Understanding the styles and approaches of mediation is fundamental to the practice, especially in consideration of desired outcomes of the parties and the broader goals of government-implemented programs. Achieving these desired outcomes and goals, however, is complicated by the fact that the practice of mediation offers a variety of styles and approaches, each with its own specific purpose and methods for achieving them. Notably, within the literature, there has been significant discussion about the effectiveness and appropriateness of different styles and approaches, with particular attention paid to how mediators maneuver the different choices available to them in their practice. One of the most prominent and enduring debates in the literature centres on the distinction and choice between two of the most common theoretical styles and approaches—facilitative and evaluative. A contrast in philosophies and techniques sparked years of debate about the role of the mediator, the nature of party self-determination, and the most effective path to resolution.

This chapter will chronologically examine the longstanding debate between the facilitative and evaluative styles and approaches. To begin, the definitions of these two approaches will be reviewed, followed by a summary of the events and opinions underpinning the debate. Next, a full examination of the debate will follow starting first with the initial outpouring of discontent with the legitimization of the evaluative style and approach and then moving to the defence and counter arguments. Included in this examination will be a review of several studies that explored and contributed to the debate. Finally, the chapter will examine more recent reflections of the debate and conclude with a brief summary.

Facilitative/Evaluative Debate

Referring to the definitions outlined in Chapter 2, while several variations exist for each style and approach, many of which will surface throughout this review of the literature, a facilitative style and approach has been defined here as a problem-solving style focused on participant communication to uncover and understand interests, resulting in a mutually agreed upon resolution. An evaluative style and approach, relying upon a thorough definition provided earlier, can be summarized as one similar to judicial settlement conferences where mediators focus on case assessments, including an evaluation of strengths and weaknesses of legal positions with an emphasis on influencing a settlement based on the respective assessment of each parties' case.

Various iterations of these definitions will be presented throughout this chapter; however, simply put, one is focused mainly on the uncovering and understanding of interests through communication, whereas the other is primarily focused on case assessments and the understanding of the associated risks. Despite their differences, both ultimately aim to achieve resolution. Notwithstanding a shared focus on resolution, how the parties are to arrive at such an outcome has proved to be a significant cause for debate amongst academics and practitioners in the field of mediation.

Before the debate fully unfolded, however, concerns arose that mediation was starting to resemble the adversarial system it was intended to replace, as exemplified in Alfini's (1991) article titled "Trashing, Bashing, and Hashing it Out: Is This the End of 'Good Mediation'?" Following a research study relying on structured interviews with circuit court mediators and

attorneys in Florida,[26] Alfini (1991) objected to mediators expressly and overtly evaluating the parties' case based on risks stemming from strengths and weaknesses as determined by the mediator. This evaluation, according to Alfini, blurred the lines between mediation and the adversarial legal system. Depending on the degree of use of the various tactics, Alfini placed mediators into three categories: *trashers*, *bashers*, and *hashers*.

According to Alfini's (1991) study, many of the mediators who fell into the trasher category were either still actively practicing law or had previously been experienced trial lawyers. They relied upon this experience in focusing the parties to evaluate their legal case narrowly in consideration of "procedural and substantive weaknesses" along with the cost of proceeding with the dispute (p. 68). The main goal of the trasher mediator was to diminish each side's case in the hopes that each would take a more reasonable approach to settlement offers. To carry out these tasks in an unrestrained manner, the trasher would ensure that the majority of time was spent in separate sessions, shuttling the different offers and counter offers between the disputants, rather than in a joint session where the parties would be privy to the mediator's evaluation of each case.

Alfini (1991) distinguished trashers from bashers in a number of different ways. Firstly, unlike trashers, the tactics of the basher mediator tended to spend more time in joint session hearing from the parties and supporting the sharing of information through direct communication. Next, bashers differed from trashers in that they neglected carrying out any evaluation of the case and focused instead on brokering a deal that was somewhere between the parties' two opening offers. The explanation for the name of this category comes from Alfini's

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[26] Most cases were personal injury, with the remaining comprised of construction, commercial contract and real estate (Alfini, 1991).

statement regarding mediators who "spend most of the session bashing away at those initial offers in an attempt to get the parties to agree to a figure somewhere in between." (p. 69).

Despite the bashing away at the parties' respective offers, interestingly and perhaps somewhat ironically, Alfini (1991) highlights one such basher mediator describing themselves more as a guide. However, Alfini eventually links the idea of guiding the parties to an outcome as being more directive in the process, a quality that separates the basher from the trasher. Most of the bashers were retired judges relying on their judicial experience to direct the negotiation. Further, Alfini, noted that basher mediators, who were not or had not been judges, were critical of those who were directive, opining they were taking advantage of their judicial background. For many, this directive element was seen as unfavourable, including by those categorized as trashers.

Alfini's third category, hashers categorized those mediators who, while still focused on reaching a mutually agreed upon resolution, supported the parties in more direct engagement and demonstrated a willingness to alter the process based on the parties' interests and needs. According to Alfini (1991), these hasher mediators described themselves using an array of different words and terms such as "facilitator," "orchestrator," "referee," "sounding board," and "scapegoat" (p. 71). These descriptions suggest a wide range of variation, a theme that would present itself time and time again throughout the discussion and discourse surrounding mediator styles and approaches.

Alfini (1991) emphasized that based on the interviews with the mediators in this category, they were described as being far less directive than the bashers and more inclusive than the trashers. The hashers, according to Alfini, embraced a process that allowed and supported participants to communicate directly with one another and ultimately have a say in how the

process unfolded. They were, however, willing to adopt similar strategies used by trashers and bashers if deemed suitable to reach a resolution; in essence, this group was described as being the most flexible in their approach.

Building on the concept of flexibility in mediation styles and approaches, Alfini (1991) noted that the literature and studies at the time lacked agreement as to the best approach for mediation but did provide plenty of options and referenced the long list by Folberg and Taylor (1984) as presented in the Definitions of Terms chapter of this thesis. Alfini (1991) draws a comparison of their three categories to Folberg and Taylor's, specifically stating "those they describe as "labour mediation" are similar to the trasher, "muscle mediation" to the basher, and "lawyer mediation" to the hasher" (p. 73). All of these comparisons, reinforce an alignment with the more adversarial legal system for which mediation was intended to be a much-needed alternative.

Despite the seemingly clear distinctions between Alfini's (1991) categories and their alignment with Folberg and Taylor's (1984) framework, their comparison to Kolb's (1983, as cited in Alfini, 1991) research reveals the potential for overlap and confusion in how these approaches are understood and labelled. For example, drawing on the same terminology some of the mediators in the hashers category used to describe themselves, specifically, orchestrator, Alfini referred to Kolb's classification of mediator styles labelled as "orchestrators" and "dealmakers." According to Alfini, Kolb's orchestrators were similar to hashers as they focused on direct communication and building mutual understanding between the parties while also demonstrating great flexibility in the process. On the other hand, trashers and bashers most closely aligned with the dealmaker, which Kolb described as "hammering" out settlements through shuttle diplomacy with little time spent in joint session (1983, as cited in Alfini, 1991).

Regardless of any overlap or confusion in terms, both of Kolb's categories, like Alfini's, highlight the emphasis on the desired settlement outcome.

Continuing the analysis, Alfini (1991) compared their mediator categories to Silbey and Merry's (1986) "bargaining" and "therapeutic styles." Not providing any specific explanation as to why, Alfini suggests that the trashers and bashers are similar to Silbey and Merry's bargaining style, and the hashers are similar to their therapeutic style. As noted earlier, Alfini also aligned the hashers with Folberg and Taylor's (1984) description of lawyer mediation. Alfini's hasher aligns well with the concept of lawyer mediation. However, equating it with a therapeutic style seems unexpected, given the contrasting connotations associated with the terms, and in the context of mediation the terms therapeutic and lawyer evoke very different meanings surrounding purpose, roles, and expectations. This unexpected connection could have been the foreshadowing of widespread confusion and the ensuing debate.

Shifting from the categorization of mediator styles and approaches to the broader context of mediation practice, Alfini (1991) argued that "good mediation" (p. 54) did not rest solely in the hands of the mediator. Alfini proposed that the process and the context in which the mediation occurred was of greater concern. To Alfini, reference to process and context was specific to whether or not the mediation was voluntary or mandatory but most important was the parties' right to self-determination. In other words, did the parties have some control in how the process unfolded and how the dispute was resolved, or not. Regardless of Alfini's conclusions, the examination of styles in the article may have provided a foundation ripe for debate.

Building on Alfini's concerns and the lack of consistent categorization of mediator styles and approaches, Riskin (1994) sparked the debate with the article titled "Mediator Orientations, Strategies, and Techniques." In this article, Riskin was interpreted as legitimizing an evaluative

style of mediation by including it within a mediation practice grid,[27] alongside the facilitative style; a style that had long been considered pure mediation. In introducing the Grid, Riskin remarked that any conversation regarding mediation "suffers from ambiguity" (p. 485) because there is no shared prescription or description. Intended or not, Riskin appeared to be echoing some of Alfini's (1991) concerns as well as recognizing the inconsistencies in terminology. To address this, Riskin (1994) proposed that the Grid could offer a comprehensive system for selecting mediation as a dispute resolution mechanism. According to Riskin, it could also help in designing mediator training, as well as evaluating and regulating mediators. This was a tall order!

Riskin's Grid (1994) was based on the mediator's assessment of the dispute and whether they should "evaluate – make assessments or predictions or proposals for agreements – or facilitate the parties' negotiation without evaluating" (p. 485). The Grid considers the mediator's assumptions about the parties' needs and interests, ranging from narrow to broad. Litigation representing narrow interests and community interests as broad, with business and relational interests in between. The narrow focus assumptions suggests participants seek help with distributive problems after exchanging positions through legal proceedings. Conversely, the broad focus assumptions suggests the parties need to expand their understanding of the dispute to include interests (Riskin, 1994).

According to Riskin, evaluative mediators, often with expertise in the relevant field, provide direction and assessment based on the assumption that parties want this guidance. Conversely, facilitative mediators, assuming the parties are the experts, assist with communication and avoid offering opinions. Riskin points out that facilitative mediators take the

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[27] Herein referred to as either "the Grid" or "Riskin's Grid" depending on context.

position that it is inappropriate to offer opinions as it risks mediator impartiality and because the mediator may not be a subject matter expert.

The intersection of these continuums creates four quadrants: evaluative narrow, facilitative narrow, evaluative broad, and facilitative broad, each with different assumptions about the parties' needs and the mediator's role. Riskin (1994) clarifies that the Grid was not intended to provide a mediator with step-by-step instruction on how to carry out one approach or another, or all, but to allow for an understanding of where mediators may fall based on the dispute type and their orientation.

Regarding orientation, referred to as style in this thesis, Riskin (1994) remarks that "mediators usually have a predominant orientation, whether they know it or not, based on a combination of personality, experience, education, and training." (p. 113). He suggests that mediators often lack clarity on their orientation and may employ strategies that deviate from it, depending on the context and participants. Riskin argues that broad mediators can adopt a narrow approach more easily than the reverse. Similarly, while evaluative mediators might theoretically embrace facilitative approaches, they are unlike to possess the necessary skills. Conversely, facilitative mediators tend to resist using evaluative strategies. He concludes, however, with the idea that an "effective" mediator is flexible and can move easily from quadrant to quadrant depending on the context or needs of the participants (p. 114). While the idea that an effective mediator is one who can move between the different styles and approaches would be cause for discussion and even debate in the future, it was Riskin's inclusion of the evaluative strategies within the Grid that proved to be problematic. Seemingly legitimizing a style that some saw as incompatible with the core principles of mediation immediately sparked a heated debate within the field.

Not the first to respond to Riskin's Grid, but definitely the most damning, Kovach and Love (1996) rebutted with an article titled "'Evaluative' Mediation Is an Oxymoron." One need only to consider the title of the article to know the position the authors were taking—evaluation and mediation are fundamentally incompatible. They began their critique with a story illustrating how an evaluative mediator's actions led to an impasse and, ultimately, a costly trial. Kovach and Love (1996) emphasized the need for standards and regulation to protect consumers if the approach was to continue, noting that an evaluative style and approach conflicts with existing mediation standards. It is further noted that the standards[28] in place at the time, according to Kovach and Love, positioned an evaluative approach to mediation ethically "at odds" with those standards in several ways (p. 31), including the centrality of self-determination and the prohibition against mediators providing professional advice, as well as the fact that trainers, teachers, or professors were not teaching such an approach.

Kovach and Love (1996) expanded on their opinion, highlighting that facilitated negotiation is a key component of mediation, setting it apart from adjudicative processes whereby the third party, person or body is neither neutral nor impartial—two required characteristics of a mediator. Furthermore, they underscored that evaluative approaches limit mutual understanding and problem-solving by the participants. Like Alfini (1991), Kovach and Love (1996) suggested that the prevalence of evaluative mediation may be due to the influence of court programs that often employ lawyer mediators who lack formal mediation training and focus on distributive bargaining. However, Kovach and Love went one step further. They argued that the evaluative style and approach was being reinforced by the lawyers representing parties in

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[28] Model of Standards of Conduct for Mediators – American Bar Association, the American Arbitration Association and the Society of Professional in Dispute Resolution.

mediation. These lawyers were more comfortable with a process that resembled the adversarial legal system they were familiar with. Perhaps anticipating Macfarlane's (2002) findings of commercial litigators' reactions to mandatory mediation in Ontario, Kovach and Love (1996) concluded their article with, "lawyers will not stretch to understand and use new paradigms unless they have to. Mediation should stand as a distinct and clear-cut alternative to the evaluative and frequently highly-adversarial processes that lawyers know best." (p. 32). Coming from two esteemed law school professors, their message reinforcing a lack of flexibility in the legal field was difficult to ignore.

Kovach and Love (1996) stated firmly that evaluative approaches should not be considered under the mediation umbrella and should require separate rules, standards, ethics, and certification. The common colloquialism – the duck test – "if it looks like a duck, swims like a duck, and quacks like a duck, then it probably *is* a duck" failed to persuade. This critique resonated with many who felt that evaluative mediation undermines the core principles of the process.

Even prior to the firm position taken by Kovach and Love (1996), the *1995 Symposium on Standards of Professional Conduct in Alternative Dispute Resolution* reported that Alfini, who previously was less critical of the evaluative mediators and who had pointed to the programs as cause for concern, had taken a firm stand that mediators should be prevented from offering opinions or evaluating (Feerick et al., 1995). In follow-up to Alfini's (1991) earlier study and in reaction to the debate sparked by Riskin, Alfini organized a panel discussion in 1996 to further explore the state of affairs concerning the use of evaluation in mediation. The transcription from that panel was published as an article in the *Florida State University Law Review* in 1997.

Alfini (1997), who served as the moderator of the panel discussion, explored the panellists' opinions regarding evaluation in mediation. Several of the panel's critical members were concerned over the legitimization of an evaluative approach to mediation like Kovach and Love (1996). They focused on the core principles of mediation, such as party self-determination, mediator neutrality, and creative problem-solving. However, they also raised concerns about the emphasis on efficiency rather than propriety, gender biases in communication styles, and power imbalances, arguing that these factors could reduce mediation to just another adjudicative process. These critics all concluded that an evaluative style and approach is simply at odds with the foundations on which mediation was built and intended to serve.

Some of the nine panellists in Alfini's 1996 discussion were not vehemently opposed to an evaluative style and approach, considering it necessary in some situations, mainly if it was required towards the end of a mediation session in order for the parties to reach a settlement. Non-academic panel members were either cautious about its (evaluative) use or quite pragmatic toward it, highlighting less concern when parties were represented by counsel. Given the existing mediation Standards[29] in Florida and other states, much of the discussion focused on distinguishing between ethical and unethical practices, reflecting a more codified approach rather than the traditional flexible spirit of mediation. Panellists were more likely to use or support evaluative approaches if they could justify them as not violating ethical standards.

Aligning with Alfini (1991, 1996) and many of the panellists, Stulberg's (1997) "Facilitative versus Evaluative Mediator Orientations: Piercing the Grid Lock" shared space in the same issue of the *Florida State University Law Review*. Reiterating a number of the points made by Alfini (1991, 1996) and Kovach and Love (1996), Stulberg (1997) offered new

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[29] See footnote #28 on page 64.

criticism of Riskin, specifically the notion that an effective mediator is one who can flex within and between the different quadrants of the Grid depending on the context. Here, Stulberg (1997) emphasizes that such a mediator lacks a necessary "home base" and concludes with:

> That vision of consensual decisionmaking, and the facilitative role required to support it, should inform the meaning of the term "mediation" in whatever statute, rule, or program it appears, and should constitute the standards by which we select and evaluate mediator performance. No persuasive reason exists to accept anything else. (p. 1005)

Echoing Kovach and Love's (1996) reference to a facilitative style and approach as "pure" mediation, Stulberg (1997) is clear on where he stands on evaluation in mediation. Notwithstanding the fervour against an evaluative approach and the concerns regarding party self-determination, others took a more balanced approach, suggesting that party self-determination included the right to choose evaluation as part of the mediation process.

In one such balanced approach, Moberly (1997) focused on the ethics of evaluative approaches, outlined arguments for and against their use and highlighted the factors contributing to the legitimization of the evaluative approach under the mediation umbrella. He argued that *any* assistance a mediator provides in assessing the strengths and weaknesses of a case necessitates an evaluative role. Further, Moberly argued that this assistance in assessing the case, is often an expectation of the parties, regardless of how the mediator is engaged (hired by the parties or assigned through a court program). Notwithstanding Moberly's countenance of the evaluative style and approach, suggesting it is not inherently unethical, he pointed out that he personally favours a pure facilitative approach and does not use an evaluative style and approach.

Similar to other critics, Moberly (1997) raised concerns with party self-determination and mediator impartiality being at risk in evaluative approaches; however, he did not take as strict of a position as Kovach and Love (1996), and suggested that such an approach may, in fact, be beneficial in some cases, "particularly civil litigation where both parties are represented by counsel" (p. 672). Despite Kovach and Love having pointed out that the teaching of evaluative approaches was not common at the time, Moberly (1997) noted that the well-known and respected Harvard Program on Negotiation included training on the effective use of evaluation in mediation. Despite a personal preference for facilitative approaches, Moberly argued that preventing parties from accessing evaluative options would actually violate their right to self-determination, taking a rather oppositional stance compared to many, and thus indirectly acknowledging the validity of evaluative approaches within mediation.

Moberly did, however, raise the risk of poorly executed evaluative approaches or cases that should be deemed inappropriate for such approaches and opined that the Standards would assist in reducing the risk. He concluded the article with a soliloquy authored by another academic practitioner:

> To evaluate, or not to evaluate: that is the question.
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> Whether 'tis wiser to let all hope of settlement sink,
>
> Or to neutrally evaluate and change what the parties think,
>
> Mediators who evaluate must be very cautious,
>
> For it can alienate the parties and to the process be noxious.
>
> Evaluation can turn them away and spur a court fight
>
> To the detriment of all, no matter who is right.
>
> On the other hand, evaluation can save the day,

Enlightening the partisan to what lies in the way.

Mediator evaluation can be a weapon of great might,

But it should be used last and it must be done right. (Corman Aaron, 1996)

This soliloquy aptly sums up and reflects the concerns surrounding evaluative mediation at the time.

Despite the fervour of the initial reactions to Riskin's Grid (1994) and the ensuing debate, in a relatively short period of time it seemed that the field began to accept the evaluative style and approach. Ironically, Kovach and Love (1996), given their strong opposition, shaped the discourse around evaluative mediation in a way that ultimately led to its acceptance. Regardless of intentions, their critique may have inadvertently legitimized the evaluative approach by acknowledging the potential validity of specific evaluative techniques in certain contexts. However, even after this unintended legitimization, some mediators continued to either actively avoid techniques associated with evaluative mediation or refrain from recommending them.

In time, while Kovach and Love (1998) seemed to moderate their position by making space for what they called a "mixed process" (p. 108) combining elements of facilitative and evaluative styles and approaches, their stance remained firm. They continued to argue that any degree of evaluation should not fall under the mediation umbrella and should be recognized for what it is—an extension of the adjudicative process.

While Kovach and Love's original 1996 article was a mere two pages in length, their 1998 article was a comprehensive forty pages. It revisited the original purpose and definition of mediation, underlining its foundation as a facilitated process committed to self-determination, and building on Stulberg's (1997) argument that mediation is not merely an extension of the adjudicative process, Kovach and Love (1998) argued that the mediation field needs to learn

from arbitration, which originally was intended to be an alternative to the courts but quickly became yet another adjudicative process. Supporting their argument, they referred to a relevant article in which Alfini is quoted as stating, "Arguably what happened to arbitration is that lawyers got a hold of it and turned it into mini-adjudication. I worry that's going to happen to mediation as lawyers colonize the field." (Holden, 1997, as cited in Kovach & Love, 1998, p. 92). Although I recognize that a comparison to colonization seems extreme in today's environment, considering all we have learned, accepted, and continue to reconcile for, the strong emotional response it evokes highlights the seriousness with which the legal and dispute resolution field viewed the acceptance of evaluative approaches in mediation.

Revisiting the notion that the legal profession was culpable for the unacceptable changes in the practice of mediation, Kovach and Love (1998) identified an irony and heeded a warning from Riskin's Grid:

> It is deeply ironic that Leonard Riskin, who so lucidly articulated the radical difference in a lawyer's standard philosophical map and a mediator's standard philosophical map, has given us a new map – the Grid – which potentially locates mediation as a familiar landmark on the lawyer's standard map. Let us use Riskin's Grid as a warning descriptor of where the mediation field is today, and create an alternative map of the mediation terrain – a map that keeps the promise of ADR [Alternative Dispute Resolution]. (p. 110)

Hidden within this warning I believe is a message underscoring the importance of purpose and overarching theory or principles in the practice of mediation and clearly separating it from the practice of law.

It is noteworthy that the debate surrounding evaluative mediation was largely confined to the legal field, rather than non-legal scholars and practitioners who were more likely to have

viewed an evaluative style and approach as antithetical to the core principles of mediation. Had the non-legal scholars and practitioners been the sole creators of the conflict, it may have been reduced to simply a difference in theoretical frameworks and an acknowledgement of different mediation approaches for different contexts (e.g. civil litigation versus community disputes). However, that was not the case, and the critique continued.

Kovach and Love (1998) argued that evaluative approaches, referred to as a mutation of mediation, should be considered distinct from traditional mediation. They emphasized that while change is inevitable, significant alterations to core principles warrant a new classification, stating, "for example, we do not call butterflies caterpillars" (p. 92). Like Alfini (1991), Kovach and Love (1998) also highlighted the potential influence of court-connected programs on the practice of mediation and raised the importance of maintaining mediation as an environment for learning and understanding opposing perspectives. Conversely, some scholars argued that the evaluative and facilitative styles and approaches were not fundamentally opposed, suggesting that the debate was unwarranted.

Birke (2000) offered a dissenting view, arguing that the debate between the two styles and approaches was unnecessary because both were inevitably intertwined in practice. According to Birke, neither a facilitative nor evaluative style could be delivered in a completely authentic or pure manner in a civil litigation context and suggested that these cases required the mediator to move between the two and that neither approach was “unavoidable” (p. 300) if the parties’ needs were being considered. These unavoidable approaches, according to Birke, are each cemented in both an evaluative and facilitative framework. One such approach is the discussion or questions around risk assessment, which Birke claims, regardless of how it is

carried out, is fundamentally an evaluative technique. The other unavoidable approach is the facilitation that guides any potential resolution that flows from the risk assessment.

Birke (2000) stressed the importance of ignoring the debate and argued that it was irrelevant to the more important goal of developing best practices in mediation. Birke urged mediators to abandon the two camps and focus on what truly mattered: factors such as the mediation model, confidentiality, and mediator training. Notwithstanding Birke claimed to have a great deal of respect for colleagues who held on tightly to the debate, he very pointedly stated: "any mediator who believes that any mediation of a legal dispute can be entirely facilitative or entirely evaluative and still [settle] is suffering from a delusion" (p. 315). This suggests that Birke's feelings about the lack of any rationale for debate were as equally strong as those who engaged in it.

Less fervent than Birke, a renowned Canadian mediator and trainer shared a similar view, suggesting that such "labels" are not actually helpful, and the emphasis should be placed on the mediator's ability to effectively utilize their skill set to assist the parties in deciding the best outcome for resolution (Stitt, 2003, p. 6). In a somewhat contradictory statement, however, Stitt immediately informs the reader that the remainder of the book will be focused on the mediator who uses the facilitative approach, while at the same time, like Birke (2000), notes that the facilitative mediator may use evaluative techniques if warranted to help parties who may be faced with an impasse. While these two opinions might have aimed to quell the debate, they may have also inadvertently further contributed to the confusion surrounding mediator styles and approaches.

Riskin (2003, 2005) attempted to address the debate and confusion surrounding the original Grid by introducing new back-to-back revised versions. In the New Grid (2003), he

acknowledged the shortcomings of the original version and conceded that facilitation "is the essence of mediation" (pp. 22–23) while also maintaining, in alignment with Birke (2000), that facilitation and evaluation are not incompatible. Riskin (2003) replaced the terms evaluative and facilitative with "directive" and "elicitive," respectively, to better reflect the range of mediator behaviours and perhaps an attempt to escape the debate between facilitative and evaluative mediation. Riskin's New New Grid (2005), which focused on the dynamic nature of mediation, addressing the topic of self-determination and emphasizing the importance of well-defined decision-making processes neglected to generate much interest or clarity. Despite these revisions, the debate continued, fuelled by ongoing concerns about the role of evaluative approaches in mediation.

Empirical research also contributed to the ongoing debate between facilitative and evaluative styles and approaches. For example, a large study (Wissler, 2002) out of the United States focused on the effectiveness of government mediation programs where over half of the mediated cases involved personal injury cases involving automobile accidents. The study relied upon survey data from mediators, disputants and representatives. In this study, effectiveness was determined based on participants' perceptions of the mediation process, including the outcome, compared to the mediator's approach. All the mediators in this study were lawyers employed by the courts, and the handling of case evaluation was a significant focus. The exercise in case evaluation was broken down into six different categories: 1) *assisting* the parties using probing questions for reality testing or risk assessment, 2) *evaluating* the case *for* the parties, 3) *assisting* the parties *in valuing* their case, 4) *suggestion* of possible settlement options, 5) *recommending* a specific settlement, and 6) *no assistance* in case evaluation. The last category made up 40% of all cases, with the remaining 60% involving some level of case evaluation. Most cases with the

mediator actively participating in case evaluation fell into categories 1, 3, and 4. These findings clearly support Riskin's (1994, 1996, 2003, 2005) and Birke's (2000) opinions. Considering categories 1 and 3, these findings also support the opinions of Kovach and Love (1996, 1998).

In contrast to Macfarlane's (2002) study in Ontario, previously detailed in Chapter 3 and referencing rather negative reviews of mediators, Wissler's (2002) study revealed a significantly higher prevalence of overall positive mediator reviews. Wissler found that most participants, representatives and clients rated mediators highly in fairness, neutrality, and overall effectiveness. Wissler's study uniquely measured the positive change in the relationship between the representing lawyers. The study found that 34% of the cases showed an improvement in the lawyer relationship, slightly more than the improvement reported in the relationship between disputants. Disputants found the mediator and the process ineffective or unfair when the mediator *recommended* a specific settlement amount or outcome. This perception held true regardless of whether the case was resolved at mediation. Interestingly, when the mediator only *suggested* a possible settlement option, participants still reporting feeling pressured and considered the process somewhat unfair. Of note is that this perceived pressure and expression of lack of fairness was only raised if there was no resolution.

Either way, Wissler's (2002) study concluded there was not a direct correlation between a resolution and party satisfaction with the mediation process. There was a direct correlation, however, between the level of the mediator intervention and resolution. This means that increased mediator involvement in case evaluation and settlement led to a higher likelihood of resolution, but such an outcome did not guarantee party satisfaction, especially regarding perceived fairness and mediator neutrality. It is also worth noting that the representatives' and disputants' perceptions of the mediator and the process were not always aligned. This study's

focus on effectiveness was limited, and it acknowledged that it did not uncover *how* the mediator's style and approach might have impacted the outcomes. Further, the factor of a relationship between mediators and "repeat players" (Wissler, 2002, p. 701) is an important consideration, as is the need to look at other mediator styles and approaches outside of the evaluative-facilitative debate. Regardless of this notion of the *how*, which I suggest needs an exploration of *why*, and the need to expand beyond the somewhat tiring debate between facilitative and evaluative styles, further analysis in Canada and the United States continued.

Approximately ten years after the Ontario courts first explored mandatory mediation, members of the legal community were still adjusting to the various iterations of program requirements and learning how to work with the mediator's role. Despite findings suggesting the legal community was more interested in a mediator taking on an evaluative role (Macfarlane, 2002), some argued such an approach was contrary to the intention of the program.

Brown (2004) suggested the Ontario program's intention was to provide a process where the mediator, as a neutral third party "facilitates communication, and takes an interest-based approach to problem-solving" rather than a process shaped by the legal community that appears no different than the adversarial process it is intended to replace. Picking up on opinions previously covered, Brown insinuated the legal community's preference for evaluative mediators might stem from the comfort it provided to counsel in the face of the still new culture of ADR. Brown also suggests this preference may also have been due to the perceived benefits of an evaluative mediator in reaching a resolution. These suggestions aligned with Macfarlane's 2002 study's findings, and regardless of the cause, Brown (2004) argued that an evaluative approach is contrary to the parties' best interests and the program's purpose.

Like other opponents (Alfini, 1991, 1997; Kovach & Love, 1996, 1998; Love, 1997) of a mediator taking on an evaluative role, Brown (2004) acknowledged some benefits of evaluation in mediation previously outlined by Moberly (1997). However, despite any benefits, Brown (2004) continued to reinforce it was not the role of the mediator or the purpose of the mediation process mandated by the courts in Ontario. The case made by Brown was that mediation is intended to be interest-based and not rights-based. Incorporating an evaluation component into the mediation process simply makes it an extension of rights-based "traditional court setting" (p. 280). Brown believed that only a purely facilitative approach by the mediator could align with an interest-based approach and the intended goals of the mandatory mediation program.

To back up this position, Brown (2004) referenced *Getting to Yes* (Fisher et al., 1991), a book that is commonly referred to as the negotiator's handbook due to its comprehensive framework and practical advice for principled negotiation. Here, Brown interprets and emphasizes the authors' focus on an interest-based approach as support for a facilitative rather than an evaluative approach to mediation. As a proponent of a facilitative approach, Brown highlights the importance of a party's right to self-determination in mediation, implying, like others, that an evaluative mediator is a threat to self-determination. According to Brown (2004), parties should be able to independently make their own choices without a third party's assessment. Including an assessment or an evaluation component in the mediation, according to Brown, immediately transitions the process to the adversarial one that mediation was intended to replace. Brown goes on to state that even offering or suggesting an evaluation of the facts, credibility, or risks, blurs the line between the two processes and repeated the argument that it is not the intention of the program for mediators to carry out these steps. A further opinion offered by Brown was that these actions could also impact the mediator's coveted neutrality, clearly

stating that “ultimately [evaluation] promotes positioning and polarization which is antithetical to the goals of mediation.” (p. 283). As a result of this polarization, Brown argued that the disputants may not willingly share important interests or needs, and they may feel dismissed from the process as the lawyers and mediators take over.

Despite Brown’s (2004) interpretation of the mediator’s role in the Ontario mandatory program, they acknowledged that the supporting information did not address the mediator’s specific style and approach, nor did it restrict evaluative techniques. Regardless, Brown maintained that the program was designed for a more facilitative approach. This opinion was based on the program’s description of the mediator and on applicable codes of conduct that emphasize party self-determination. Like the lawyers in Saskatchewan (Keet & Salamone, 2001; Macfarlane & Keet, 2005), Brown (2004) recognized that lawyers were interested in having an opportunity for a more evaluative process prior to trial. Brown acknowledged the potential benefits of such a process in reaching a resolution; however, consistent with the views of other opponents of an evaluative approach (Alfini, 1991, 1997; Kovach & Love, 1996, 1998), also believed that any evaluation should not be considered under the umbrella of mediation. Brown (2004), while maintaining their position on the best approach for the Ontario program, suggested that *if* evaluative techniques are used, mediators should clearly identify this in client-facing material. Brown also recommended requiring proper training and evaluation of such skills. Ultimately, like others, Brown (2004) urged that mediation should maintain its original purpose and model, focusing on interests rather than being consumed by a “familiar” and “comfortable” adversarial rights-based process (p. 295).

Touching on opportunities for further research raised by Wissler (2002) and concerns raised by Brown (2004), another study attempted to address both. A study aimed to uncover the

influence of the mediator's style, specific to disputed employment matters in the United States, attempted to resolve the debate. McDermott and Obar (2004) conducted a quantitative study similar to Wissler's (2002), focusing on the mediator approach and its impact on party satisfaction and settlement outcomes. McDermott and Obar's (2004) study included cases where disputants were not represented by legal counsel, which revealed a rather unique finding, however, similar to Wissler's (2002) findings, participants reported higher satisfaction with facilitative mediators.

McDermott and Obar's (2004) study also found that evaluative approaches tended to result in higher settlement amounts. Unexpectedly, in cases where the complaining party lacked legal counsel, the settlement amount was lower, suggesting a potential disadvantage. McDermott and Obar described the findings as both disturbing and reinforcing, highlighting the potential for mediator bias and the importance of legal counsel in mediation. This is noteworthy considering the criticisms of legal counsel's role in adjusting to mediation as an alternative to a more adversarial process.

Despite the impact of legal representation on settlement amounts, this study was primarily interested in the correlation between mediator approach and party satisfaction. Referencing articles similar to the debate here, the researchers introduced a theory that suggested facilitative mediators are more concerned with procedure than substance and evaluative mediators more concerned with substance than procedure. This theory aligns with others that suggest that facilitative mediators prioritize party-satisfaction while evaluative mediators prioritize settlement outcomes (Stempel, 2000). Echoing Brown (2004) and Stempel (2000), McDermott and Obar (2004) emphasized that different cases may benefit from different mediator approaches. Stemple (2000) refers to this as an "eclectic" approach (p. 371).

Regardless of the ongoing debate forming the basis for yet another research study, McDermott and Obar's conclusions from their 2004 study are most interesting, while at the same time lacking in more qualitative data. Before examining their key findings and conclusions, it is important to bring attention to a new concept starting to emerge in the literature: the subtle differences used to separate evaluative approaches from facilitative approaches. Similar to Birke's (2000) opinion shared earlier, this new concept relates to mediator intent. Directly responding to Kovach and Love (1996, 1998), Birke (2000) opined that whether a mediator probes through non-pressing questions for risk assessment, case value or makes suggestions of options for resolution, the intent is the same as offering an opinion or challenging a party's position. Therefore, according to Birke, any of these mediator approaches should be recognized as evaluative.

Applying a broad definition of an evaluative approach, McDermott and Obar (2004) analyzed 425 cases and found that roughly 25% used an evaluative approach, while 34% used a strictly facilitative approach. The remaining cases involved mediators who used both approaches at various times throughout the mediation or a combination of the two at any given time. While their findings dispelled a belief held by Birke (2000) and Stempel (2000) that a purely facilitative approach was impossible, they also showed that most cases used either a hybrid or an evaluative approach. This finding suggested to the researchers that any program directing or promoting a facilitative approach would be "futile" (McDermott & Obar, 2004, p. 95), which may be seen as disappointing in light of Brown's (2004) interpretation of the Ontario mandatory program. However, McDermott and Obar's (2004) findings reinforced the earlier point that a more facilitative approach correlated with higher scores on perceived neutrality and overall party satisfaction.

The researchers acknowledge the merits of both sides of the debate, recognizing that the preferred approach may depend on the parties' priorities—experience or outcome. McDermott and Obar (2004) briefly discuss the relationship between interests and needs, suggesting needs are more deeply rooted than interests because they reflect a person's values. Due to the limitations of an evaluative approach, underlying values may not be uncovered as effectively as they might be with a facilitative approach. This ability for a facilitative approach to speak to values would therefore be more "pleasing" to the parties (p. 107). While values will be explored more deeply later in this thesis, specifically as a motivator for decision-making, the question of *why* mediators adopt certain approaches was explored in a UK study specific to mediation used in construction cases.

Consistent with the literature reviewed thus far, a 2007 UK study by Brooker examined evaluative and facilitative techniques, drawing on descriptions provided by a local provider of ADR services specializing in construction mediation. Brooker (2007) described facilitative mediation as an interest-based approach where the mediator helps the parties arrive at their own settlement. Specifically, Brooker highlighted the distinction between a facilitative approach, where the mediator controls the process while the parties control the content, and an evaluative approach, where the mediator takes a more active role in risk assessment. In establishing the context for the study, the researchers focused on mediation theorists who suggest that mediators should be able to explain *why* they choose to practice in one way versus another (Della Noce, 1999; Stulberg, 1997). Notably, unlike previous studies that relied primarily on surveys, Brooker (2007) employed qualitative interviews with 30 mediation users and practitioners.

The use of interviews in Brooker's (2007) study was to better understand how different mediation styles and approaches, beyond achieving a settlement, affect the overall process.

While acknowledging the ongoing debate surrounding facilitative and evaluative mediation, Brooker (2007) offered a more precise definition of the latter, limiting it to instances where the mediator engages in "making decisions … predicting court … outcomes… giving an opinion on the merits … pressuring the parties to accept proposals" (p. 226). This definition is arguably clearer than some of the literature discussed previously. Despite this clear definition, Brooker's findings, like those of other studies, indicated that a combined approach remained most prevalent. However, Brooker echoed concerns raised by others, highlighting the risk that evaluative approaches may compromise mediation's core purpose as a distinct alternative to adversarial processes.

To ensure the continued effectiveness of mediation for disputes in the construction industry, Brooker (2007) argued for greater awareness and understanding of diverse mediator styles and approaches. Brooker advocated for increased transparency and the establishment of practice standards "grounded in theory and empirical research" (p. 233). Expanding on these concerns about mediation's role as a true alternative to adversarial processes, a Canadian study critically examined the influence of the legal system on mediator styles and approaches, referring to its co-option and likening mediation in its current state to language games played by skilled actors (Woolford & Ratner, 2009).

In their 2009 qualitative study based on interviews with 15 mediators in British Columbia, Woolford and Ratner argued that mediation had been reduced to a mere extension of litigation, with little credibility or resemblance to its origins. They described evaluative mediation as a utilitarian, directory-led process that is "congruent with the legal status quo" (p. 317) and exists solely to deal with efficiency goals. They further posit that this approach is preferred in commercial cases with professional disputants who are considered to have a

"capacity for rational communication" (p. 319). Conversely, they point out that facilitative mediation focuses on process, procedure and party satisfaction using an interest-based approach, with the mediator as orchestrator and the assumption that parties are capable of flexibility and compromise. Further, Woolford and Ratner (2009) in their criticism of the common approaches in mediation refer to transformative mediation as the best alternative. They describe it as a process focused on "substantive goals" and, while, also concerned with process, suggests the mediator takes on the role of supporter of participants who are believed to have the capacity for "value creation" (p. 320). The use of substantive here is not in reference to legal issues but instead refers to empowerment and recognition goals. While the elements of transformative mediation and the corresponding debate will be explored thoroughly in the following chapter, it should be noted that Woolford and Ratner (2009) reinforced similar concerns covered earlier. Specifically, the concern that true or pure mediation, intended to focus on the substantive goals, was being assimilated into the traditional adversarial legal process focused solely on settlement outcomes. Lastly, Woolford and Ratner shared that despite the continued use of common terms to explain the different mediator styles and approaches, along with the ongoing debate, some mediators wanted to abandon the terms altogether. These mediators suggested that defining terms were confining them to a practice that was intended to be both flexible and creative.

Echoing a similar sentiment, Golann and Corman Aaron (2019), as well as Kidner (2011), have argued against the use of rigid labels like facilitative and evaluative to define mediator styles and approaches. They suggest that these labels, while intended to clarify, can actually overlook the nuances and complexities of the context in which mediation occurs. Similar to Birke (2000) and others, Kidner (2011) suggests that "the style employed in any given mediation falls along a sliding scale or continuum" (p. 167). Golann and Corman Aaron (2019)

go so far as to suggest that "a schizophrenic split [exists] in our field about the wisdom, value, and ethics of mediator evaluation" (p. 1), clearly defending evaluation within the skill set of *any* mediator. The factors that should influence movement along the continuum, according to Kidner (2011), include relationship, power, type and history of dispute, trust, and the scheme or system in which the dispute is escalated. Kidner suggests that a mediator should identify these factors and then utilize various approaches along the continuum, with the facilitative approach at one end and the evaluative approach at the other.

Similar to Kidner (2011), Golann and Corman Aaron (2019) argue that evaluation is "essential to a mediator's role" (p. 1) and support the belief that *all* moves a mediator makes, whether asking a question, choosing to pause or comment, reflects an evaluation of the matter and what the next best step is. Despite Golann and Corman Aaron suggesting that evaluation should not be avoided, the authors do state, however, that they see it as a "risky" practice that should be used "carefully" and "sparingly" (2019, p. 3). This view aligns with Golann's (2013) advice in a book on mediation aimed primarily at lawyers, which states that when selecting a mediator, lawyers should choose one "who resorts to evaluation sparingly but is willing to use it when necessary" (p. 107).

Notwithstanding these opinions, all suggest that the use of evaluation is an active choice a mediator makes depending on the context or situation, whereas Cloke (2001) raises a concept of silent evaluation that is less about choice and more an inherent reality for all mediators. Cloke describes the silent evaluation or judgement as what goes on inside a mediator's head constantly *throughout* the mediation process, which requires acknowledgment and management by the mediator. Cloke emphasizes the need for all mediators to practice self-reflection in order to understand how their state of mind and beliefs can influence the mediation process and outcome,

regardless of their style and approach. This is another example of not just how a mediator may practice but *why*, and not just in general, but also in consideration of the context. While these perspectives focus on recognizing and managing bias to maintain neutrality, I argue they also reinforce that intrinsic needs based on values also play a significant role.

This perspective, which emphasizes the inherent evaluative elements of mediation, is further explored by Kidner (2011), who continued to challenge the notion that evaluative and facilitative approaches are mutually exclusive. Drawing on the work of other Canadian academics, mediation practitioners, and trainers, like Dr. Julie Macfarlane and Genevieve Chornecki, Kidner (2011) disagrees with the view that mediation is an extension of the adversarial process. Kidner emphasizes mediation's dynamic and creative nature, highlighting the mediator's role as a creator of options. Further, (Kidner, 2011) emphasizes that mediators should not limit themselves to one fixed style and argues that a good mediator should not adhere rigidly to any single approach. Suggesting that "to do so would be to decide the debate in a vacuum and oversimplify the complexity of factors that influence how a mediator chooses to conduct the mediation" (p. 178). Kidner does not advocate for one over the other, stating that each is required depending on the context of the dispute. This flexibility, according to Kidner, reinforces what is considered to be the cornerstone of mediation, setting it apart from the more adversarial processes.

While Brooker (2007) and others, recommend transparency about mediator style, Kidner (2011) offers caution, arguing that disclosing a specific style may cause confusion if mediators are actually practicing along a continuum of facilitative and evaluative styles. Furthermore, Kidner suggests that advertising a specific style may lead parties to enter mediation with preconceived notions. They may then adjust their behaviour accordingly, rather than being open

to responding to the mediator's guidance at various moments or stages throughout the process. I would argue further that sharing a mediator's style and approach with clients presupposes that they would be aware of and understand the fundamental differences between the options available, which is highly unlikely. These varying perspectives on an evaluative style and approach and the importance of transparency and self-reflection highlight the ongoing complexity of the debate, even decades after it began.

This debate, sparked in the mid-nineties, continues to be a topic of discussion in current research and literature, highlighting its lasting impact on the field. While reference to Riskin's Grid (1994, 1996, 2003, 2005) has been common in the literature about mediator styles and approaches, more recently, it was a topic for discussion in a 2021 book chapter centred around why Riskin's Grid was a foundational contribution to the field. [30] Perhaps most notable of all the contributors was one of Riskin's most outspoken critics—Kimberlee Kovach.

In Kovach's contribution to the 2021 collection, in the chapter titled "Growth from the Grid?" they recognize Riskin's contribution to the field by introducing the Grid and focusing attention on the mediator's role. This focus, according to Kovach, allowed for much-needed debate and analysis, all of which were required to develop the field. Kovach, like others (Erez-Navot, 2021), recognized that no prior debate had ever impacted the field quite so significantly. Looking at the Grid again, Kovach (2021) outlines three areas for further discussion–practice versus theory, government or court-connected programs' impact on the practice, and the type of evaluations that typically occur.

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[30] Riskin's initial 1994 and early subsequent release of the same grid in 1996, are consistently referenced interchangeably. Other than brief clarifications in the 1996 article in response to initial reactions there are few fundamental differences between the two.

Kovach (2021) revisits the gap between theory and practice noting that the teaching of mediation varies significantly from actual practice and also touches upon Golann and Corman Aaron's (2019) case for the legitimization of evaluation to ensure it is taught, understood, and used safely. Consistent with much of the literature referenced thus far, Kovach (2021) recognized the impact of government programs on the practice of mediation. Kovach acknowledges that the convergence of mediation and the legal environment, as described by Macfarlane (2002) could lead to a new form of mediation where evaluation becomes the norm. Alternatively, Kovach (2021) may have been persuaded by Waldman (1998) who also suggested that the debate was not in need of resolution, but like a good facilitative approach, required a simple "reframe of the issues by viewing them through the lens of therapeutic jurisprudence" (p. 158). Here, Waldman posits and concludes that the field needs merely to reflect on itself through this lens of seeing the law as an agent of change.

Lastly, building on the influence of the legal environment and the concept of therapeutic change in mediation, surprisingly, Kovach (2021) questions if there may be increased opportunities for evaluation outside of simply legal case outcomes. Noting that outside of legal outcomes there are "social implications of interpersonal relationships in the workplace" as well as "psychological aspects involved in conflict engagement – and failing to resolve disputes" (p. 199). She questions whether these are areas where mediators, as experts in conflict, should consider offering evaluation. In reading these questions by Kovach, I wonder where the boundaries of mediators' focus on informed decision-making exist. Do the boundaries extend beyond the legal case, risk, and monetary outcome? Do needs and values come into play? As one of the most vociferous critics, Kovach's words are perhaps the most meaningful of the contributing authors; however, others are also relevant to the debate being covered here.

Identifying Riskin's Grid as being formative to the study and practice of mediation, others have recognized various aspects of its purpose and impact. These include a "a mixed legacy" (Erez-Navot, 2021, p. 192), "true enough" (Colatrella, 2021, p. 183), and potentially "predicting the future" (Carrel, 2021, p. 188). Considering the controversy surrounding Riskin's introduction of an evaluative approach to mediation, Erez-Navot (2021) reminds us that conflict can lead to positive innovation and change. Recognizing that Riskin's Grid has brought increased attention to areas such as standards of practice, program and ethical guidelines, and quantitative research methods, ultimately improving outcomes. At the same time, Erez-Navot (2021) questions whether the debate will ever truly end, acknowledging that while it has "led us to accept diverse mediator orientations," and hopes that future discussions will "safeguard our end users and [ensure] high-quality mediation." (p. 196).

Contemplating the satisfaction of the end users, Colatrella (2021) focuses attention on the accessibility of the Grid in teaching students of mediation as well as the act of self-reflection for mediators. According to Colatrella, mediators with different overarching "philosophies" may do all the same things but with different principles and purpose. In its simplicity, the Grid would help mediators check in on the *why* behind their actions. In likening the Grid to a model of a complex entity like a carbon atom, Colatrella suggests that the Grid never intended to represent all the various entanglements of an endless number of factors at play in any given moment in mediation. Like a concept used in determining the usefulness of a scientific model, Colatrella emphasized that for purposes of teaching, learning, or understanding, the Grid needed to be simple, accessible, and ultimately "true enough" (p. 184). Accordingly, Colatrella opined that the Grid was both true and good enough for what it had been intended for, claiming that despite its simpleness, its impact has been anything but. Echoing the significant impact of the Grid, Carrel

(2021) sits somewhere in the middle of the debate acknowledging both the critics' concerns and the proponents' defence of the Grid.

Carrel (2021) shares the opinion of those (Birke, 2000; Golann & Corman Aaron, 2019) who believe strongly that there is no dichotomy or discourse as between a facilitative and evaluative approach while at the same time acknowledging others (Love, 2021; Pappas, 2021; Press & McAdoo, 2021; Stulberg, 1997, 2021) concerned with the ethics around evaluation, specific to neutrality and party self-determination. This perspective underscores the ongoing tension giving rise to the facilitative-evaluative debate.

This chapter has examined the multi-faceted debate surrounding facilitative and evaluative mediation, highlighting the diverse perspectives and concerns that have shaped the practice. Early concerns focused on the potential for an evaluative style and approach to undermine the core values of mediation within the legal context, the very adversarial system mediation was intended to offer an alternative to. The introduction of Riskin's Grid further fuelled this debate, raising concerns about party self-determination, mediator neutrality, and the need for clear standards and training.

While opinions differed on the appropriateness of evaluative techniques, a consensus emerged that mediators should be mindful of their orientations and the potential impact of their choices on the process. This recognition led to a deeper exploration of the factors influencing mediator practice, including program goals, the nature of the dispute, and the mediator's values and beliefs. Ultimately, the debate solidified the evaluative style and approach amongst the most common theoretical approaches; however, the debate also fostered a greater understanding of the

complexities of mediation practice and the need for mediators to be self-reflective and adaptable in their approach.

Much of the literature reviewed here points to Riskin's Grid and the inclusion of an evaluative style and approach as a formative influence on the development of mediation practice. This seminal work, now in its 30th year, continues to be referenced and debated, demonstrating its lasting impact on the field. Another influential work, also in its 30th year, introduced an alternative style and approach—transformative mediation—which sparked further debate, primarily around its applicability and often clouded by misconceptions.

In the next chapter, I will explore the core pillars of the transformative style and approach to mediation, examining the arguments for and against its adoption as well as its practical application and strategies. I will also delve into a number of misconceptions surrounding this style and approach. These misconceptions have potentially contributed to its marginalization in practice despite it often being referred to as one of the most common theoretical styles and approaches.

CHAPTER 5 – THEORY IN DEBATE: PART 2

The previous chapter examined the longstanding debate between facilitative and evaluative mediation sparked by Riskin's Grid. Considering different contexts and goals, the last chapter also highlighted the divergent opinions regarding the mediator's role and influence on the process. In the same year Rikin's Grid sparked controversy due to its reference of evaluative tactics in mediation, two practicing mediators, extensively involved in training, supervision, administration, and evaluation of mediation programs, authored a book that would further challenge the field. Bush and Folger's (1994) *The Promise of Mediation – Responding to Conflict Through Empowerment and Recognition* (*The Promise of Mediation*) challenged many of the assumptions of both the facilitative and evaluative styles and approaches, offering an alternative perspective on the fundamental focus of mediation.

The Promise of Mediation, later referred to as the transformative approach to conflict or transformative mediation, seeks to foster understanding and growth within the disputing parties and is often listed as one of the most common theoretical styles and approaches to mediation. Transformative mediation prioritizes the quality of the interaction between the parties over the outcome of the mediation process. Bush and Folger's transformative approach, like Riskin's Grid, has been celebrated, embraced, and critiqued over the past thirty years. However, unlike Riskin's Grid, which ultimately legitimized an evaluative style and approach, transformative mediation has faced persistent misconceptions about its applicability and effectiveness, ultimately hindering its adoption in certain contexts.

Similar in structure to Part I, this chapter will chronologically examine the transformative style and approach to mediation. The chapter will begin by covering the emergence of transformative mediation and exploring and defining its foundational principles, followed by the

arguments for and against the transformative style and approach. This exploration of an equally important but perhaps less controversial debate, will include a review of transformative mediation's practical application and strategies specific to the focus on fostering empowerment and recognition. Finally, the chapter will address some of the key misconceptions of transformative mediation and conclude with the potential implications for the field when exploring how mediators understand the different theoretical approaches.

Transformative Mediation

In 1994, Bush and Folger released *The Promise of Mediation,* coinciding with the publication of Riskin's work regarding mediator orientations, strategies, and techniques. Motivated by a concern about a purely individualist problem-solving focus in mediation, Bush and Folger acknowledged the same mediation movement that led Saskatchewan and Ontario to introduce mandatory mediation programs that same year. Echoing sentiments expressed by Alfini (1991), they emphasized that this focus was fraught with shortcomings that did not align with the fundamental purpose of mediation. Somewhat critical of the path mediation had taken, Bush and Folger (1994) supported an alternative approach focused on a relational view, empowerment, and recognition.

At the same time Riskin's Grid was the focus of criticism by Kovach and Love in 1996, Bush and Folger continued to develop and refine the transformative approach, publishing a follow up article in 1996 and later clarifying their ideas in a new and revised edition of their initial book. Building on their earlier work, Bush and Folger's revised edition of *The Promise of Mediation* (2005) provided a more comprehensive and practical guide to the transformative approach. This edition expanded on ideas, changed wording and offered more practical advice

for using the transformative approach.[31] Another purpose of the book was to clear up misconceptions or misunderstandings stemming from the first edition in 1994, acknowledging that there were "certain ambiguities … that led to difficulty for some in grasping the aims and methods." (2005, p. 3). Bush and Folger's books lay the foundation for their transformative approach and for ease of reference will be referred to collectively as *The Promise of Mediation* in this chapter. Further the 1996 article "Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice" (Folger & Bush, 1996) will be referenced separately where necessary in the debate section; however, the summary below considers all three as laying the groundwork for the approach. To understand the summary to follow, it is essential to first explain the core pillars of transformative mediation: relational view, empowerment, and recognition.

These pillars, as defined by Bush and Folger, represent the foundational principles of transformative mediation and provide a framework for understanding its unique approach. Bush and Folger, accentuated conflict's negative impact yet, similar to those caught up in the facilitative versus evaluative debate also emphasized the unique potential mediation offers. In keeping with other conflict theorists (Clark, 1990; Fisher, 1990; Sites, 1990), Bush and Folger recognize that human beings are inherently social and when in conflict are reduced to destructive acts that stem from weakness and fear, often because of a real or perceived threat.

Similarly, Gold (2003) speaks to the psychological changes that occur with individuals in protracted conflict acknowledging that the situation becomes somewhat of a crisis which causes parties to lose sight of the circumstances leading to the conflict, focusing solely on their personal

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[31] Bush and Folger's 1994 book specifically mentions that its intention was not to be a "manual for practice" (p. xvii)

experience. According to Gold (2003), “myopia sets in, at the center of which is the individual’s sense of self – what is owed, the damages done, the redress or retribution sought.” (p. 185). Acknowledging these factors, Bush and Folger chose to focus on how mediation could create or restore the social equilibrium from the conflict. Because conflict can be destructive both internally, through poor or ill-informed decisions and actions, and externally, through a lack of compassion or empathy towards others, mediation offers a unique potential: the “capacity to transform the quality of conflict interaction” (Bush & Folger, 2005, p. 9). Transforming the interaction becomes the source of strength, allowing the parties to overcome the fear and perception of weakness, which, among other limiting behaviours, could prevent the exercise of self-determination if left unchecked. With this understanding of the context and rational for transformative mediation, we can now examine each of the three pillars in more detail, beginning with the relational view.

According to Bush and Folger, maintaining a relational view based on human nature and social interaction as it relates to conflict forms part of mediation's unique nature and potential. With the framework of a transformative style and approach to mediation, a relational view can be described as having awareness and understanding of both self and *others* within the context of any social connection and according to Bush and Folger “human nature includes both the capacity for self-interestedness and the capacity for responsiveness to others” (1994, p. 242). To clarify this duality between self and others, Bush and Folger state that “individual agency and social connection is not just a peripheral characteristic – it is the very essence of human consciousness, the core of our identity as human beings” (2005, p. 60).

Such social connections can apply to one’s community, whether small or large, short-term or long-term, and narrow or broad. Again, like Bush and Folger, Gold (2003) emphasizes

the various levels of disconnection that contribute to conflict and states emphatically that the restoration of connection to *others* is the fundamental purpose of mediation. To further clarify, the relational view is simply seeking to acknowledge and understand the "needs and concerns of the *other* [emphasis added] and developing a willingness to address those needs and concerns" (p. 185). Another way to present a relational view is to identify what it is not.

Della Noce (1999) and Bush and Folger (1994, 2005) describe the opposite of a relational view as an individualist view. This view emphasizes the satisfaction of the individual's personal fulfillment of self-proclaimed objectives, through a series of transactions with limited or no consideration of the social community. The achievement of goals using an individualist view comes about by either ignoring the community (others) or at some expense of the community. Members of the community are viewed as either standing in the way of one's goals or simply as a tool towards the achievement of goals. So, whereas the relational view is a pillar for which empowerment and recognition can be achieved, the individualist view supports interest-based bargaining or negotiating (Della Noce, 1999).

According to Bush and Folger, an individualist view, while not inherently negative, is simply inadequate or short-sighted when compared to a relational view. While Della Noce (1999) aligns the individualist view with interest-based negotiation, Gold (2003), suggests that Fisher et al. (1991), in *Getting to Yes*, focused on interest-based negotiation, which has been previously referred to here as the negotiator's handbook, emphasizes a relational view. However, this similarity is limited to the broad concept of relating to others, and a deeper comparison reveals significant differences between Bush and Folger's transformative mediation and Gold's (2003) interpretation of *Getting to Yes*. The differences in the meaning or interpretation of

relational underscores one of four common misconceptions of the transformative style and approach that will be addressed later in this chapter.

As mentioned earlier, Bush and Folger, like others engaged in the mediation movement, identified the process as having great potential. Bush and Folger, however, defined mediation somewhat differently than what we've explored thus far. According to Bush and Folger (1996) mediation is defined as "a process that enables people in conflict to develop a greater degree of both self-determination and responsiveness to others, while they explore solutions to specific issues" (p. 264). This definition incorporates the three pillars of transformative mediation: relational view, empowerment, and recognition. Accordingly, Bush and Folger saw the potential of mediation as not *only* an opportunity to come to a resolution of the conflict presented but *also* an opportunity for personal growth through the focus on understanding themselves, the conflict, and others.

Friedman (1990) supports this notion of gaining knowledge through understanding to satisfy one's basic intellectual needs, consciously or not, and has highlighted the impact of understanding on the "wellbeing [of] an individual" (1990, p. 259). From this growth, through increased understanding and knowledge, Bush and Folger (1994, 2005) posit that individuals in conflict can make the best decisions for themselves in the conflict and beyond the mediation setting. The focus on understanding underlies their other two key pillars – empowerment and recognition.

As shared by Bush and Folger (1994), the word empowerment is used to explain the increased understanding of *oneself* as well as the renewed "sense of their own value and strength" to manage life's most challenging moments (p. 2) whereas the ability to acknowledge and understand *others*' situation, experience, interests, or goals is described as recognition.

The act of acknowledging others can take many forms and can be conscious or unconscious. According to Della Noce (1999), acknowledgement, as I have referred to it here, is akin to both perspective-taking, as used by Bush and Folger (1996), and demonstrating empathy. Della Noce (1999) explores empathy in the context of mediation quite extensively; however, while most of the exploration is beyond the scope of this thesis, two critical points are relevant here. The first is that there are different types of empathy as well as separation of the types based on the overarching view—relational or individualist. The second is that the focus on supporting empathy should be between the disputing parties.

Empathy demonstrated by the mediator towards any party while arguably helpful to the process, Della Noce (1999) argues that its purpose is more to develop a "professional rapport" than addressing the recognition needs of the parties (p. 280). On the contrary, where the mediator's efforts are encouraged is it relates to empowerment is when the main objective is looking for opportunities where parties gain an increased understanding of themselves and what they are capable of. Moving in this direction, with the support of the mediator and through acknowledging their abilities and source of strength for self-determination, parties can experience Bush and Folger's definition of empowerment. Despite their critique of the mediation movement, Bush and Folger recognized that the process was inciting positive, measurable outcomes; however, like the non-efficiency goals covered at length in the context and literature earlier, they felt strongly that the "less tangible" (p. 3) goals were being ignored at a cost to society. It was their hope that by considering a relational view, empowerment, and recognition, the cumulative effect of mediations conducted in such a manner would "impact on the larger social arenas in which daily interactions unfold in our society" (p. xvi), a transformative impact understood here as aiming to achieve societal good.

In an effort to explain the transformative approach and the pillars on which it is based, Bush and Folger created four stories to help distinguish the transformative approach from others. These stories have been commonly referenced over the years for multiple purposes, and I suggest they are among the first and perhaps the seminal stories in the teaching of mediation. The four stories are: “The Satisfaction Story,” “The Social Justice Story,” “The Transformation Story,” and “The Oppression Story” (Bush & Folger, 1994, 2005).

In presenting the four stories, Bush and Folger (2005) emphasized that while it was their values that motivated the transformative approach, they suggested that “mediation practice in general is never ‘value-free’ but is based on ideological or value premises, no matter what model is being used” (p. 1). The core theme of values is seen throughout the stories, which I will summarize next.

The satisfaction story, the most commonly referenced of Bush and Folger’s four stories, aligns with the evaluative and facilitative styles and approaches introduced first and debated earlier in this thesis. Bush and Folger (2005) describe mediation in the satisfaction story using words such as “flexible,” “consensual,” “collaborative,” and “creative” (p. 16), echoing interest-based negotiation recommended by Fisher et al. (1991). Like Fisher et al., the satisfaction story clearly emphasizes problem-solving, and therefore Bush and Folger (1994, 2005) argue that this focus limits the potential of mediation. Referring to others (Fisher et al., 1991; Ury, 1993) who have identified the value of an approach that can provide economic benefits, Bush and Folger (1994) highlight the “integrative problem solving” (p. 16) focus of the satisfaction story not as a bad approach, but one that short changes the true potential of mediation to have a more significant impact. According to Bush and Folger, the greatest impact is in the transformation story's underlying values.

In contrast to the satisfaction story, Bush and Folger argue that the transformative story builds the capacity of disputants through empowerment and recognition. These elements promote mutual understanding and enable parties to "mobilize their own resources to address problems and achieve their goals" (1994, p. 20), even if those goals do not necessarily involve reaching a settlement. The transformation story prioritizes this focus on mutual understanding and growth, reflecting values that are intended to support the greater societal good. These values supporting a societal good are not to be confused with the third story shared by Bush and Folger.

In the social justice story, Bush and Folger suggest the main objective of mediation is to "organize individuals around common interests and build stronger community ties and structures" (p. 18). This story addresses situations involving power imbalances or systemic injustices. Umbreit (1997, 1998) connects this story to humanistic or restorative mediation, while others see it as aligning with activist mediation, where party self-determination and mediator neutrality might be sacrificed for the greater good (Harper, 2006; Stulberg, 2021). Bush and Folger acknowledge these varying perspectives and concerns expressed within the social justice story. Further acknowledging the views of those who see mediation as an opportunity to exploit the weak or simply as an extension of the very system intended to address injustices and deliver better access to justice, Bush and Folger share the oppression story.

This story echoes concerns regarding a narrow focus of some mediation styles and approaches. Specifically, concerns regarding a sole focus on efficiency goals along with criticism of approaches that reinforce the status quo of a rights-based adversarial court system (Alfini, 1991; Kovach & Love, 1996, 1998; Welsh, 2004; Woolford & Ratner, 2009). Bush and Folger mirror many of these themes, highlighting also that in the oppression story, the mediator is viewed as being motivated not only by potential biases but also by their personal goals and

motivations that are hidden and protected by the structure of the process as well as the heavily protected veil of confidentiality. This aligns with a Canadian study that concluded "what we are beginning to see is that there is a tangible settlement-orientation among those mediating in our mandatory scheme, and that those mediators are quite prepared to view and to use their power as a tool for satisfying that orientation" (Hanycz, 2005). Prior to leaving the oppression story, it is important to separate the common meaning of power or the balancing of power from Bush and Folger's meaning of empowerment.

To clarify the distinction between empowerment and power redistribution, Bush and Folger (1994) explain that while "redistribution of power" could be used to "protect weaker parties ... empowerment is always practiced with *both* parties" (p. 95). They further emphasize that empowerment does not "mean adding to strength of either party by becoming an advocate, advisor, or counsellor" (p. 96). As defined earlier, empowerment is essentially building knowledge and understanding to foster self-awareness and self-reliance, enabling individuals to maneuver their lives and navigate challenges effectively. This renewed sense of their value and strength to manage conflict positions them to make informed decisions. It is important to note that this focus on potential psychological and intellectual needs should not be confused with a capacity-building approach in mediation, where the mediator would assist in addressing the more physiological needs of a party, more commonly used in family conflicts (Barsky, 2011).

The discussion of power and empowerment in the summary of the oppression story highlights another common misconception stemming from *The Promise of Mediation*. In this summary of the core pillars of the transformative approach, as introduced by Bush and Folger (1994, 1996, 2005), I have alluded to four misconceptions. The first two relate to the underlying relational view and the concept of empowerment. In addition to these, a third misconception

arises from the term *transformative* itself, and the fourth is specific to the mediator's role. These misconceptions appear repeatedly throughout the debate captured in the following three subsections and will reemerge in the research data from this study. To understand how these misconceptions have shaped the discourse around transformative mediation, it is first necessary to explore the reactions to Bush and Folger's transformative style and approach.

Like the reactions to Riskin's Grid, there were immediate responses to Bush and Folger's introduction of a transformative approach to mediation; however, initially, the reactions were primarily supportive. This support can be seen in what has been heralded as the largest and most significant government mediation program adopted by the United States' Postal Service (USPS) in 1998 (Nabatchi & Bingham, 2001). The USPS, facing a considerable number of employment discrimination complaints, sought to address this issue through mediation. They recognized the established use of transformative mediation in family and community settings, as well as the benefits of mediation in reducing court and government program backlogs. The USPS program proved successful, not only in a large number of case closures but also a reduction in new complaints (Antes et al., 2001; Nabatchi & Bingham, 2001).

What made the USPS program unique to other programs mentioned here is that the administrators required all mediators to use a transformative approach with little to no research on the success and outcomes of such an approach in the employment context. It is also worth noting that prior to deciding to embrace a transformative approach, the program was initially piloted in Florida in 1994. This was in the face of the concern and criticism, as previously shared (Alfini, 1991, 1997; Moberly, 1997) regarding the tendency of Florida mediators to use more evaluative approaches. To address this concern, mediators were first instructed to take a facilitative approach in the pilot project; however, for reasons not entirely clear, when the

program expanded nationally in 1998, the facilitative approach was abandoned in favour of Bush and Folger's transformative approach (Nabatchi & Bingham, 2001). Beyond simply resolving existing complaints, the USPS program aimed to bolster employees' abilities to manage workplace conflicts more effectively. This, in turn, would foster a more positive and productive work environment and reduce the need for formal complaints and third-party intervention. By adopting a transformative style and approach centered on empowerment and recognition, the program could achieve these more complex and broader goals. A study published in 2001 (Antes et al.) provides evidence of this, examining the impact of the USPS program on mediation participants' communication and interaction.

Antes et al.'s (2001) study, moving beyond the efficiency objectives and quantitative proof of success, sought to understand whether there was evidence of a change in participants' communication and overall interaction related to the conflict that would suggest personal growth and skill-building. The researchers also sought to understand the challenges the mediators faced in these matters and what they had to do to overcome them. Relying on focus group interviews with program mediators and ADR specialists, the researchers sought to uncover the experience and challenges.

The mediators in the program were all highly experienced but were mainly new to the concepts of transformative mediation. The ADR specialists, USPS staff previously trained in the transformative style and approach, were delegated to ensure mediators were practicing in keeping with the theory (Antes et al., 2001; Nabatchi & Bingham, 2001). In this study, the mediators and specialists were asked to reflect and focus on disputants' communication as well as shifts in understanding the disagreement or conflict. The results showed that during the mediation, as acknowledged overwhelmingly by the mediators and specialists, that the

participants demonstrated an increase in skill and comfort as the process progressed. With the support of the mediator and the process, mediators reported witnessing an improvement in overall communication between parties resulting in an ability to gain a much better insight and understanding of themselves and others. Whether the issue was resolved or not, although, the majority of cases were resolved, the mediators recognized the transformative approach as "a model that honours the capacity of human beings to talk with each other" and "reach new understandings, and make decisions, in the face of conflict" (Antes et al., 2001, p. 463).

According to Antes et al. (2001) these results were drawn from statements by mediators who reported witnessing participants gaining insight and understanding. Mediators observed participants recognizing their contributions to the conflict and developing a greater understanding of the other party's perspective. Based on the mediator accounts, parties to the process approached the mediation from a place of being mostly misunderstood, yet through the process, with new information and understanding, they were able to shift to a mindset allowing them to discuss options for resolution. Regardless of every indication of success, the researchers also wanted to better understand what the potential challenges were, and may continue to be, if left unchecked. Some expected challenges identified were the mediator's lack of experience with the transformative approach, coupled with inherent doubts about the approach.

Despite some of the mediators claiming they "prefer the transformative way of doing things" and "suggesting that it[transformative mediation] resonated with them as a person" (Antes et al., 2001, p. 462), many of the mediators struggled with how they were habitually inclined to manage certain situations in the process. The mediators made mention of how they would typically respond in certain situations, relying on more "facilitative, directive, or problem solving models" (p. 463). Connected to the mediators' inclination to default to styles and

approaches more familiar to them, Antes et al. (2001) noted that the program specialists pointed out that as soon as a mediator became more directive in their approach, participants body language suggested a lapse back into the more adversarial process of a complaint hearing. Therefore, in this instance, there was a real risk of falling back into the more familiar approaches, even when those approaches might not be the best fit for the program goals and parties' needs or align with the mediator's values.

While the mediators had expressed a personal connection to the values of transformative mediation, their lack of experience and the isolating nature of the practice may have led them to revert to more familiar approaches, even though those approaches might not have been as effective in achieving the program's broader goals. The idea that what a mediator thinks and feels about people and conflict underscores Bush and Folger's (1994) notion that a mediator must understand *why* they do what they do. However, according to Antes and Saul (2001) this can be difficult to measure or identify when evaluating a mediator who is expected to or intends to follow the transformative approach.

Antes and Saul (2001) suggest that when evaluating a mediator's practice, first identifying the basic premise of an approach and next comparing it to the basic principles in their practice, as demonstrated by their specific behaviours, can determine if in fact, they are doing what they say they are doing. Perhaps more meaningful is that Antes and Saul, through the development of an evaluation technique, concluded that such an assessment "reinforces a critical awareness that purpose drives practice" (p. 323). I believe the various factors and complexities that may have been behind the challenges mediators noted would not be exclusive to the transformative approach but could apply across the different styles and approaches.

Other challenges noted in the program evaluation, not concerning the mediator's role, included issues of authority and participant understanding of the process. Given these are not directly relevant to this thesis they will not be explored further. Notwithstanding the challenges expressed by Antes and Saul, another study reported in 2001 suggested there was limited reason to be concerned about any program challenges.

Nabatchi and Bingham's (2001) study focused on observations of all 72 ADR specialists across the United States and suggested any concerns about mediators honouring the transformative approach may not be warranted. Relying on an article by Bush and Folger (1996) in support of their 1994 book, Nabatchi and Bingham (2001) used ten indicators of transformative mediation to code and analyze the data stemming from the specialists' observations. The results showed that 64% of the mediators successfully demonstrated examples of supporting empowerment and recognition, often through summarizing and paraphrasing, as well as having parties share their story or perspective and experience.

When mediators struggled, it was mostly due to situations where they tended to insert additional resolution options or move the parties in a particular direction. Interrupting the parties was also seen as changing the flow or direction of the mediation, as was too much use of caucus and missing the opportunity to slow the process and check in with parties to help ensure a balance of perspectives and participation. The biggest challenge the ADR specialists observed, negatively impacting the focus on empowerment and recognition was a "directive approach" taken by the mediator (Nabatchi & Bingham, 2001, p. 421).

Here, the researchers' definition of directive is difficult to distinguish from what has been previously described here as evaluative in some of the literature. According to Nabatchi and Bingham (2001), quoting Bush and Folger, a directive approach to mediation is one "in which

the mediator ‘hears the case’, diagnosis the problem, formulates what he or she sees as a good solution, and tries to persuade the parties to accept this solution.” (p. 419). Perhaps noting the perceived fine line between evaluative and directive approaches, the researchers combine the two when reporting on observations. None of the challenges seemed to be considered insurmountable and generally, the techniques employed by the mediators were determined to “[follow] transformative mediation theory” (p. 426).

Nabatchi and Bingham (2001) emphasized the need for further research centered on mediation participants’ experiences to fully understand the program's overall success. While a more thorough examination of the program's history exceeds the scope of this thesis, it is important to recognize that the USPS program continues to employ the transformative approach today (United States Postal Service, n.d.). Although the USPS program is distinct from the three Canadian government-implemented mediation programs discussed in Chapter 3, the studies by Antes (2001) and Nabatchi and Bingham (2001) suggest that, regardless of the program or the specific context of the dispute, mediators hold significant power and influence over the process. As such, if inclined or expected to do so, a mediator is also in the position to deliver an approach, regardless of party knowledge, understanding, or preference. Lastly, outside of mediator power and influence, aligning with Bush and Folger’s expressed values surrounding self-determination and awareness of other perspectives, Antes et al. (2001) found that the program “stressed the importance of allowing people to clarify the nature of their conflict, make their own choices and achieve greater understanding of the perspectives and viewpoints” of others (p. 467).

As mentioned earlier, before the USPS program, transformative mediation had been embraced in family and community mediation, and with the success of the program, it seemed adequately fixed in the employment sphere. It stands to reason that the business world, excited

about and championing the advice and theories of Steven Covey, would influence mediation literature on transformative mediation.

In the article titled, “Habits of a Highly Effective Transformative Mediation Program,” Franz (1998) applauded the transformative approach for its focus on long-term goals and skill-building within the mediation process. Franz connected the application of a relational view to conflict with *The 7 Habits of Highly Effective People*, noting that taking a relational view aims to “increase self-confidence and to create stronger and more meaningful relationships with others” (Covey, 1990, as cited in Franz, 1998, p. 1039). Drawing on Bush and Folger’s (1994, 1996, 2005) focus on process rather than outcome, Franz (1998) further reinforced the importance of process in the relational view of the transformative style and approach. To support the need to shift from a focus solely on outcomes or problem-solving, Franz quoted Carrie Menkel-Meadow (1995) as stating “the time is … ripe for new conceptualizations and theoretical attention to the role of mediation in our society” (p. 241).

While I’m certain Menkel-Meadow does not fall into the fully supportive camp, Franz used this as a jumping-off point for the assertion. Franz (1998) posits that in consideration of the good business practice and the focus on relationship building, perhaps like the USPS program, transformative mediation should be considered the preferred approach even for court-connected mediation programs. At the same time, however, Franz noted that the more typical adversarial nature of the courts, sharing different core values, could preclude the successful installation of a transformative mediation program. Despite these risks, Franz outlined the various considerations for implementing such a program within the courts, using Covey's framework.

While initially one could conclude that Franz was party to the misconception that a relational view was a direct link to managing a specific ongoing relationship, despite the

introductory comments, Franz (1998) clarified the point when referring to Covey's purpose as "[enhancing] navigation in a social reality in which individuals must cooperate with one another to achieve mutually beneficial goals" (p. 1047). This does right the wrong on the relationship aspect, however, it could be interpreted as a very superficial comparison to the core values of transformative mediation. Regardless, Franz continued to touch upon the web of interdependency in human relations, whether the relations are brief or prolonged, and makes a significant impact in the literature when pointing to Covey's 5th habit – Seek First to Understand, Then to be Understood. Here, I suggest the case for comparison is the most convincing; however, when tackling the other habits focused on creativity, solutions, and outcomes, Franz (1998) leans heavily into themes of *Getting to Yes* (Fisher et al., 1991) and *Getting Past No (Ury, 1993)*, which, in my opinion, are themes most fitting for a problem solving approach which Franz later acknowledges.

Notwithstanding the differences, Franz (1998) finds a way to develop a comprehensive mediation program framework and evaluation of the same based on a transformative approach for government policymakers. Concluding with the recognition that the problem-solving approach has a monopoly over practice and programs, supported by efficiency goals, Franz suggests that a transformative style and approach can still be a possibility if the necessary attention is given. Reinforcing a prior opinion (Alfini, 1991) regarding the cause for concern regarding different mediator styles and approaches as being a problem with the system, Franz once again quotes Covey as stating "often the problem is in the system, not the people. If you put good people in bad systems, you get bad results. You have to water the flowers you want to grow." (Covey, 1990 as cited in Franz, 1998, p. 1070).

Following the success of the USPS program, the transformative approach garnered sufficient attention. It frequently appeared alongside the facilitative and evaluative approaches in much of the literature at the time (Cloke, 2001; Della Noce, 1999; Kovach & Love, 1998; LeBaron, 2002; Lederach, 2003; Mitchell et al., 1998; Umbreit, 1997; Waldman, 1998). But, despite Franz's (1998) case for broad application and how to implement it, transformative mediation was rarely included in the literature focused on government or court-connected mediation programs dealing with civil matters. One potential reason for this limited adoption may be the misconception that Bush and Folger's (1994, 2005) reference to a relational view focus, a core pillar of transformative mediation, necessitates an ongoing relationship between the disputing parties.

This misconception about the necessity of an ongoing relationship has led some to believe that transformative mediation is unsuitable for certain types of disputes. For example, many (Billikopf, 2009; Reimer et al., 2015; Stitt, 2003) have suggested that disputes between two parties without an ongoing relationship, where money is the only issue, are unsuitable for a transformative approach. In extreme contrast to this opinion, Raines (2005) has opined that not only is a transformative approach appropriate for exclusively monetary disputes, like in many commercial cases but suggests that even in online dispute resolution (ODR), a transformative approach is possible.

Raines (2005) acknowledges that many resist ODR entirely but questions whether parties should be prevented from accessing ODR if it is the only option for parties, even with any challenges or risks that may be associated with it. Raines highlights opportunities for a transformation approach within ODR, outlining practical examples for supporting empowerment and recognition through communication skill development and focusing on mutual

understanding of perspectives in the context of online mediation. Raines' opinion may seem controversial, given the potential objections to ODR as a valid mediation model, let alone one conducive to a transformative style and approach. However, the recent COVID 19 pandemic forced a similar shift in mediation practices. Mediators, accustomed to in-person sessions, adapted to online platforms to continue providing timely and worthwhile services. While this adaptability may have been motivated by a number of different considerations, Raines (2005) recognized the inherent flexibility of expert mediators, citing later work with Poitras (2013) where they are described as "adaptive, flexible, intuitive, and pragmatic" (p. 150). I would suggest that an expert mediator, in their ability to adapt and be flexible can also introduce an approach based on their values and motivations, motivating similar adaptation by the parties.

While some may question the suitability of transformative mediation for certain types of disputes, Bush and Folger, in an interview with Pynchon (2005), argue for its broad applicability, including commercial cases where monetary issues are central. According to Bush and Folger, a transformative style and approach is not only *applicable* in these cases, but actually *superior*, as it aims for both parties to leave satisfied with their best-informed decisions, rather than unhappy due to concessions. In the article titled "Habits of a Highly Effective Transformative Mediation Program," Franz (1998) applauded the transformative approach for its focus on long-term goals and skill-building within the mediation process. Moving parties from "self-absorption to recognition" (Pynchon, 2005, para. 13) according to Bush and Folger are key components that can be applied regardless of the type of dispute. Self-absorption is the individualist view, focused solely on one's perspective, rather than the important relational view, which considers the self as well as the perspective of *others*. Another important aspect is the need for open communication between the parties rather than a dependency on counsel or the mediator.

In this interview with Pynchon (2005), Bush and Folger argue that promoting open communication allows the parties to share control of the mediation process, which ultimately serves to meet their needs, whether they choose mediation voluntarily or it is mandated. The creation and support of guidelines for communication is supported by Bush and Folger's belief and trust in participants to create the best environment for resolving their dispute, and limiting communication is therefore not only a risk to the process but also a risk to self-determination. According to Bush and Folger, primary parties value "the voice and choice" (para. 20) the process affords them, and further, the transformative approach delivers this without advice or pressure.

Bush and Folger argue that having voice and choice equals party self-determination and they criticize other approaches as being controlling and exploitive, reducing the mediator to another negotiating party to the conflict and taking away self-determination. Bush and Folger further opine that a transformative approach can be more useful early in the commercial dispute when parties are more willing to assume some risk associated with the unknown rather than later in the process where they may have become more entrenched in the individualist view. They suggest, however, that the more evaluative inclined a mediator is, the more likely they are to be comfortable with the advanced process once more of the typical litigation steps have been completed (e.g. examination for discovery). In summarizing their point that transformative mediation is the best approach to commercial cases, Bush and Folger share five reasons supporting their point:

> First, it supports the process of negotiation be removing barriers to settlement that restrict information and cloud decision-making. Second, it avoids mediator-imposed, cookie-cutter settlement and instead supports the emergence of settlements built and valued by

> the parties themselves. Third, it allows for a humanizing rather than demonizing negotiation process, so it makes dispute resolution less stressful and personally repugnant for both clients and lawyers. Fourth, it contributes to greater client satisfaction with their lawyers and increases lawyers' professional satisfaction with the nature and quality of their work. And fifth, it avoids potential mediator abuses, especially the exercise of excessive pressure, as well as ethical pitfalls such as dual representation and unauthorized practice of law. (Pynchon, 2005, para. 35)

This last article focused on applicability of transformative mediation in commercial matters specifically. It is important to note that since 1994, Bush and Folger have emphasized that transformative mediation has no limitations and can be broadly applied. Support for this vast applicability continues and is further explored below.

Jean Paul Lederach (2003), while not participating in the debates and whose focus is on conflict transformation, generally presents a transformational approach as a better way to address conflict than simply taking a problem-solving approach. In Lederach's opinion, a problem-solving approach neglects the social or community benefits agenda, which is believed to be a core element of the practice of mediation. In support of this claim, Lederach tells a story highlighting the experiences of those in conflict who shared the opinion that simply resolving something "is just another way to cover up changes that are truly needed" (p. 3). This suggests that even with the resolution, there are opportunities that, when left unrealized, can be detrimental to one's human relations. This, in my opinion, reinforces the relational view of transformative mediation and gives credence to what I referred to as Franz's recognition of the web of interdependency in human relations that she connects with Covey's core habits. Another instance where Lederach connects to more transformative approaches in addressing conflict is in

the book *The Moral Imagination – The Art and Soul of Building Peace* (2005). In this book, where much of the in-depth exploration is out of scope here, Lederach emphasizes the importance of finding knowledge in stories, recognizing and learning from life's fortuitous moments, and listening and paying deep attention to what is unfolding around us. Among other lessons, Lederach outlines the benefits of utilizing both a wide and narrow lens when looking at conflict, and perhaps most importantly, staying curious and creative. Simplifying the message considerably, I suggest that all of these efforts lead to using one's moral imagination in seeking to gain a better understanding and perspective of the self and others, thus giving credence to the core pillars of transformative mediation.

Gaynier (2005), like Franz (1998) and Lederach (2003, 2005), is another proponent of the fundamentals of transformative mediation *in theory.* Focusing on the process, Gaynier refers to the mediator in "true mediation" as a "steward," not a "dictator" (p. 397). Despite some concerns about the transformative approach, which will be explored later, Gaynier ultimately asserts that "the methodology works" (p. 404). Similar to others, Gaynier applauded Bush and Folger for bringing concerns about the practice of mediation to the forefront and also acknowledged the dissension it caused; however, Gaynier suggested that the controversy was less about *what* was said but *how* it was said. Gaynier opines that notwithstanding a good methodology, the transformative approach is lacking in theory. While Gaynier does not address direct concerns with the relational view as an underlying theory, they suggest that transformative mediation is more accurately grounded in Gestalt theory. A theory, according to Gaynier (2005), intended to explain the present insofar as oneself and the "whole" with whole referring to "[understanding] our environment in an organized manner". Gaynier further emphasizes that Gestalt theory supports an approach that is "noninterpretative and nonjudgemental, emphasizes personal

responsibility, and is holistic" (p. 405). This comparison suggests an effort to legitimatize the transformative style and approach further, aligning it with other theory, grounding it in party-self-determination and acknowledging the elements of empowerment and recognition, which, when considering the relational view, is a focus on *self and others*.

Reflecting on the emphasis of community and others in understanding the relational view and while revisiting Lederach's writing, much of which is centred around peace, I was reminded of a TEDx Talk. In this talk, Hoffman, a well-known lawyer, mediator, arbitrator, author and teacher, referred to lawyers as peacemakers (TED, 2016). Hoffman spoke of the internal debate between winning and being collaborative and described the decision to abandon the idea of winning to focus on peace-making. Like Bush and Folger (1994, 2005), Hoffman acknowledged the benefits to society in making such a decision. The internal debate Hoffman described is also similar to the difference between an individualist view and the relational view, as described by Bush and Folger.

For Hoffman, the role of peacemaker aligned closely with the role of mediator. This alignment extended to Hoffman's values and predisposed them to such a practice. Although this staged announcement as a peace-maker occurred in 2016, before the TEDx Talk, Hoffman co-edited a book in 2003 (Bowling & Hoffman) focused on how mediators can bring peace into their practice based on their personal qualities and values. Preceding both of these claims, Hoffman (1999) wrote an article revealing that, while initially discounting Bush and Folger's transformative approach, it was becoming increasingly more difficult to do so. However, despite a natural inclination towards the approach, Hoffman struggled with focusing on an objective the parties had not explicitly requested insofar as the mediation process. Hoffman also seemed to suggest that the transformative style and approach would be context specific, contrary to the

opinions shared by Bush and Folger in the Pynchon (2005) interview. Hoffman (1999) sang the praise of Bush and Folger, while at the same time admitted to being a problem-solver at heart. Despite the strong leaning towards a relational view, Hoffman also confessed to having a significant amount of uncertainty around how exactly to integrate the transformative style and approach into practice. Hoffman's solution was simply to consider it within the context of the dispute or upon request by the parties. Like others, Hoffman suggests the transformative style and approach was specific to conflicts or disputes where an existing relationship was at stake, notwithstanding an apparent understanding and appreciation for the relational view.

In contrast to Hoffman's view regarding the appropriate context for the transformative style and approach, another lawyer mediator, expressed a completely different perspective. Senft (2015) shared a story of abandoning adversarial approaches to fully embrace transformative mediation in all aspects of their practice, stating:

> We believe in the transformative power of quality dialogue. We believe in the restorative power of conversation driven by participants courageous enough to have face-to-face candid discussion with the assistance of a skilled mediator. (p. 8)

This shift, which occurred 21 years after the original Promise of Mediation was published, demonstrates a long-standing commitment to the transformative style and approach. The connection to transformative mediation and the vast applicability of it cannot be clearer.

Senft's (2015) strong endorsement of the transformative approach highlights the practical benefits offered by Bush and Folger's (1996) article titled "Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice." Here, the authors offered what they referred to as "concrete steps" (p. 263) and delivered them in language familiar to practitioners, such as opening statements in joint session, caucusing, re-framing, and

managing emotion. They also addressed other approaches used in facilitative and evaluative styles and the level of directiveness by the mediator. The article further clarified the focus of a relational view, party self-determination, and the importance of having confidence in the parties' abilities, especially with the effects of a focus on empowerment and recognition by the mediator. Concluding with attempts to clarify some misconceptions, including the applicability of transformative mediation, the authors presented useful tool for mediators wanting to practice this style and approach.

Senft (2015), having embraced the practical benefits of Bush and Folger's 1996 article, touches upon the sharing of perspectives, recognition, and the power that comes with increased understanding of the self and other. According to Senft, "it turns out, this is what people and organizations want most." (2015, p. 9). Senft explained that while transformative mediation does not focus on the outcome, inevitably, through the process settlement is the "likely by-product" (p. 10). Senft emphasized the importance of party self-determination and informed decision making, suggesting that parties are more likely to be satisfied with outcomes they have control over. Senft also highlighted the mediator's role in supporting understanding and avoiding unnecessary intervention, allowing parties to work through the process themselves. In concluding the article, Senft (2015) calls out to lawyers and representatives encouraging them to trust in their client's abilities and allow them the opportunity to experience mediation as it was intended, while at the same time noting the obvious discomfort a transformative mediator would cause those who believe in an approach that more closely aligns with distributive bargaining or deal making.

Another supporter of the transformative approach, a lawyer mediator, like Senft, believes that a party's right to self-determination, must be respected in every way, and the best mediator

style and approach to protect that right is a transformative one (Weldon, 2012). Also, a mediator trainer, Weldon argues that there is a better alternative to the common search for overlapping interests, summarizing a popular description of mediation as "leading the disputing parties through a series of predetermined negotiation steps designed to bring them to a settlement." (p. 30). Reinforcing the view that parties in conflict are impacted by a range of emotions, including fear, that intensifies their focus on self, Weldon posits that the best antidote is a transformative style and approach.

According to Weldon, a conversation focused on empowerment and recognition, a mediator guided by the transformative style and approach will restore the party's ability to approach the dispute from a place of strength and ultimately recognize themselves and the other as having the perspective and agency to resolve the matter. According to Weldon (2012), these are the fundamentals of party self-determination of which mediation is the champion. Weldon also recognized that the transformative approach, which they described as having "integrity and consistency" (p. 31), had evolved over time from the first introduction in 1994 to the follow-up book in 2005. Acknowledging the lack of clear direction for a mediator seeking a step-by-step approach from the 1994 Promise of Mediation, Weldon (2012) suggests that the books are very different in purpose, and the 2005 revised version should be seen as filling in any gaps or misunderstandings from the former. Regardless of the practicality of the transformative approach, Weldon sees this method as enabling the parties to actively participate in the process, rather than merely observing or being subjected to a pre-determined or inflexible model. It also facilitates practical steps that are specific to common mediator communication strategies, such as reflection, summarizing, and check-in questions. Weldon reinforced the important element of not taking over the process by becoming directive when challenging moments present but instead,

purposely stepping back to pause allowing the parties time and space to exercise self-determination in the process.

The use of caucus, according to Weldon, is not discouraged by the transformative approach; however, posits that caucus should focus more on the mediation process and procedures, an opportunity to take a break and consider communication challenges, rather than the discussion of substantive issues of the dispute. Weldon explains that "the real work of conflict transformation takes place where parties speak directly to each other" (2012, p. 35). Lastly, Weldon brings attention to the issue of outcome, specifically, how the transformative approach can best assist parties in arriving at a resolution. Weldon reinforces Bush and Folger's (1994, 1996, 2005; Pynchon, 2005) claim that the transformative approach does not ignore the parties' desire to resolve the conflict but instead focuses on supporting the party in making that decision independently. When the mediator focuses on empowerment and recognition, if the parties are inclined and motivated to resolve matters, they will.

Further, Weldon (2012) explains that even in the absence of a formal agreement, the ability to come to a greater understanding of aspects like goals and options of self and others is still an informed resolution. In delivering the more practical elements of a transformative approach in order to reinforce its general applicability to a variety of dispute types and contexts, Weldon chooses not to address the relational view. This omission of sorts is also in keeping with the Hallmarks article (Folger & Bush, 1996) and may be due to the general misconceptions of the relational view and a tendency to align transformative mediation solely with disputes where parties have an ongoing relationship.

Despite existing misconceptions and the importance of the relational view in transformative mediation, prior to Weldon's (2012) and Senft's (2015) strong support for this

approach, Kuttner (2006), another supporter of the transformative style and approach, identified some potential shortcomings or inconsistencies within the relational view, specific to the mediator's role. They acknowledged that the relational view is an amalgamation of understanding the self *and* others, highlighting that self-determination is specific to the self. In emphasizing the importance of self-determination in the transformative approach to mediation, Kuttner questioned whether or not the goals are in fact congruent. They also expounded on the effort by Bush and Folger in follow-up to their inaugural 1994 book to translate the more theoretical approach to day-to-day practice while also acknowledging that the relational view could cause some confusion. Kuttner pointed to the specific words used to explain the transformative approach to address this confusion.

Kuttner (2006) highlights Della Noce's (2001) explanation of Bush and Folger's transformative approach as not providing the "structure, order, and predictability" that other models focused on settlement do (p. 71). Here, Della Noce (2001) suggests that for a mediator requiring step-by-step instruction, the transformative approach may feel "like being lost in the woods without a map" (p. 71). Kuttner (2006) explains that this comment is not a critique but instead an acknowledgement of the theoretical versus the practical. Upon acknowledging, understanding, and accepting the relational view, practicing mediators would still seek examples and explanations for delivering a process while honouring the relational view. Kuttner opines that with the more practical tools (Bush & Pope, 2003; Bush & Folger, 2005; Folger & Bush, 1996, 2001) provided since the introduction of transformative mediation, practitioners have been provided with the map they need. Where Kuttner applauds Bush and Folger, despite recognizing where readers may have been inclined to abandon the approach, is in the very challenge the theory posed. According to Kuttner (2006), the relational view and transformative approach

"challenges practitioners to pay attention to their underlying guiding principles (worldviews, stories, orientations) and reflect on their practice" (p. 345).

In keeping with others mentioned earlier, specific to the importance of recognizing underlying values and orientation as well as the need for self-reflection (Bowling & Hoffman, 2000, 2003; Cloke, 2001; Gold, 2003; Hoffman, 1999) Kuttner (2006) supports this thinking when emphasizing that mediators, whether students or experienced practitioners, also need to make "informed choices in relation to their foundations" (p. 345) and what they bring to the mediation and the conflict. Kuttner (2006) reinforces the importance of a grounding framework or "worldview" quoting Leonard Riskin's "philosophical map" as being "part of a story we tell of what it means to come to mediation or negotiation" (p. 345). As mentioned earlier, Kuttner highlights a potential gap or area of confusion in the relational view as the underpinning of a transformative approach, referring to one of the early critics of Bush and Folger. A review of this critique and the ones to follow will now be considered, followed by a summary of the common misconceptions of the transformative approach.

Seul (1999), a Harvard academic, criticized transformative mediation through a comprehensive assessment focused on a perceived goal of transformative mediation to create significant change in disputants through empowerment and recognition. Seul questioned the entire premise of a transformative style and approach and argued it would require a mediator to have a strong foundational understanding of developmental psychology, namely constructive development theory, in order to produce any significant change. In this regard, Seul (1999) cautioned practitioners about transformative mediation's limitations, stating that transformative mediation is "no more supportive of individual moral development" (p. 138) than approaches focused on problem-solving exclusively.

Seul's primary concern was not with the benefits of understanding oneself and others resulting from a transformative style and approach, but with what they perceived as Bush and Folger's ambitious goal of supporting significant change through moral growth. Seul (1999) differentiated between "situational transformation" to explain an increase in understanding and "developmental transformation" for what he understands Bush and Folger to be espousing (p. 155). According to Seul, situational transformation includes perspective taking and empathy, and could occur in the mediation setting, whereas developmental transformation must include an obvious transition from one stage to another supported by constructive development theory specific to adults.[32] This is where the goal becomes far too onerous, if not impossible, for the mediation process according to Seul.

Seul (1999) further argued that assuming a party capable of situational transformation during a mediation will apply their learning to other contexts, is an overreach, pointing out the challenge posed by the uncontrollable factor of individual capacity for any change. According to Seul, lack of capacity applies to both situational and developmental transformation and according to Seul, reinforced the position that significant change or developmental transformation within the context of mediation is not likely. Despite the critique of transformative mediation, the limitations of the mediation process, and Seul's position, in perhaps an unusual turn, in the same article, examples of how mediators could support developmental transformation, aligning with the transformative approach, should a party have capacity were provided. One practical example, in particular, demonstrates very clearly, how a mediator could decline to evaluate or direct, uphold a transformative approach according to Bush

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[32] Seul outlines the different stages of constructive development theory, however, those stages are not relevant for purposes of this thesis.

and Folger, as well as honour Seul's developmental transformation in keeping with the psychological theory. Seul (1999) offers the following mediator statement to serve as an example:

> This obviously is a very major decision, Jim. I certainly can understand your indecision and your desire to have someone else decide for you. I'll be happy to ask you questions and provide some information that may be helpful to you as you think through the implications of Karen's proposal. But, in the end, the decision about whether to agree to these terms, agree to other terms, or go to court is yours to make. (p. 157)

According to Seul, this example showcases the potential for integrating constructive development theory with transformative mediation principles.

Seul (1999), referencing Bush & Folger's (1994) use of "individual moral development" (p. 24), seemingly adds another layer of complexity to transformative mediation, potentially exceeding Bush and Folger's (1994) original intention of simply moving parties toward "greater strength and greater compassion" (p. 27). Seul (1999) nonetheless offered valuable insights into the psychological basis for motivating change, along with providing practical tools for supporting it, while emphasizing that developmental transformation must respect party self-determination. Indirectly, in making this statement, Seul can be interpreted as suggesting that an evaluative or directive approach would not support any development on the part of the disputants. Noting the complexity that a focus on developmental transformation can add, Seul suggests that implications for such a practice would involve a mediator being equipped to assess the parties' developmental stage and their capacity to move beyond their existing stage. Here, I contend, is where mediators are likely to push back as their role is not one of therapist or

development specialist, and, depending on the student or practitioner, this assessment may cause them to discount the transformative approach to mediation as pursued by Bush and Folger.

Seul's (1999) assessment of Bush and Folger's (1994) transformative mediation raised concerns around the use of the term "moral development" (p. 27) in the context of mediation. However, the 2005 edition of *The Promise of Mediation* provided an explanation of what the authors meant when referring to moral development. Perhaps this improved and more practical version referred to by others (Kuttner, 2006) is in part due to Seul's (1999) assessment.

Before leaving Seul's assessment to share another critique of transformative mediation, because it will become more relevant in the following chapter, it is essential to note that Seul disagrees strongly with Bush and Folger that styles and approaches should not be combined based on context. Seul (1999) believes a transformative approach and problem-solving approach *can* "cross-fertilize" (p. 171) and, in many cases, should. Seul further posits, in response to the various purposes of mediation, "it seems unlikely that they will be defined by rigid distinctions between ideological orientations to practice (p. 171). While Seul acknowledges some merit in the transformative style and approach, another critic has been far less open to acknowledging any benefits or application of the approach.

Nearly two decades after the success of the USPS program and despite efforts to further clarify transformative mediation, Condlin (2013) published a scathing critique, outlining numerous flaws and limitations of transformative mediation in the article, "The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype." The title offers little subtlety in foreshadowing the content of any arguments and yet reinforces the message early, stating that a transformative approach "while not the most popular theory … is the most self-assured, the most insular, and the most overblown" (p. 621).

Seemingly baffled by the survival of the transformative style and approach, and also suggesting that it has experienced widespread humiliation, Condlin wanted to explore why transformative mediation had endured. Several of Condlin's criticisms stemmed from previously highlighted misconceptions that will be summarized following this critique.

All of Condlin's criticisms extend to both editions of *The Promise of Mediation* and any supplemental or supportive articles regardless of whom authored them. Much of the focus for critique was placed on the meaning of the word *transformation*, what exactly it was intended to apply to, and how would one know if it had occurred. These are not dissimilar to the concerns raised by Seul (1999) and likely fuelled by Bush and Folger, as well as supporters' efforts to explain and make the approach more accessible. Condlin's (2013) criticisms extend to all reports and research data that have concluded the approach to have been successful, calling them all into question and even suggesting the results to be suspect and perhaps even "non-existent" (p. 623). Following the same pillars of transformative mediation covered earlier– relational view, empowerment, and recognition - one by one, Condlin calls each into question.

Using the term specific to Bush and Folger's first edition book, "relational worldview," Condlin makes the connection to the idea of group harmony and philosophical debates concerning Marxism. Expanding on this idea, Condlin criticizes transformative mediation as placing emphasis on the greater good, which is outside of the mediator's purpose. In a rather unexpected comparison, Condlin likens the hope of some greater long-lasting outcome or change from the mediation session to "Soviet and Chinese five year plans" (p. 629) and further posits that the idea of the mediator focused on an agenda the parties did not hire them for was no better or different than an evaluative mediator offering an opinion as to how a matter should be resolved.

Condlin's (2013) most significant objection to transformative mediation lies in its name—*transformative*. This objection prompted a litany of examples and factors that called the concept of transformation into question for Condlin. In the various case examples used by Bush and Folger (1994, 2005) to explain how a transformative mediation process would unfold, Condlin (2013) suggests that the approach at best is no different than other approaches,[33] but in an effort to purport uniqueness, Condlin claims that Bush and Folger's examples of success are either false, fabricated, or altered to support the transformative claims. Condlin refers to the mediator behaviours in the case examples as merely "prosaic" in contrast to the grandiose promises the approach makes (p. 630) and later argues that any inferred transformation "was closer to a mood swing" (p. 633).

This latter point reinforces Condlin's (2013) belief, similar to Seul's (1999), that any change, transformation, or recognition occurring in the process is too fleeting to last beyond the mediation session. In contrast to this, however, Condlin (2013) does appear to recognize that exposure to a new skill or understanding is the first step. Specifically, he states, "experimenting with new behaviors and values in a single mediation can start the process, but it can only start it" (p. 636). While Condlin is a clear critic of transformative mediation and the claims it makes, they do applaud specific techniques of mediators in the case examples, in particular, when noting the mediator's ability to have the parties work together on crafting an agreement. This is an interesting observation by Condlin considering other critics of the transformative style and

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[33] Condlin (2006) uses the term "communitarian" to refer to any bargaining or negotiation approach based on collaboration, interests, and integration. Condlin considers these to be similar to the encouraged exchange of information promoted by transformative mediation as well as the techniques espoused in *Getting to* Yes (Fisher et. al., 1991).

approach focused on a perceived mediator passivity in the process, especially where any focus on resolution is considered.

Notwithstanding some praise for the mediator techniques in one of the case examples, Condlin then criticizes the mediator when the agreement falls apart; suggesting that the mediator's role was to walk the parties through an exercise of risk assessment including consideration of the alternatives to the agreement. Condlin (2013) then goes one step further to suggest, with unequivocal certainty, that the parties would have reached an agreement *if not* for the mediator needing to honour party self-determination and states that "it is reasonable for [the parties] to expect a mediator to protect them against themselves" (p. 632).

So, on one hand, Condlin rebukes Bush and Folger for suggesting a mediator focus on empowerment and recognition in hopes that parties may enjoy positive effects during and after the mediation, stating that is not what the parties hired the mediator for, while on the other hand, suggests that parties hire mediators to shield themselves from their destructive acts. I doubt that parties to a dispute believe they are hiring a mediator to protect them against themselves, any more than they would be hiring them to focus on empowerment and recognition. Further, parties are less likely to understand these nuances in the process, let alone what they may be called. On the other hand, self-determination, even if not acknowledged as such, does seem like a reasonable expectation of the parties.

Like Bush and Folger, Condlin (2013) acknowledges that disputes can have a negative impact on people, causing them to focus solely on themselves and the conflict. While this impact motivates Bush and Folger to focus on empowerment and recognition, thus restoring parties' ability to be open to others, Condlin, uses the negative state caused by conflict as discounting the ability for parties to experience any lasting change, or transformation. Staying on the topic of the

psychological impacts of unresolved conflict and disputes, Condlin (2013) describes a transformative approach case study as being “a little over the (even metaphorical) top” in how it refers to insurance claimants' feelings regarding the treatment by company representatives and the disputing parties’ desire not to exacerbate the negative experience. Yet ironically, at the start of this article, Condlin compares Bush and Folger hope for long lasting change to a communist manifesto. Despite Condlin’s contradictory standards for meaningful metaphors, like others (Gaynier, 2005; Menkel-Meadow, 1995; Seul, 1999), they highlight the dearth of empirical research supporting the claims coming from a transformative mediation practice. Noting, that the “amorphous” approach would make research even more challenging (p. 673). Referring to the USPS program as an ideal source for research, Condlin discounts those specific studies claiming insufficient or erroneous methods, because they lacked scientific basis and relied upon narratives, memories, and impressions thus leading to vague results open to interpretation.

In this 2013 critique, Condlin, curious as to the apparent staying power of the transformative mediation, likens Bush and Folger’s 1994 book as generating “hoopla” (p. 678) similar to that of the first edition of *Getting to Yes* in 1981. Stating rather harshly that “one might think over-exaggerating the benefits of a dispute resolution theory was no longer possible after the publication of *Getting to Yes*” (p. 678), Condlin manages to criticize both books, insinuating neither is of any merit. Despite transformative mediation being regularly referenced in the literature as a valid style and approach, in what perhaps Golann and Corman Aaron (2019) might describe as a schizophrenic split, Condlin (2013) suggests transformative mediation was a fad that lost any staying power it had, while at the same time stating, “there is a lot to like” (p. 678) with transformative mediation without any mention of those qualities. I remain curious as to what the empirical basis is for his comment.

Rather than supporting any positive claims, Condlin's (2013) focus is on emphasizing that transformative mediation has no "saving grace" and is "outdated more than obscure" (p. 678). Considering the vast amount of literature regarding transformative mediation that has been generated since its inception, the irony that Condlin was referring to it as outdated while at the same time writing about it 20 years out seems lost on them. Condlin (2013) concludes this article by introducing a less constructed critique concerning Bush and Folger's insistence that transformative mediation techniques cannot be combined with others, a position that will be explored fully in the next chapter. However, to fully understand the context of that critique, it is necessary first to address the common misconceptions of the transformative style and approach that have been touched upon thus far.

Misconceptions have obscured the true nature of transformative mediation, so much so that Bush and Folger, created an entire chapter to address the misconceptions in the 2005 revised edition of *The Promise of Mediation*. Clearly well aware of the critics and discussion, they acknowledged some of the challenges, stating clearly that one of the purposes of the book was to clarify for those who may have difficulty "in grasping the aims and the methods of the model" (p. 3). While proponents of transformative mediation continued to practice, train, and defend it, Bush and Folger also attempted to address the articles critiquing the transformative style and approach directly. Bush and Folger (2013) were open to the discourse stating that they welcomed all "cogent" and "substantiated critiques" as they "believe such comments further substantive discussion and debate" (p. 231). Although Bush and Folger addressed numerous misconceptions, this thesis focuses on four main categories: (1) the meaning of transformation, (2) the distinction between a relational view and an ongoing relationship, (3) the concept of empowerment and (4) the role of the mediator. Misconceptions around empowerment, differentiating it from balancing

power or building capacity was clarified earlier in this chapter, however, the other three will be expanded on in the following section.

Stepping back and considering the critiques covered in this chapter, much of it can be attributed to the word *transformative*, or likely the core word *transform*, as well as some of the wording and focus of the 1994 book. The response to use of the word transformative was not surprising, with Bush (2023) noting that the word transform had "puzzled many mediators" (p. 292). I think for most people, the word transform comes with a perception of significant gravity and perhaps when used alongside other words such as transcend, might be viewed as an unreasonable responsibility for either a mediator or the mediation process. Despite the significance it appears to hold, coupled with the responses it has elicited from critics including Seul (1999) and Condlin (2013), the word transform is defined as "a marked change in form, nature, or appearance" (Oxford University Press, n.d.) and does not seem excessively onerous to achieve; remaining sufficiently ambiguous to allow for a subjective determination of what constitutes a marked change.

Between the 1994 and 2005 editions, the authors attempted to help readers understand their use of the word, and even more recently, explained that the word "transformation is one term for change" (Bush, 2023, p. 293). One could argue that working through a dispute in the mediation setting, one which results in a resolution by way of an agreement, is a change, and likely a marked change for all involved. Perhaps for a large corporate client, the change may not feel all that significant such that any representative would refer to the outcome as transformative; however, it does not seem too far of a reach to consider that an individual plaintiff or claimant with the same outcome could experience it as much more significant. That, of course, is only if we agree with the opinions regarding the significant impact of conflict on disputants, from both a

monetary and non-monetary perspective—those factors to be considered in a thorough risk assessment before arriving at the promoted informed decision (Keet et al., 2020).

If it is plausible to think that a resolution of a long-standing dispute could feel like a transformation of one's personal stature (nature or form), is it not also plausible to think about the development of any new or existing skill, along with increased understanding or knowledge, to also be indicative of a change? Is it also too much to consider that an increase in skill, knowledge, or understanding of others just may transcend the mediation? This aspect seems equally applicable to a corporate party as an individual, especially in a case where the dispute uncovered a systemic or structural problem. Therefore, looking at the word *transform* and its different meanings, while initially seeming like a grandiose claim, can become simpler in its application.

In considering the application of a transformative style and approach in a dispute involving a corporation and an individual, like many of the matters that would be included in the context of this thesis, we are presented with another common misconception, that being the belief that transformative mediation is only suitable for dispute where the parties have or would like to have an ongoing relationship.

As mentioned briefly earlier, outside of the authors, experts, or impassioned supporters, when transformative mediation is covered in either academic or general training literature, while often applauded, it is also referenced as being most suitable for family, community, or other disputes where there is an ongoing relationship. The literature demonstrates that this limitation is unfounded. The misconception likely arises from a failure to fully grasp the relational view and its applicability beyond relationship-based conflicts. As we've learned here, the relational view is simply a focus on self *and* others, gaining a better understanding of both, and not exclusively in

reference to an ongoing relationship between the parties. This relational view and the potential for increased understanding and change separates the transformative style and approach from a problem-solving approach and lays the necessary groundwork for goals above and beyond just settlement or agreement. The delivery of a style and approach, with a view of all goals, leads me to the final misconception covered here, namely the belief that a transformative mediator does not take an active role in the process.

This misconception, that transformative mediators are passive, is widely held, not just amongst critics. In responding to Condlin's (2013) critique, Bush and Folger (2013) differentiate between "mediator control" and "mediator support" with the former more indicative of an evaluative or directive mediator, and the latter as being purely facilitative (p. 239). According to Bush and Folger, transformative mediators invite parties to move throughout the process in a manner they are comfortable with as opposed to the mediator maneuvering them through an inflexible process. Inviting the parties to participate in a process, one with choice and options, recognizes the mediator as the hired expert of the process while still allowing parties to have a voice in the process and in some cases, what they are paying for.

Shifting our focus to the expectations of the parties, we must acknowledge that those in conflict who either choose, or are assigned, mediation as an alternative to other adversarial processes are most often looking to resolve the dispute, and therefore it is not unreasonable to state that the primary goal of the mediation process is to help the parties achieve this objective. Notwithstanding Bush and Folger's emphasis on empowerment and recognition over a problem-solving focus, a transformative style and approach does not change the objective to reach a resolution, it simply changes *how* the objective is met.

Folger and Bush (2005) in responding to Gaynier's (2005) article welcomed the suggestion that transformative mediation could be grounded in Gestalt theory. Recognizing similar foundations based in communication, perception, and understanding, Folger and Bush (2005) agreed that such a theory aligns with their view, that there is no single way to achieve the objectives of transformative mediation, as long as it is carried out in a "value-based" practice (p. 123). This emphasis on values and the importance of achieving empowerment and recognition has led to the misconception that transformative mediators do not prioritize helping parties reach a resolution. A misconception that overlooks the fact that transformative mediation, while prioritizing empowerment and recognition, is instrumental in facilitating mutually agreeable outcomes.

This second chapter of the informing literature has presented the core pillars of the transformative style and approach for addressing disputes in ways that go further than simply resolution, moving beyond mere settlement. From its emergence in the mid-nineties to present, at its core, transformative mediation aims to achieve empowerment and recognition through the process of building mutual understanding. By prioritizing the quality of interaction between parties, rather than focusing solely on resolution, embedded in transformative mediation is the mechanism to achieve more complex goals by fostering growth through increased understanding of self and others.

Transformative mediation has demonstrated success in various contexts over the last few decades, with significant efforts invested in supporting practical application and strategies. Despite success and effort, like the evaluative style and approach, transformative mediation has faced its share of criticism. Much of the criticism as well as the lack of adoption has stemmed

from a number of different misconceptions that have been covered here. Stemming from those misconceptions is the belief that the transformative style and approach, with its focus on empowerment and recognition, does not foster resolution. This misconception has been further complicated by Bush and Folger's insistence that, due to value-based differences, transformative mediation cannot be combined with other styles and approaches. While a strong critic like Condlin (2013) sees no authenticity behind transformative mediation warranting any adoption of practice, others like Gaynier (2005), Seul (1999) and Menkel-Meadow (1995), who recognize and value a transformative style and approach to mediation, are also critical of the uncompromising position Bush and Folger have taken. This issue—the combining of styles and approaches—has created its own debate, which, when coupled with the challenge of inconsistent terminology, further complicates discussions about the practice of mediation. This final debate of the literature review and the contributing challenge of common language with different meaning will be examined in the following chapter.

CHAPTER 6 – RETHINKING STYLES AND APPROACHES

The prior two chapters have presented a chronological examination of the debates surrounding the three most common theoretical styles and approaches to mediation: facilitative, evaluative and transformative. Both preceding chapters and Chapter 3, providing the context for this thesis, touched upon opinions on the potential for combining any or all components of each style and approach, depending on the type of dispute. Many agree with Seul's (1999) suggestion that the potential for different approaches to "cross-fertilize" (p. 171) leads to a more integrated and adaptable practice. While a variety of terms have been used to label such an approach, from basic terms like combination or hybrid to more nuanced like eclectic or flexible, the reference to mediator tools or the term "toolbox" has become widely adopted (Bush, 2023; Corman Aaron, 1996; Furlong, 2005; Hoffman, 2009; Welsh, 2004). This combination approach has also sparked debate amongst practitioners and academics alike.

This debate encompasses several key aspects, including concerns surrounding the level of directiveness, the extent to which mediators control the process,- as well as challenges in understanding the discourse based on a lack of consistent use of terms used in describing both the process as well as the mediator's role. Therefore, this final chapter of the informing literature will examine the toolbox debate and explore the impact of inconsistent terminology on the understanding of mediation practice. Lastly, it will question and explore the complexities of mediator directiveness in the practice of mediation.

The Toolbox Debate

The notion of combining different mediator styles and approaches was first introduced in the early debate as between pure facilitative mediation proponents (Alfini, 1997; Kovach & Love, 1996, 1998) and those who maintained the necessity of an evaluative style and approach in

certain types of cases or mediation environments (Menkel-Meadow, 2011; Riskin, 2003). Others (Birke, 2000; Golann & Corman Aaron, 2019) suggested there is no clear divide, and every mediator moves along a continuum of sorts depending on their assessment of the parties' needs. As evaluative mediation became more common, some opinions softened and even an element of acceptance could be seen; however, for some, facilitative mediation was still considered the ideal (Brown, 2004; Erez-Navot, 2021; Stitt, 2003).

Studies suggested that evaluative mediators were more open to using facilitative techniques if the case warranted; however, it was also found that these mediators lacked both an understanding as well as an ability to practice purely facilitatively. The pure facilitative practitioners, while somewhat accepting of an evaluative style and approach having an element of legitimacy, were less likely to use evaluative techniques. Some have suggested that more transformative-like techniques can find space in an expert mediator's toolbox, as they have viewed these techniques as a type or subset of facilitative mediation (Riskin, 2003). Since its inception, however, Bush and Folger (1994, 2005), along with proponents of transformative mediation, have maintained that a hybrid approach is not possible.

The idea of a mediator toolbox is not specific to just the styles and approaches covered here. Using a map analogy in the foreword of a book titled *The Conflict Resolution Toolbox* (Furlong, 2005), Christopher Moore, a well-known mediator, trainer, and author, likens a hike in an unfamiliar setting as not dissimilar to "navigating one's way through a conflict." Pointing out the need to locate oneself on a map, acknowledge the important signs, and "develop successful strategies to handle a wide variety of unforeseen circumstances" (p. xii). In this book, Furlong (2005), while not introducing the different styles and approaches covered here, focuses on diagnosing the origin of a conflict, identifying the context, and then determining the best model

for acting as a third party in assisting the parties. Furlong (2005) introduces eight models for mediation intended to form part of the mediator toolbox. Model according to Furlong include the structure of the mediation process as well as various styles and approaches dependent on the unique factors of any dispute. While an exploration of each of these eight models are not directly relevant to this thesis, Furlong offers a helpful and compelling explanation for differentiating between theories and models.

The definition of model in this thesis, as covered in Chapter 2, refers to the structure of the mediation process such as the use of co-mediators, pre-mediation, caucus, or how the mediation is chosen or where the mediation occurs. This is not consistent with Furlong's use of the word model. The relevancy of pointing out this difference pertains to Furlong's effort to distinguish model from theory. The definition and use of theory in the context of mediation practice are most relevant here. Furlong (2005), referencing the Merriam-Webster dictionary, summarizes "that theories are broad principles that are often related to abstract thought of a high order" and suggests that "for practitioners, very little 'deep' theory is directly useful and applicable … other than in the most general way." Furlong continues, highlighting a gap between theory and practice, and states, "as in many fields, this significant gap between theory and practice exists because practitioners rarely see how the majority of research conducted helps them as practitioners." (pp. 7–8).

Furlong's solution to this practitioner blind spot is multiple models intended to act like a map to provide useful and practical direction, all while avoiding any connection to an overarching theory or orientation. This solution, however, is reminiscent of Keet's (2005) criticism of a one-dimensional superficial evaluation, comparing it to a doctor writing a prescription in the absence of a diagnosis. Furlong's solution seems somewhat ironic, in my

opinion, as it suggests that the models, absent of any theory, also assist the mediator in diagnosing the type of dispute. I would compare these models to setting out on an Alpine hike, map in hand, but without the benefit of the weather forecast and a compass. Regardless, none of the maps Furlong presents for diagnosing and resolving conflict refer specifically to the common theoretical styles and approaches covered here. Despite this lack of reference, an experienced and knowledgeable practitioner could easily identify where Furlong's models might correspond to either a facilitative, evaluative, or transformative style and approach. Of interest is that most, if not all, of the models suggest a relatively high level of mediator directiveness along with a focus on settlement-like solutions. While Furlong (2005) does not explicitly address the specific styles and approaches, the importance of mediators benefiting from a diverse toolbox of skills from which to practice is reinforced.

To support this claim, Furlong emphasizes the importance of a mediator becoming a reflective practitioner. Quoting professionals in reflective practice in mediation, he highlights:

> Reflection is the process by which professionals think about the experiences, events and situations of practice and then attempt to make sense of them in light of the professionals' understanding of relevant theory … reflection occurs both during the performance of professional practice (reflection in action) and after the experience (reflection on action). It nurtures exploration and discoveries that lead to an increased repertoire of skills, it enhances the person's ability to modify forms of intervention, and it may alter his way of thinking about the problems presented. (Lang & Taylor, 2000, as cited in Furlong, 2005, pp. 13-14)

While I would not argue the benefits of a reflective practice, it is interesting that a key element of the above quote is reconciling one's understanding of applicable *theory*, despite Furlong's

suggestion that theory is of little benefit to practitioners. Regardless of this apparent contradiction, based on my interpretation, Furlong is reinforcing the importance of theory as well as the need for mediators to have options, referred to as maps or tools, to help them in their practice. The relevancy of theory as well as reflection has been noted by another author who agrees with Furlong as to the importance of maps in mediation practice. Alexander (2008) highlights the mediator's overarching theoretical "orientation", as influencing parties to a mediation and the importance for mediators in recognizing their dominant orientation (pp. 104–105).

The idea of mediators accessing different styles and approaches depending on the type of dispute or, throughout the course of a mediation, is punctuated by both proponents and opponents of those covered thus far. Whereas Birke (2000) and others (Golann & Corman Aaron, 2019) focused on a toolbox filled with both evaluative and facilitative techniques, others (Gaynier, 2005; Menkel-Meadow, 1995) focused on the addition of a transformative style and approach to a mediator's skillset. According to some, this ability to incorporate a variety of styles and approaches reflects an "expert" (Poitras & Raines, 2013) or "skilled" mediator who can "command a range of techniques, regardless of their dominant process or problem orientation" (Alexander, 2008, p. 105).

As noted earlier, Hoffman (1999) identified as a problem-solving mediator who, in their quest to bring peace into the mediation process, began embracing elements of transformative mediation as introduced by Bush and Folger in 1994. Like others referenced above, Hoffman (1999) considered transformative mediation techniques as simply more tools to add to their skill set. Ten years later, on the topic of training, Hoffman (2009) also suggested that teaching a toolbox approach would allow new mediators to "conceptualize their work as achieving a high

level of skill using a wide variety of tools," thus allowing them to be more successful in their practice as they would be able to apply their vast skills to "a wide variety of people" (Hoffman, 2009, :47). Hoffman, like Furlong (2005), highlights the toolbox as allowing mediators to choose an approach based on the context and other factors, like the participants, of the dispute they are hired to mediate. Hoffman, perhaps purposely, stays away from any discussion or debate concerning theory, focusing mainly on more practical applications of different approaches. On the other hand, noting the importance of understanding theory when reflecting on one's practice, another author has attempted to reconcile the disconnect between theory and practice.

Lande (2000) addresses this disconnect by exploring the relationship between theory and practice in the context of the facilitative and evaluative debate. Referring to that debate, Lande suggested it was a distinction between lawyer and non-lawyer mediators in the field and agreed with those supporting a toolbox approach.[34] Lande stated that this co-mingling is warranted, including the use of elements from transformative mediation. Lande helps clarify terminology, underlining that elements such as empowerment and settlement are mediator *goals,* whereas facilitation, and evaluation are mediator *techniques*. While I do not disagree entirely with this clarification and I fully support the goals definition, insofar as mediator techniques, highlighting the subtly between facilitation and facilitative or evaluation and evaluative, I would argue that it could cause further confusion in a field already plagued by an abundance of subtle differences in terminology. In this thesis, I have presented facilitative and evaluative each as a style and approach. Referring back to the Definitions of Terms chapter, the style (worldview, orientation or ideology) is aligned with a corresponding approach (tactic, technique or strategy). Regardless

[34] This claim is not supported by the literature presented in this thesis where the debate occurred between academics and practitioners with a law background.

of this difference, Lande's point is helpful in separating goals from techniques (approaches). Lande (2000) makes another important distinction as it relates to an evaluative approach; here, he clarifies that mediators at times believe that an evaluation provided by the mediator can allow parties to make the much needed "informed decision"; however, a mediator will purposely refrain from telling the parties how to proceed (p. 323). This may be a distinction of practice worth noting.

While somewhat critical of the debate that had ensued following Riskin's Grid, suggesting it may have caused mediators to be somewhat self-conscious of their practice, like others, Lande recognized the benefit of good debate. Similar to Golann and Corman Aaron (2019), Lande (2000) believed that the debate created sound guidelines for mediators choosing evaluative approaches and allowed for the thorough development and consideration of policies such as codes of conduct. Lande also emphasized the debate resulted in "improved theoretical understanding of mediation" (p. 330). While Lande focuses mainly on the importance of maintaining confidentiality and neutrality, support of "eclectic approaches by mediators" is conveyed, suggesting that any debate mostly likely stems from a difference in "ideology" (p. 333). Expanding on the idea of a toolbox of one of creativity and not just a mixture of techniques, Lande encourages "an eclectic variety of mediation ideologies and practices" that can meet the goals of mediation, including "empowerment, settlement, facilitation, and evaluation" (p. 333). It is noted that Lande does not use the term transformative in describing any of the techniques but instead refers to empowerment, one of the three core pillars of transformative mediation, as a goal.

Lande and others who have taken the position that a toolbox or eclectic approach to mediation is either good practice or a sign of a skilled or expert mediator are all in opposition to

transformative mediation, according to its proponents. This discourse is fuelled by a difference in underlying theory and ideology and an opinion that practitioners generally do not know the different styles and approaches or what they mean. A recent article has attempted to address this disconnect.

Referencing academics and practitioners supporting a toolbox approach, Bush (2023) highlights the widely accepted view that mediation's core purpose is the "production of agreements" (p. 255). According to Bush, this view has created the idea that either multiple tools in one box or multiple toolboxes for different purposes is an acceptable means of practice. Bush argues that this perspective is based on a misunderstanding of the core principles of the different styles and approaches. Acknowledging one of the three misconceptions of transformative mediation covered in the preceding chapter, Bush points out that the use of *transform* has likely caused confusion, contributing to the lack of understanding. The purpose of the 2023 article was to provide much-needed clarity.

Providing a direct comparison of a mediator's "purpose," their "practices," and the differing "premises" underlying transformative, facilitative, and restorative mediation, Bush (2023) aimed to demonstrate how each are "not only different but incompatible" (p. 258). While providing a detailed analysis as to why different styles and approaches are misaligned with transformative mediation, Bush also explains why a toolbox approach would be appealing to practitioners. One should note that Bush incorporates the more evaluative mediator strategies into the facilitative style and approach, not unlike those who have suggested that there is no fundamental difference between the two, simply only varying degrees.

According to Bush (2023), the incompatibility of the three: transformative, facilitative, and restorative, stems directly from the purpose, practice, and premise of each.[35] In summary, Bush emphasizes that purpose drives practice, both of which are based on the premise of each approach. Whereas the main purpose of facilitative mediation involves reaching agreement, and restorative mediation also involves agreement with the added purpose of reconciling a relationship (individual or community), reaching an agreement is described as a "side-effect" (p. 278) of transformative mediation with the main purpose of restoring the conflict interaction, through empowerment and recognition, between the parties. Bush describes facilitative and restorative practices as being significantly directive, especially where controlling the process is concerned. This is in contrast with a transformative style and approach that seeks to develop an acceptable process based on the input and needs of the parties.

The difference in premise seems to align with underlying beliefs and theories regarding the parties' abilities or competencies when in conflict. According to Bush, facilitative mediation assumes parties need to be protected from themselves, thus requiring the assistance of the mediator, and restorative mediation assumes parties are driven by a desire to be socially accepted and be accepted by their valued community, whereas transformative mediation assumes parties seek both individual agency (self-determination) and social connection. Notwithstanding these fundamental core differences, according to Bush (2023) all three are positioned to result in an agreement, resolution, or settlement. Meaning that, neither facilitative nor restorative mediation is in better position than transformative mediation to reach a resolution through the process.

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[35] See Appendix G for Bush's (2023) Table One comparison of purpose, practice, and premise on p. 305.

Despite the three examples sharing a similar outcome, the differences in purpose, practice, and premise according to Bush means that they cannot be combined. Because purpose drives practice, according to Bush (2023), there is no such thing as a "value-neutral practice," stating "how I practice depends on what I'm trying to achieve, which is determined by why" and further, emphasizes that the *why* encapsulates the important underlying values (p. 260). Bush asserts that these values, the *why* behind a mediator's approach, are both fundamental and not easily changed.

Further, Bush (2023) intimates that a practitioner's avoidance in recognizing this "reality may represent a tendency to avoid reflecting on the values underlying one's practice" (p. 288). Like others (Bowling & Hoffman, 2003; Cloke, 2001, 2004; Gold, 2003), Bush (2023) believes that self-reflection should be a core function of any practitioner and if one's values are covered up to "be all things to all clients" it suggests a lack of transparency and possibly a strategy to acquire or maintain a profitable practice (p. 288). Bush further claims that a toolbox approach creates confusion about the different ways in which mediation can be practiced and perhaps allows practitioners to avoid fully understanding, or explaining, the core differences and aligning themselves to just one. I suggest that a lack of understanding could prevent a mediator from being fully competent in any one style and approach and limit their potential impact, thus creating a disservice to the practice and to the parties it is intended to serve. Bush (2023) presumably supports this conclusion when stating "there is no workable general mediator 'toolbox', and a mediator who claims to be using one is either using a grab-bag with no coherence, or s/he is following a specific model of practice but is either not realizing it or not admitting it" (p. 291).

Party self-determination, a concept explored throughout this thesis, is another key distinction that Bush highlights between the transformative style and approach and others. According to Bush, only the transformative approach indubitably honours party self-determination. Other approaches Bush (2023) argues "intrude on" or "supplant" choices that should be made independently by the parties throughout the process (p. 293). This, of course, was a popular argument covered earlier between the opponents and proponents of the evaluative style and approach. Here, and likely somewhat disturbing to opponents (Alfini, 1991; Kovach, 2023; Kovach & Love, 1996, 1998; Love, 1997) of evaluative mediation, Bush (2023) has included evaluative techniques *under* the facilitative style and approach umbrella.

Focusing on the assessment of the three, Bush (2023) emphasizes that the comparison of purpose, practice, and premise is not intended to suggest superiority of one over another, but rather to highlight their fundamental differences. Recognizing that there will be variations in the demonstration of each between mediators, Bush aims to simply identify the core differences that would preclude a toolbox approach. Further, Bush (2023) shares the belief that having a diversity of approaches "is a great advantage in the mediation field" but cautions that it is only beneficial if "the differences are acknowledged and properly understood" (p. 295). Perhaps surprising to proponents of transformative mediation, and those who have opined that it can be applied to *any* type of case or matter, Bush states "given how the user understands the situation and prioritizes the values at stake, one model will almost always be preferable to the others" (p. 298). Bush touches on the various levels of users such as governments, program administrators, and disputants, highlighting the importance of their awareness and understanding of the different approaches. At the same time, Bush notes the obvious constraint due to a general lack of understanding, not just by users but also by practitioners.

Acknowledging the lack of understanding of the theoretical styles and approaches, another academic and practitioner suggests the cause of any misunderstanding is because of either oversimplification or misleading and confusing language. Lande (2023), having previously been cited as a supporter of an eclectic approach to mediation, a term used synonymously with the toolbox approach, recognizing the value yet tiring of the debates, proposes the field move on and consider a different way forward. Presumably acknowledging the underlying values or ideologies feeding the debates, Lande claims that "arguments about what is or is not real or good mediation have spawned unhelpful ideological divisions in the field" (p. 348). Lande's solution is shifting away from the common theoretical approaches to a dispute system design (DSD) theory. A tried and tested approach, according to Lande which "can provide a better theoretical framework for understanding mediation and guiding people's actions in mediation" (p. 348). Lande, while critiquing the traditional theories, does not abandon them altogether, stating that DSD can incorporate and refine them in addition to other elements of mediation. Lande further claims that "using DSD as a central frame for understanding dispute resolution integrates the entire dispute resolution universe, not just mediation" (p. 348). This ambitious claim emphasizes a desire for consistency and simplicity across the field.

In preparing for explaining the basis for DSD, Lande provides a similar history of the debates that have been offered here thus far, referring to the 2000 article, also cited earlier, acknowledging the benefits that have stemmed from the discourse, although also sharing a concern that they are no longer beneficial to the field. Unlike Bush (2023), Lande (2023) doesn't clearly place facilitative and evaluative approaches into a category sharing similar purpose, practice and premise but does refer to any differences as unintelligible. Thus, indirectly agreeing

with Bush's positioning of the two, suggesting it would be difficult to clearly or easily separate the two in practice.

Lande (2023) describes facilitative mediation as a series of moves assisting parties in carrying out risk assessments, including reality testing, and negotiating their interests. Whereas Lande refers to evaluative mediators as making similar moves but also "predicting impact of settling and court outcomes; urging parties to settle; and proposing settlements" (p. 351). Lande states that the distinction between assisting parties and engaging in more directive actions, such as predicting, urging, and proposing, can be both subjective and confusing for mediators. As a result, according to Lande, mediators often find themselves combining these actions, adapting their approach based on their assessment of the parties' needs. Lande questions how one might describe themselves if they typically use facilitative approaches but on occasion access an evaluative tool. Does the brief use of such a tool now create an evaluative mediator? Regardless of what the right answer may be, Lande suggests that these terms likely do not align with what mediators' understanding of them actually is.

In addition to suggesting mediators do not have a full understanding of these well-known theoretical mediation styles and approaches, Lande (2023) further posits that those who align with either a facilitative or transformative approach experience positive and powerful "cognitive effects" (p. 325). According to Lande such effects support the mediator's values and ideals around addressing conflict and helping people to improve their overall lives. Lande (2023) also asserts that these values or ideals also cause "a negative view of mediators who impose their view on parties" (p. 353). Thus, the debate continues as some fixate on what constitutes good mediation versus bad mediation based on a difference in values.

Suggesting the common theoretical styles and approaches are no longer relevant, Lande (2023) opines that "mediation practice is a lot more complex and nuanced than suggested by the theoretical definitions or is commonly portrayed" (p. 354) and offers DSD as the solution. According to Lande (2023), this system is not specific to mediation or resolution of a conflict but would also facilitate prevention and is focused first on understanding the goals of stakeholders. Lande also points out that the concept is not new and is used around the world in multiple types of organizational environments, from community programs, courtrooms, employment settings and even when dealing with the "aftermath of wars" (p. 356). Lande notes that the DSD solution, while applicable to a wide variety of situations, may be overlooked in smaller more isolated settings. To address this, Lande recommends that mediators consider each case or dispute as its own system with "required actions before, during, and after the mediation session" (p. 359).

Actions before the mediation would include formal or informal pre-mediation discussions with the parties, and actions after the mediation would include debriefing and reflection, as well as ongoing training and learning. According to Lande, these constitute a mediation system for which the mediator builds and prepares based on stakeholder goals, recognizing that there many different factors to consider. Two such factors include the system in which the mediation is occurring as well as the mediator's relationships.

Existing systems, like court-connected mediation programs or other government-implemented programs, will impact the individual mediator's own mediation system development. Focusing on court-connected mediation programs, Lande (2023) uses the term "liti-mediation" to highlight "that mediation often is routinely integrated into litigation practice culture, transforming both lawyers' and mediators' approach to mediation." (pp. 359-360). Lande further emphasizes that considering mediators and lawyers are working together on a

regular basis, developing a more constant and close relationship than those with the individual disputants, the mediation process is "dramatically [affected]" (p. 360). Lande warns that this relationship can cause the mediator to "cater to the lawyers' interests, which often entails pressing the principals into settlement," especially in those environments where the lawyers select and hire mediators (p. 361). To understand other considerations involved in designing a mediation process, Lande sought to explore mediator behaviour and motivations, including the techniques they use as well as the factors drawing them to the practice of mediation. Lande (2023) credits Kressel (2007, 2013) as having spurred the project.

Kressel who published a number of articles regarding strategic mediation, and who is referenced in Chapter 2, later authored an article titled "How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decisionmaking" (2013). In this article, Kressel summarized and interpreted the findings from three studies. From this summary, according to Lande (2023), Kressel (2013) concluded that what a mediator *understands* about a theoretical style is very different from what they *think* they are doing. Like Lande (2023), Kressel (2013) posits that the common styles and approaches are not helpful in addressing all the complexities of a mediation, including the constant fluidity of factors at play. Kressel's (2013) finding of variation between the different styles and what mediators *believe* they are doing is similar to a study that will conclude this chapter. These studies reinforce that the findings in this study are not uncommon in both the United States and Canada. Notwithstanding the variation between the styles and approaches and what mediators believe they are doing, highlighting Kressel (2013), Lande (2023) emphasizes that "much of what mediators do is outside of their conscious awareness" and with increased experience, these actions may not even form part of a reflective practice (p. 366).

With Kressel's (2013) findings front and center, Lande (2023) hand selected 10 experienced mediators considered "highly self-aware" (p. 368) to provide written details of their practice type and design as well as information concerning 1) their background, training, and experience, 2) their perception of core values and goals of the parties to mediation, and 3) their goals in mediation. According to Lande (2023), the fact that many of the mediators in the study both mediated and taught allowed them to "operate at the intersection of theory and practice" (p. 371). There was a range of practice types (e.g. family, employment, civil litigation, human rights, etc.) with practitioners mainly from the United States and one from the UK. Three areas of particular interest emerged from Lande's extensive analysis of participants' responses: mediator background, party core values and goals, and mediator goals.

Although all of Lande's mediator participants had an education in law, as mentioned, they came from a range of backgrounds and experiences and in several instances referred to a certain moment or event that sparked their passion and interest in mediating. Lande (2023) referenced their descriptions in certain situations as a "personal calling" with some as being influenced by politics in the 1950s and 1960s, ultimately contributing to "progressive ideals" (p. 373). One participant referred to Bush and Folger's (1994, 2005) *The Promise of Mediation* as having a significant impact on them and their practice. A number of participants noted an ability to be a problem solver or mediator even at a young age along with having an innate ability to appreciate all different perspectives. The findings on values and goals for self, the participants and the mediation were also intriguing.

In reviewing the list of descriptions offered on the mediators' values and goals from Lande's (2023) study, I would broadly categorize them as honouring party self-determination, focusing on building knowledge and understanding, skill building in the areas of communication,

problem solving and managing emotions, as well as inciting change beyond the mediation setting. Some of the participants specifically referenced “peacemaking,” “parsimony,” and “empowerment” (p. 375). Due to the range of practice types, the perceived party and mediation goals were quite varied; however, they can be categorized into acts of recognition as well as resolution of interests, needs, and wants. As mentioned earlier, Lande also examined the influence of any umbrella system (such as court-connected mediation) as well as representing lawyers on the mediation process. Although a complete analysis is not presented here, all participants noted and worked with these factors regularly, recognizing a need to adjust their approach accordingly. Interestingly, all of the mediator participants in Lande’s study preferred to start and use joint session extensively rather than starting in caucus or remaining in caucus for the majority of the mediation. This is not to say that Lande’s (2023) mediator participants did not believe in the benefits of caucus, but more that the overuse or dependency of caucus was not considered to be beneficial to the process. I suggest this tendency towards joint session is supported by the mediator values and goals focused on knowledge building and recognition referred to earlier.

As part of each mediator’s own mediation system design, Lande (2023) explored the “role of mediation theories” (p. 384). Here, Lande recognizes that, along with other factors, “mediation theories influence mediator’s thoughts and actions to some extent” (p. 384). According to Lande, the participants often referred to approaches that mirrored a traditional facilitative theory. Still, they rarely identified it specifically and often made mention of also using elements of an evaluative approach. One participant, connecting with the transformative approach, also suggested that she was likely more directive than what would be considered in keeping with the theoretical approach. Lande describes some of the participants as referring to

the traditional theories more "as ideas to be used selectively rather than sources of mutually exclusive prescriptions to be strictly followed" (p. 384). Considering where Lande places this group of highly reflective practitioners, they seem to align with others (Alexander, 2008; Hoffman, 2009; Poitras & Raines, 2013) who believe that a highly skilled, expert or master mediator takes the toolbox approach depending on the parties, the issues, and any challenges in the moment. One of Lande's (2023) participants opined that the three theoretical approaches—facilitative, evaluative, *and* transformative—are "complementary" and that mediators should be flexible in their approach depending on the parties' wants and needs (p. 385).

Notwithstanding Lande's expressed opinions that theories are both important and influential, they conclude that a "system of traditional mediation models is problematic" because few actually understand them. Further, Lande (2023) posits that mediation is simply too complex to apply only one (model) and that discourse based on conflicting ideology is now "counterproductive" (p. 387). Further, Lande highlights the general lack of understanding of terminology as a problem for the practice and suggests that the DSD framework offers a solution. In order to understand Lande's solution, one needs to reconcile the terminology.

Based on my interpretation, Lande (2023) is aligning theory with style (orientation or worldview) and model with approach (technique and strategy) and placing both within a series of tasks and considerations referred to as a necessary framework. Recognizing the importance of theory but suggesting a better *approach* that can incorporate multiple theories based on the process (system), parties, goals (objectives) and the context (case, matter, issue). The amalgamation of these components is the solution, according to Lande (2023), referring to it as the Real Mediation Systems based on the DSD framework.

Regardless of whether or not Lande's (2023) Real Mediation Systems is the more practical solution for teaching or guiding mediation, and despite opinions that the theoretical styles and approaches can be combined, creating a toolbox of options or not, the knowledge and understanding of theory is still an important aspect. I agree with Colatrella's (2021) assessment that these commonly referenced terms—facilitative, evaluative, and transformative—used to identify different theoretical styles and approaches "have become part of the mediation lexicon and have allowed us to communicate more clearly and think more systematically about the mediation process" (p. 186), and I argue that the knowledge and understanding of these theories is more than just an important aspect; but instead, is a fundamental requirement of any mediation practice. In order to build a toolbox, one must be aware of all the tools, and their respective purpose, if they are to make informed choices. If one is unaware of the existence of a specific and important tool, how do they ensure it is in their toolbox?

Given their background and experience, Lande's project participants clearly possess a deep understanding of the various styles and approaches to mediation, including the more common and theoretical ones covered here. This distinguishes them from a category of *general* practitioners, who, as Lande points out, often lack this level of knowledge and understanding. While Lande references a number of different sources to reinforce this point, I have chosen a Canadian study in consideration of the context of this research.

Common Language, Different Meaning

Whether a mediator is aligned with or chooses one style and approach to practice, selecting a variety from a toolbox, or implementing an entire system, they must first have fundamental knowledge of the theoretical styles and approaches. Some empirical studies have raised concern that this basic knowledge or understanding does not exist. A PhD dissertation,

along with articles stemming from the findings, supports this concern and demonstrates that the same language can have significantly different meanings within the field.

Picard (2000, 2002, 2004), a mediator, trainer, and academic, carried out a study involving 88 mediators from across Canada in various practice environments. These mediators were selected because they were also trainers in the field. The purpose of the study was to explore what mediators understand about what they do and how factors such as experience, gender, and context influence perceptions of their practice.

The study sample was represented almost equally by men (47%) and women (53%), with the majority from Ontario and 7% and 6% from Manitoba and Saskatchewan respectively. When asked about their role in mediation, the vast majority, 89%, described themselves as a facilitator. However, their description of what being a facilitator entailed varied considerably. Some participants focused on managing the process, while others on the communication exchange, and still others on resolution. In facilitating such goals, mediator participants used terms such as "guide, conduit, catalyst, bridge-builder, and assistant" to further describe their role (Picard, 2002, p. 254).

From the analysis, Picard was able to identify specific tactics (approaches) used to achieve how the mediator's viewed the parties' goals along with the mediators view of their role. Such approaches included reinforcing parties' needs, emotions, increased knowledge, problem-solving, empowerment and self-determination. While there was variation in where the emphasis was placed, for example, process versus communication, only a small percentage perceived resolution as the main focus of their role.

One particular difference between the genders was that female participants were more likely to have focused on facilitating communication solely or communication *and* process. In

contrast, the male participants were more likely to focus solely on process or, process and resolution. Another difference was between participants with and without a law background. Those with a law background were more likely to focus on process more so than communication. Interestingly enough, this focus towards process was also most prominent and aligned with increased years of experience. This latter finding caused Picard to pause and consider the potential cause.

To explain why some experienced mediators, identifying as facilitators, may prioritize the process over communication, Picard speculated on three potential causes. One potential cause was if the general background and type of mediator was undergoing a change thus causing a shift in focus. Two, whether a change in mediation environment was the cause and three, if perhaps experience simply caused a mediator to be less idealistic and more pragmatic in their approach. Additionally, Picard also looked to the experience coming from the United States and wondered if the emphasis on problem-solving rather than other objectives was starting to take priority in Canada as well.

Coining the terms “outcome meanings” and “no-outcome meanings,” Picard (2002) sought to connect the type and qualities of a facilitative role to the types of outcomes. An outcome meaning focus directed a mediator towards reaching a settlement whereas a no-outcome meaning focus directed a mediator to less tangible, less measurable and more broad outcomes. Here, the results were both similar and different. The men, regardless of background, tended to lean towards outcome meanings, reinforcing the focus on process rather than communication, whereas female participants with a business, law, or social sciences background focused more on no-outcome meanings. The cause for these variations may have been related to the mediation environment or the context of the dispute. From these initial findings and analysis, Picard

concluded that when mediators are explaining their role, even if using the same descriptor facilitator, the meaning of the word differs between mediators. Further, when exploring the various approaches, the findings were similar.

Like the debates covered in the preceding chapter, Picard (2002) drew on the discourse in literature following Riskin's Grid and the subsequent validation of an evaluative approach in practice. Given the debate, Picard was curious as to whether or not the participants could articulate the differences in approaches. Picard uncovered multiple definitions and examples of what the participants considered an evaluative approach to be. For example, one participant considered a number of factors at play in the mediation to be subject to evaluation, including barriers to resolution as well as options. Whereas another participant described an evaluative approach as one to assist parties in becoming more understanding of themselves and the other. This latter definition, I suggest, is one that, without question would form part of the definition of a facilitative or transformative style and approach rather than an evaluative one. Notwithstanding the majority of Picard's participants referring to their role as one of a facilitator, and the study's exploration of the no-outcome and outcome meanings, Picard also queried the participants on the definition of a facilitative approach.

Not unlike the responses to the evaluative approach, the definitions varied based on five key concepts or areas of emphasis – "education, settlement, communication, process, and self-determination" (Picard, 2002, p. 262) but none of them accurately defined a facilitative style and approach. Based on the Definitions of Terms chapter and details offered in Chapter 4 covering the facilitative/evaluative debate, the definitions of facilitative mediation shared by Picard's participants were either oversimplified or misfocused, edging into definitions of either evaluative and transformative mediation or both.

Picard (2002), summarizing the transformative approach as "transformative mediation requires that participants in mediation be empowered to resolve their dispute, and be able to recognize what the other party is going through" (p. 263), found that while some were able to accurately define the approach, others struggled. Transformation of "institutional structures" (p. 263) or a focus on parties' ongoing relationship as well as a spiritual component were included in some participants' definitions. Two of these are suggestive of the common misconceptions of the transformative approach covered in the preceding chapter.

While not relevant overall to this thesis, Picard, explored definitions of two other approaches, settlement (Alexander, 2008) and humanistic (Umbreit, 1997), which are listed in the Definition of Terms chapter. The findings are relevant here because they highlight significant inconsistencies and inaccuracies in the definitions of each offered by the participants. Picard concluded that regardless of the term, there is no accurate understanding or consistent definition amongst mediators. Given all of the participants were also mediation trainers the findings could be considered rather problematic to the field. Concluding on the implications of the study to the field, Picard (2002) shares:

> The most obvious implication is that we can no longer presume to know what people mean when they talk about mediation. We can no longer assume that mediators are of like minds in what they mean by mediation. Common language does not imply common meaning. (p. 264)

Despite the lack of understanding of the theoretical approaches and the inconsistent use of similar language, Picard was not discouraged by the study results.

Picard (2002) opined that the variety in the understanding of mediation approaches would allow a "plurality of practices rather than a single-model approach" (p. 264). While not using the

term specifically, Picard appears to be a proponent of the toolbox approach and warns decision makers, to avoid requiring mediators to subscribe to just one style and approach, suggesting that doing so would "stifle the growth of mediation" (p. 264). This raises the question of the extent to which mediators are directive in delivering different styles and approaches and whether this is just another element in a mediator's toolbox, supporting the flexibility and diversity many consider to be qualities of expert mediators.

Directive: A Closer Look

The categorization of directive as being distinct, or an element of a theoretical style and approach, has also been a subject of debate within the field. While designing my research plan and submitting my proposal, I was asked why I chose to include *directive* in the list of options available to potential participants to select from. I recognized that it is likely not a stand-alone style and approach, often appearing in the literature significantly less than others; regardless, in my area of practice, mediators would often refer to directive as a common style and approach. Additionally, based on my experience as a consumer and in sharing insights about certain mediators, the level of directiveness would often emerge in discussions.

Driven by a desire to explore the complexities of understanding mediator styles and approaches, I included directive alongside facilitative, evaluative, and transformative as another option in my research. This decision was motivated by a curiosity to understand how mediators perceive and utilize directive techniques, both in practice and as reflected in the literature. As highlighted in earlier chapters, the term directive is used inconsistently within the field, reflecting a lack of understanding and consensus of its meaning and application.

According to Christopher Moore in *The Mediation Process* (1996), directiveness refers to mediator control, and the degree varies over a continuum from highly directive to highly

nondirective. Using another author's (Kolb, 1983, as cited in Moore, 1996) terms to describe different mediator styles, Moore compares dealmaker to a directive style and the orchestrator to a nondirective style. One could suggest that a dealmaker is more in keeping with a focus on problem-solving than an orchestrator who is focused on the experience of the process. Therefore, it can be insinuated that any focus on resolution, over and above the process, is considered to be directive.

In the literature reviewed in Chapter 4, authors such as Alfini (1991) and Menkel-Meadow (2011) refer to directive as a component of a style or orientation, and others have described it as being synonymous with evaluative mediation. Riskin (2003), in the third iteration of the Grid, wanting to escape the distraction of the debate, departed from the use of evaluative and facilitative and instead chose to demonstrate the continuum of intervention using directive versus elicitive. This suggests that Riskin believed that more directive intervention was in keeping with the evaluative approach. Still, Little (2007) differentiates directive from evaluative, highlighting that people confuse the two and suggest that while evaluative techniques are acceptable, directiveness should be avoided at all costs.

While Little (2007) argues against directiveness in mediation, others (Riskin, 2005; Umbreit, 1997) suggest that directive techniques can be found in a facilitative approach or even a humanistic approach, even if commonly associated with evaluative mediation. Furthermore, as indicated by Bush (2023), restorative mediation, although distinct from evaluative mediation in its purpose, practice, and premise, does, according to Umbreit (1998), involve a highly directive approach regarding process, content, and expected outcomes.

Those (Birke, 2000; Golann & Corman Aaron, 2019) who argue there is no clear differentiation between an evaluative and facilitative mediator who may be encouraging and

supporting a thorough risk assessment by the parties, yet approach it differently, may be referring to the level of directiveness. Whereas an evaluative mediator may be more overt and offer opinions in addition to questions, and the facilitative mediator may be more covert and subtle with questions, I wonder if the issue may actually be about the level of directiveness. The result is the same; the manner in which it is arrived at is where the difference lies.

According to Alexander (2008), this manner in which outcomes are achieved is very much a style and is one often assumed by lawyer mediators. Alexander suggests that lawyer mediators, those focused on problem solving and who see themselves as a subject matter expert or an authority in law, tend to be more directive. However, accessing the definition from Chapter 2, outside of a program's mediation model (structure), the level of directiveness also refers to control of the process, regardless of any expertise or authority. Referring to Picard's (2002) study, those participants who described themselves as a facilitator or as assuming a facilitative approach referred to controlling the process but leaving the content to the parties. This sentiment was not just shared by mediators with a law background in Picard's study. Further, outspoken proponents of the facilitative approach, like Kovach (2021), highlight the separation of content and process, with the facilitative mediator often controlling the process.

This dominant approach, regardless of whether a mediator was facilitative or evaluative, according to Bush and Folger (1994, 2005), was solely "settlement-oriented" and that in and of itself was directive. In a transformative style and approach, directiveness must be avoided at all costs because of the focus on empowerment and recognition (Bush et al., 2013; Bush & Folger, 1994, 2005). This opinion with respect to a directive approach is shared by others (Billikopf, 2009; Little, 2007) and is not just associated with a transformative approach. Billikopf (2009) states that a directive approach by a mediator is one where the main focus is on settling or

compromising, neither of which should be the objective of the mediation process. Further, from a party-satisfaction perspective, mediator directiveness can have a similar impact as an evaluative approach on the participants, risking the importance of self-determination as well as perceived mediator neutrality (Kovach, 2021; Welsh, 2004).

Like the other debates covered here, there are varying opinions on the meaning and application of a directive practice. Some consider it synonymous with evaluative mediation while others consider it an acceptable part of a facilitative style and approach. Still others take the position that any level of directiveness undermines party self-determination and mediator neutrality by shifting the focus towards problem-solving. Regardless, based on the opinions expressed in these last few pages, I believe it is fitting to consider directive as a mediator approach but not a style. A mediator's level of directiveness could be considered a tactic or strategy—a means to an end of sorts. It does not fit the definition of a style as offered in the Definitions of Terms chapter as it is not, in my opinion, an overarching orientation, guiding ideology or theoretical framework.

In summary, these three chapters of the informing literature have explored the debates surrounding the evolution of mediation theory and practice. The landscape leading up to the early debates grappled with concerns that mediation had started to resemble the very adversarial process it was intended to replace, threatening party self-determination and mediator neutrality. These concerns coincided with contradictions and confusion with terminology and began to create dissonance in the field. Efforts to address the lack of clarity, gain a shared understanding, and protect the promise of mediation sparked years of debate that brought attention to key aspects of the practice.

Although many agree that the debate resulted in necessary and helpful discussion for the practice, the initial concerns surrounding the potential for mediation to mirror adversarial processes and undermine party self-determination were never fully alleviated. Further, despite the controversies surrounding evaluative mediation and the successes of transformative mediation, the ongoing discourse revealed the unique and influential role of the mediator in shaping the mediation process. Beyond ethical considerations and professional standards, it was found that a mediator's choice of style and approach is determined by several factors, including their predominant orientation (overarching paradigm or worldview), experience and training, as well as their personal beliefs and goals for the process. Complicating matters further was that mediators often did not understand the common theoretical styles and approaches, used inconsistent terms to describe what they did, or were not aware of their predominant orientation.

The idea of an overarching paradigm, or orientation, separates transformative mediation from facilitative and evaluative mediation because of a fundamental difference in purpose. Whereas the latter are focused on problem-solving the former is focused on a relational view which prioritizes the interaction between the parties with a goal of fostering change. This fundamental difference has led to further discussion raised by those who sought to avoid the original theoretical debates and offer a combination of styles and approaches that depend upon differences in context and goals, or simply mediator choice. Reflected in these fundamental differences is also the lack of consensus on the degree to which mediator directiveness is used. Proponents of transformative mediation argue that no amount of mediator directiveness is appropriate and further, the overarching worldview and purpose of the different styles and approaches prevents them from being combined. Whereas there are those who suggest that expert mediators are those who can effectively co-mingle different styles and approaches as

determined. Regardless of the difference in positions, there is overwhelming support that an in-depth understanding is always paramount and further, to support such an understanding, self-reflection and open dialogue amongst mediators should be cultivated for an effective practice.

While discussion and reference to the original debates have continued into more recent scholarship, and new related debates have surfaced, revisiting findings from over two decades within a similar context have not been explored recently. To address this gap, this research study aims to explore the current state of mediator understanding of the different styles and approaches. The following chapter provides a detailed description of the methodology, including the theoretical framework employed in this study.

CHAPTER 7 – METHODOLOGY

Within the research context and literature presented in the previous chapters, this study explored how mediators understand the common theoretical styles and approaches to their practice. The reasons feeding the curiosity behind this qualitative exploratory study were twofold. One reason was the understanding that government-implemented mediation programs include important and often ignored goals outside the more commonly measured efficiency goals. The other was a question as to whether mediator knowledge and understanding of the different theoretical styles and approaches are pivotal in achieving such goals. In considering the emphasis on empowerment and recognition in transformative mediation and with a focus on understanding and meaning-making, this qualitative study is based on an interpretivist theory and relies on a phenomenological design. Relying on one-on-one interview data, this research aimed to gain rich insights into mediators' understanding and perspectives of different theoretical styles and approaches.

This chapter will begin by briefly sharing insight into my journey in developing a research plan, followed by an outline of the research paradigm underpinning this study. I will then provide a description of the research design, including details of how the research participants were chosen along with the specific procedures used for data collection and the approach to analysis. The sections in which the design is covered will also offer justification for these methodological choices, drawing on relevant theoretical and empirical literature and, where appropriate, aligning them within the context of mediation practice. Lastly, I will conclude with a brief summary of the methodology used to produce the research findings.

Behind the Approach

Prior to launching into my research plan journey, explaining why this study is considered exploratory is important. This research is exploratory in nature because it seeks to understand something new in this context, and therefore the results can inform future research intended to build on the original findings. Similar to the mediation process, exploratory research is intended to be "creative, open-minded, and flexible" and is similar to the role of a mediator in that the researcher is to remain curious and "adopt an investigative stance; and explore diverse sources of information" (Neuman, 2012, p. 16). While I knew from the outset my research would be exploratory, uncovering the overarching paradigm and determining the methodological approach proved far more challenging.

In the introduction to this thesis, I referred to the experience of a non-academic venturing into the world of research and the cause for being overwhelmed and confused. The cause for such feelings flowed from an endless list of paradigms, theories, and approaches available to choose from. Regardless of the fundamental differences between the options, what was both clear and consistent throughout was that *any* choice depended on the researcher's main goals and objectives. In other words, the *why*. Considering the literature I have offered to inform this research study; the irony is not lost on me. Revisiting the literature covered in this thesis and the evidence of confusion in the field of mediation where theory is concerned, one can easily see the parallels between research and mediation and the different theoretical styles and approaches.

While I attempted to sort out my personal dilemma in identifying the research theory to inform this study, I empathized with the student of mediation. Arriving at a decision was a journey in and of itself. Notwithstanding the confusion that was the journey, from a deep dive

into various theories and approaches, I stumbled upon a line from a researcher that resonated with me. Stressing the importance of understanding theory, Corbin (2009) states the following:

> We can't have practitioners walking around doing things without having a body of theoretical knowledge, along with their experience, to guide their actions. Knowledge may not mirror reality, but it does help us understand human response. (p. 40)

Ultimately, Corbin is capturing the importance of the relationship between theory and practical experience; they are necessarily connected and not mutually exclusive.

This quote speaks to me for several reasons. On reflection, I realized there was a lot of important information in classes I attended at the early stage of this academic undertaking. It also highlighted a behaviour that was not in keeping with my typical curious ways, as it was a rare instance where I was not focused on the *why*. I had been in a rush to understand the practical steps of research. The excitement of the process and the ultimate goal distracted me from understanding the *why*. This discovery only occurred through reflection and a return to the all-important theory.

Guiding Theoretical Framework

I share the belief in the importance of theoretical knowledge. Driven by my curiosity to understand the human experience—behaviours, perceptions, actions—and recognizing the importance of this understanding in how we conduct ourselves, I discovered that my thinking aligned with an interpretivist paradigm. Rather than simply seeking to explain behaviour (what occurred), interpretivism is concerned primarily with seeking to understand the behaviour (why it occurred). The essence of the *why* is based on how humans interpret the world (Bryman, 2008). Further, this epistemological stance also suggests that the knowledge gained through understanding is subjective and context-dependent (Crabtree & Miller, 2023).

Cementing this stance in the context of research regarding mediation makes sense to me. As a mediator, I not only enter the process focused on seeking to understand the parties' different perspectives, interests, needs, and goals but also how I can facilitate the exchange of knowledge and understanding between the parties. Only upon mutual discovery of this knowledge can I support the parties in determining and achieving the best outcome. In my opinion, another important aspect of understanding the parties' perspectives within a dispute is understanding that reality is not shared. The subjective reality of one participant is often considerably different than the reality of the other. The creation or construction of this reality stems from their exclusive and independent experiences. Further, throughout the mediation, as knowledge and understanding are gained, the present reality for the parties is in a constant state of construction.

Considering my overarching interpretivist paradigm and an ontological assumption of how reality is constructed, I have taken a phenomenological approach to this research design. Like the journey in arriving at an understanding of my overarching paradigm, the choice of approach was not without challenges. The following section explores the options I considered in this journey before outlining the core elements of the decided phenomenological design, followed by the specific steps undertaken to produce the participant sample and collect and analyze the data acquired.

Research Design and Methodology

I was most curious and perhaps even passionate about conducting an action research study. This type of research actively engages the participants as co-researchers alongside the primary researcher, all of whom are practitioners in the subject field of the research. Further, action research has a values and reflective practice foundation and has been used in other studies surrounding transformative mediation (Lederach & Thapa, 2018; McNiff & Whitehead, 2011).

These qualities spoke to me as a mediator and a new researcher. Despite my passion, undertaking an action research study seemed both onerous and premature. Onerous because significantly more time and effort were required to plan the research alongside my participants, and premature because I believed there were important and preliminary questions that needed to be addressed first.

Reflecting on the overarching question that forms the title of this thesis, *Transformative Mediation: Is It Possible in a Numbers Game?*, I realized it wasn't simply about exploring the different theoretical styles and approaches, comparing them against the context of this study, and arriving at an answer. In the field of dispute resolution, various styles and approaches have been presented as the ideal for serving the goals of mediation. Studies, often relying on survey data, have been undertaken to explore different elements of style and approach such as participant satisfaction, specific mediator techniques, and mediator influence (Charkoudian et al., 2009; Herrman et al., 2003; McDermott, 2012; McDermott & Obar, 2004). In contemplation of the bigger question reflected in this thesis title, I required richer and more meaningful data.

As I ruminated on the problem as I saw it, reflecting on my experience as a consumer participant of mediation and my experience as a practitioner, what I was seeking became clear. Before this larger question could even be contemplated, I needed to uncover *how* mediators understood the common theoretical styles and approaches; this, of course, became the main aim of this research. That said, it was more than just uncovering their understanding.

In addition to uncovering mediators' knowledge of the different styles and approaches to mediation, I was curious how their personal values, beliefs, and experiences might compare to how they choose to practice. Much of the existing literature supports the idea that the mediator becomes an active and dynamic party to any conflict they are involved in. Further, their role

comes with significant influence on both the parties and the process. As such, gaining insight into the qualities they bring to the table seemed essential. Only with this in-depth understanding would I be in a position to address the questions I had been pondering for so many years. With this increased understanding and clarity of my research aims, I determined that the best approach at this stage would be a phenomenological one.

Phenomenology is a qualitative methodology based on an interpretivist paradigm and is structured on the belief that how humans behave flows from how they interpret the world around them as well as within the context of their experience. Further, in a research setting, there are multiple levels of interpretation at play. First, in collecting information in the form of words, descriptions and explanations, the researcher acknowledges that the participants have carried out interpretive steps in arriving at their perspectives. Next, the researcher interprets that information, the data. Lastly, the researcher's interpretations are subject to further interpretation based on any theoretical or practical context along with the applicable literature (Bryman, 2008).

In my case, while I am seeking to understand mediators' understanding of theoretical concepts, I am also interested in their subjective experience of these concepts. I am seeking to understand how they perceive and interpret the theoretical styles and approaches to mediation. By using a phenomenological approach, I seek to gain valuable insights into how mediators construct meaning, the language they use to describe these concepts and any limitations of their understanding.

It is important to note that while phenomenology is most closely aligned with an interpretivist paradigm, the research design elements of this study also embrace constructivist views. These views posit that the social world is in a state of constant change, and therefore any findings must be considered a "version" of what has been studied rather than a definitive reality

(Bryman, 2008, p. 19). This overarching view applies specifically where the data analysis is concerned and will be explained more thoroughly in the upcoming sections. Before applying one's methodological approach to data collection and analysis, first, participants are required.

Participant Selection and Characteristics

While having the resources to study all mediators[36] practicing within the context described in Chapter 3 of this thesis would have been ideal, it would have been far too expensive in terms of time and resources; simply put, it would have been impractical. As such, pursuing the largest sample or a subset of the larger group, or population was of great interest to me. The following outlines the process of seeking interested participants, the justification for each step in the process, as well as some of the limitations and challenges.

Recruitment

Approval to proceed with the research study was received from the Research Ethics Board of the University of Manitoba, Fort Garry campus, on February 6, 2023. The study sought mediators practicing in non-family civil litigation (or analogous administrative law program) matters in Saskatchewan, Manitoba, and Ontario to participate on a volunteer basis. Recruitment was conducted through two distribution channels: LinkedIn (see Appendix B) and emails sent to mediation and mediator networks and organizations (see Appendix C). This type of sampling approach is considered to be nonrandom or nonprobability and is commonly used in qualitative research when there is no pre-determined sample size and the total population from which the sample will be drawn is unknown (Neuman, 2012). In nonprobability sampling, not all members of the population have an equal chance of being selected; however, this approach allowed for a

[36] Referred to as the population in which the sample (participants) is drawn from.

more focused recruitment of participants with specific expertise, essential for the in-depth exploration of the research aims. Although I had no predetermined size, I needed to consider the best type of nonprobability sampling technique to ensure I had sufficient numbers without jeopardizing the validity of my research findings.

Recognizing the number of years I have been immersed in the mediation community, not to mention the number of different roles, it was obvious to me that I could have solicited potential participants directly based on existing professional relationships. This approach, referred to as convenience sampling, while less onerous and time consuming, comes with risk. The most common risk is that your research may not represent the population you seek to study (Neuman, 2012). Notwithstanding that participation was voluntary, due to my ties to the mediation community, I wanted to avoid any perceived pressure or sense of obligation on behalf of the participants. Further, hand selecting the participants for this study could have exposed the results to criticism around selection or researcher bias. This type of bias is considered a threat to the validity or credibility of any research as it can influence the process as well as outcomes and conclusions (Bryman, 2008; Neuman, 2012; Silverman, 2013). In light of these risks, I chose a more passive sampling approach relying on a combination of purposive and snowballing principles. Both approaches align with a phenomenological approach to research.

Purposive sampling is used when a more specific or unique experience is sought, and the snowballing method is defined broadly as any recruitment process that relies on different networks for seeking participation (Neuman, 2012). Outside of various experience levels, my research sought mediators with experience in specific government-implemented mediation programs, thus the purposive sampling principle. Further, I sought participants relying on networking through the combined use of social media and mediation organizations and

associations. Relying on networks or networking is an aspect of snowball principles of sampling (Neuman, 2012). To further distance myself from the participant selection process, and in keeping with the idea that social media sites "allow users to maintain physical separation and a degree of anonymity" (Gelinas et al., 2017), I created a LinkedIn post, which was intended to present like an electronic poster seeking interest in volunteers to participate in the study. Given the limited time to conduct interviews, reaching and securing the greatest number of potential participants was of great interest, and recognizing that securing participants for research can be a significant challenge, with over 500 connections on LinkedIn, relying on social media seemed to be the most efficient. Lastly, considering the biographical information available on my LinkedIn page, it was an opportunity to provide full transparency to potential participants interested in understanding my background.

Insofar as the email to mediation organizations and associations, also relying on the networking aspect of the snowballing method, I recognized that in some cases, the person receiving the email, in their role, could also be a potential participant. Given the careful wording of the email, it was felt that the risk was low for perceived pressure or sense of obligation and was not crossing the line into convenience sampling and the associated risks threatening the validity of my research. Lastly, direct or indirect recipients of the invitational email were encouraged to forward the email at their discretion, yet another example of the snowball sampling method described earlier.

Interested mediators were asked to complete a survey (see Appendix A) before April 1, 2023. The purpose of the survey, created using Qualtrics software, was intended for participant selection only. Due to the nature and purpose of the survey, all questions were either closed or limited in response options. The only free-form options for responding to the survey questions

pertained to the choice of "combination" for the mediator style and approach they most aligned with, and the listing of "other" present or past memberships in professional organizations that were not listed on the survey question.

As all response data were collected anonymously, the IP address collection capability of Qualtrics was disengaged.[37] The survey did seek out demographical and identifying information, but it would only be connected to the respondent if contact details were provided at the end of the survey. This identifying information would later be verified and referenced if the respondent chose to proceed. Selected participants, with consent (see Appendix E), would be asked to participate in a one-on-one interview prior to June 30, 2023, which would form the primary data and basis of the study.

A total of 22 completed survey responses were collected. Of the 22 responses, 20 met the criteria, and of those, 17 indicated a willingness to participate in the research study by providing their name and contact information. In keeping with the context of this research study, the criteria for participating were, 1) mediation experience in the specific government-implemented mediation programs in Ontario, Manitoba, and Saskatchewan; 2) a minimum of three years practicing as a mediator; and 3) greater than 12 mediations per year. The latter two criteria were applied to ensure participants had sufficient practical experience to offer meaningful insights into the research questions. Overall, applying inclusion criteria helped to ensure focused data collection and enhance credibility for this study (Suri, 2011).

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[37] Option made available with choice to anonymize responses. See link: https://www.qualtrics.com/support/survey-platform/survey-module/survey-options/survey-protection/#AnonymizingResponses

Selection and Engagement

Initially when designing my research plan specific to participant selection, I had anticipated a high response rate. Seeking to guard against the potential for researcher bias, a real threat to the external validity or transferability of the research (Bryman, 2008), I began to consider the various strategies I could use to counter the threat. Fortunately, albeit somewhat disappointing, given the number of interested respondents, I was not forced to make a choice or engage assistance in the selection. While I had avoided this one potential threat, other threats were considered and will be discussed in the upcoming sections of this chapter.

Prior to May 15, 2023, all 17 respondents were contacted by email to schedule an interview. Upon scheduling, the consent document was provided, and a signed copy was provided electronically before the start of the interviews. Interviews were conducted between May 5, 2023, and June 30, 2023; due to scheduling conflicts, one respondent withdrew prior to the interview, and another interview could not be scheduled within the required timeframe and therefore a total of 15 interviews were conducted. None of the 15 participants withdrew from the study after interviews were completed. Becoming familiar with the realities of seeking participants and opinions suggesting that a sample of 12 to 20 is beyond what is typically required for a homogenous sample (Crabtree & Miller, 2023), I was satisfied with the number of participants. In summary, significant effort was made to obtain a research sample to help ensure both credibility and transferability specific to the identification and selection of the participants.Table 2 provides a detailed breakdown of the participant characteristics.

Table 2

Participant Characteristics	*n*	*%*
Gender		
Female	5	33
Male	10	66
Program Experience[38]		
Rule 24.1 Mandatory Mediation (Ontario)	10	66
Automobile Injury Mediation Program (Manitoba)	2	13
Mandatory Civil QB[39] (Saskatchewan)	4	26
Years of Mediation Practice		
> 20	8	53
15-20	2	15
10-15	4	26
5-7	1	6
Highest Education level		
BA	3	20
Graduate Degree[40]	2	47
JD/LLB/LLM[41]	11	33

[38] One participant had experience in two of the programs therefore the total reflects 16.

[39] At the time of the survey and interviews, court reference was the Court of Queen's Bench (QB).

[40] Not including LLM. One participant had a JD and a Graduate degree in an unrelated field therefore the total is 16.

[41] At the time of the interviews, participants with a law degree had previously practiced law and two were still practicing law, while actively mediating.

Data Sources and Collection Methods

In keeping with a phenomenological approach, the primary data collection method for this study, as previously referred to, was interviews. In developing the interview questions, I drew from two common types of research interviews. Specifically, my approach combined semi-structured interviews, commonly defined as interviews consisting of open-ended questions, which allow flexibility in exploring and probing by both the participants and researcher; however, the general questions are the same for each participant (Bogdan & Biklen, 2007). This type of interview is flexible while still allowing for focus and consistency in the data collected. The other type of interview considered here is that of in-depth interviews which also seek to uncover rich data and are most common with a phenomenological approach (Della Porta, 2014). The aspect of the interview developed for this research plan, placing it into a richer category is the invitation for the participant to actively share a story. According to Pinnegar and Daynes (2012), stories, also referred to as narratives, offer the potential to discover meaning not possible in quantitative studies, emphasizing another fundamental distinction in research methodologies. The importance of this distinct potential is reinforced by Senehi (2019), who acknowledges that storytelling "is a central concept for the research process." (p. 47).

While statistical data drawn from the participant characteristics collected through the recruitment survey and results from other empirical studies inform this research, these additional data sources are contained within the analysis aspect of this study. As such, the transcripts flowing from the interviews are considered the primary data source for this study.

In contemplating the interview process, I was reminded of certain aspects of the debate around transformative mediation, wherein the emphasis on honouring the process over outcomes was criticized. According to Bogdan & Biklen (2007), "qualitative researchers are concerned

with process rather than simply with outcomes" (p. 6). The interviewer and their role in the process, not unlike the mediator within the mediation process, is an important one.

Interviews

As a trained and experienced mediator, the interview process was one aspect of this research journey that did not seem daunting. Carrying out an interview in this context aligned with several aspects of guiding the mediation process, regardless of one's theoretical orientation. Introductions, setting the tone or mood, summarizing the purpose, asking open-ended probing questions, seeking clarification, checking in, and, of course, active listening are just a few of the many similarities. All of these steps were utilized and the interview unfolded more like a focused conversation. Promoting a conversation-like interview in this way was intentional with the hopes it would provide the interviewee with a comfortable environment allowing them to share "on their own terms" and actively reflect and explore while the conversation unfolded (Stringer, 2014, p. 105). The expected outcome of such an approach was rich, deep, meaningful data. Despite the conversation-like approach and the benefit of flexibility, the semi-structured interview still allows some structure to maintain focus on the purpose (Bryman, 2008). Actively probing participants to expand on their answers or seeking clarification allows the researcher to be both an observer and partner in participants' acts of self-reflection through narrative (Holstein & Gubrium, 1995).

Further, as presented by Senehi (2000), inviting and encouraging the participant to share stories in the interview process supports a more conversational-style interview, giving the participant freedom and space to provide a rich portrayal with the context and the details they may want to include. Senehi points out that stories have a lot of nuances and are an effective way to show how a person was impacted by an event and how they responded to it. According to

Senehi, the researcher may also take the stance of the learner who is receiving the insights and experiences of the participants, and in this indirect way, the research participant is a partner in the analysis. This storytelling aspect of the interview allowed me to explore participants' meaning-making experiences, facilitating an interpretation of values in their stories.

Interviews took place via video conference using a private UM Zoom account with unique meeting passcodes. Each interview was auto-transcribed within Zoom in real time. Only the audio portion of the interview was recorded and saved on the University's secure server along with the transcription document. In the survey and consent document, as well as the scheduling email, participants were informed of the intended length of the interview (30-60 minutes), the focus of the questions, and the sharing of a story related to a memorable mediation. The average length of time for the interviews was 45 minutes.

The interview questions (see Appendix D) were developed purposefully and focused on exploring the following categories:

- values: Understanding what motivated the participants to choose mediation as a practice as well as who or what influenced them in the decision (questions 1 and 2).
- perspectives: Exploring the perception of a mediator's influence or impact on parties to the mediation during and after the mediation session (questions 4 and 5).
- knowledge and understanding: Recalling, examining, and reflecting on training and experience, including their practice, with the different styles and approaches of mediation (questions 3, 6-11).

At the start of each interview, oral consent and demographic information obtained in the survey were confirmed, and with the exception of two participants, there was no change in the survey responses. The new information did not impact the participation criteria for the two

participants who provided corrections or clarifications of the survey responses. One clarification was provided at the start of the interview and given it had no impact on the participant criteria, the interview proceeded. Later, during the transcription review and analysis phase, educational information provided in the survey was called into question, and the participant was contacted to clarify. Once again, this clarification did not change the participation criteria, and the interview is included in the results.

All participants were offered the option of receiving a brief summary of the interviews. Every participant requested a summary, which was sent by their preferred method in July 2023 (see Appendix F). At that time, preliminary findings were shared from a rudimentary review of the data. What followed was months of analysis in an effort to understand the data and the findings fully.

Data Analysis

To ensure the accuracy of the auto transcriptions, prior to the destruction process and commitment outlined in the participant consent document, all audio recordings were subject to multiple reviews and transcripts were updated or corrected as required and where indicated. In addition to accuracy, all identifying information was removed to anonymize the transcriptions. Once again, this was in keeping with the consent document provided to the participants in advance of the interviews. Assured of the accuracy of the transcripts, I accessed a thematic analysis framework to interpret the data. This framework is used frequently in qualitative research as it allows for categorization, commonly referred to as coding, for purposes of identifying core themes in the data (Bryman, 2008). Using the categories of interview questions referred to above, the data were separated between the initial questions focused on (a) mediator

values and perspectives, and the remaining questions intended to explore (b) mediator knowledge and understanding.

In the spirit of an interpretivist paradigm, and aligning with a phenomenological approach, inductive coding, one option within thematic analysis, allows themes to emerge organically, from the "ground up" (Neuman, 2012, p. 33) from participants' responses to the interview questions (Bryman, 2008). For much of the data flowing from the interview questions an inductive coding practice was used, whereas, in analyzing the data flowing from the collected stories, as part of the interview, a deductive coding practice was better suited.

Here, rather than allowing the themes to develop organically from the story data, I utilized a deductive approach to the coding. In essence, a deductive coding strategy attempts to categorize data in keeping with pre-determined codes (Neuman, 2012, p. 32). For the stories shared by the participants, the data was analyzed using two of the core pillars of transformative mediation – empowerment and recognition – as outlined in the informing literature. According to Willig (2013), carrying out thematic analysis, utilizing both inductive and deductive coding, can result in richer findings. Therefore, by employing both coding approaches, this study aimed to maximize the depth and breadth of insights gained from participants' rich interview data.

While coding is commonly understood across qualitative methodological approaches, phenomenological research focuses on identifying significant statements in which meaning can be interpreted and applied, resulting in an "essence description" (Creswell, 2009, p. 172). Arguably essence is both abstract and subjective, yet entirely fitting for this coding exercise, regardless of the data coded inductively or deductively, for ease of applicability, reference, and understanding, as it relates to my research findings, I will use the word theme to capture the essence description flowing from the coding of significant statements in the research interviews.

Lastly, to conclude this section on coding as part of the analysis process, consideration was initially given to using data analysis software that assists with data retrieval and coding; however, due to the relatively low number of interview transcripts, utilizing the capabilities of Microsoft Excel satisfied my needs in this area.

This chapter detailed the methodological choices underpinning this qualitative exploratory study. This study was guided by an interpretivist paradigm and a phenomenological approach. It aimed to explore mediators' understanding of the common theoretical styles and approaches in mediation practice through a thematic analysis of interview transcripts. The chosen approach, with its emphasis on understanding subjective experiences, will guide the analysis and findings of the interview data presented in the following chapters. This analysis will be used to address the research questions and offer insights into the complexities of mediator perspectives on theory and practice.

CHAPTER 8 – FINDINGS: EXPLORING MEDIATOR UNDERSTANDING

Government mediation programs seek to achieve various types of goals. Mediator styles and approaches are instrumental in the achievement of those goals, and therefore this research explored how mediators understand the different styles and approaches. To uncover the fullest understanding possible, this research explored two dimensions of understanding. First, it examined a practical understanding of how mediators align themselves with and define the different styles and approaches. Second, it explored a more in-depth understanding of their values, beliefs, and experiences.

Relying primarily on interviews with mediators from Saskatchewan, Manitoba, and Ontario, this chapter presents the findings from participants' responses to the interview questions and the stories they shared. As outlined in the preceding methodology chapter, all interview data was subject to a thematic analysis. Based on the styles and approaches listed in the survey and covered in the literature, this chapter first presents how and why the participants positioned themselves with the different options presented: facilitative, evaluative, directive, transformative, and combination.[42] Included in this initial presentation is an exploration of those instances where participants' alignment changed between the completion of the survey and the interview. Following this initial presentation, the remainder of the chapter will report on the findings organized in three sections.

The first section will explore how the participants defined and described these different styles and approaches. The second section will present factors motivating these participants to the practice, along with perceived influence on the parties to a mediation. The findings in these

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[42] The Qualtrics recruitment survey used the word "combination" in the list of choices/options and allowed the respondent to expand if so inclined. In the literature, a "combination" approach has been presented and discussed as a "toolbox" approach.

first two sections were arrived at using an inductive approach, resulting in themes developed organically from the words and meanings of participants' responses to the interview questions. The final section of this chapter presents the findings drawn from a deductive approach using pre-determined themes applied to participants' shared stories of their most meaningful mediation experiences. The pre-determined themes are drawn directly from the literature specific to a transformative mediation approach. This chapter will conclude with highlights of the key findings before introducing my analysis and interpretation of the data in the following chapter.

Self-Reported Styles and Approaches

Based on the self-reported style and approach, in the survey as well as interview data, close to half and two-thirds, respectively, of the participants positioned themselves most closely with a combination of styles and approaches rather than just one. Table 3 captures where participants positioned themselves with the different mediator styles and approaches. The top half of the table reflects responses collected from the participant recruitment survey and the bottom half reflects how participants responded to the corresponding interview question less than three months later.

The survey allowed respondents to choose the combination option with or without further explanation. Out of the 15 participants, in accordance with the survey results, seven chose a combination approach. Of those seven, five of the participants expanded on their approach choice. Three indicated a combination of facilitative/evaluative, one referenced facilitative/directive, another offered "facilitative, transformative, [and] directive, *with* a facilitative bias." The remaining two simply indicated "all" with one participant expanding with "as may be required to assist in negotiations."

Table 3

Participant self-reported style and approach	*n*	*%*
Survey		
Facilitative	3	20
Evaluative	3	20
Transformative	1	7
Combination	7	47
Directive	1	7
Interview		
Facilitative	2	13
Evaluative	2	13
Transformative	1	7
Combination	9	60
Directive	1	7

Looking at the single style and approach option and the combination option, the facilitative and evaluative styles and approaches, or elements of either, were the most referenced in the survey. The least referenced styles and approaches were transformative and directive. Similar results were seen when asking the participants during the interview what style and approach they positioned their practice with. In the interviews, however, there was some variation in the responses, along with efforts to explain the basis for positioning with a chosen style and approach.

As mentioned, while Table 3 demonstrates that most participants chose a combination of styles and approaches over the others during the interview, some of the answers given were

either less clear or changed entirely. Insofar as lack of clarity for example, two of the participants, stating an alignment with a combination of styles and approaches in the survey, during the interview could not offer clear examples of any particular style and approach in their practice. Meaning, while they shared what they did or how they achieved something, they were unable to articulate where any particular move, tactic, or technique fit insofar as the different styles and approaches.

For example, one of these participants in an effort to explain their alignment, described focusing mainly on managing time constraints of the process and highlighting how parties can perceive the various mediator moves and the importance of framing questions. At the same time, this participant described their style and approach as one where the focus was mainly on the aspect of humanity. Offering two statements "you know what I bring to the mediation is my humanity and that's why I get hired in a lot of cases" and when suggesting risk analysis can be done with a formula or computer this participant highlighted "I go there bringing my humanity."

The second participant having previously indicated a combination approach but who also could not clearly articulate their style and approach, or the basis for it, focused mainly on the purpose of promoting shared communication. Their emphasis was placed on "pressing" for information to be shared with the mediator in order to actively assist in the negotiation process. For example, this participant stated:

> One of the things I am particularly fond of doing is [that] somebody will tell me ABCD, whether it's points of evidence, their offer, or a message they want to get across to the other side, and I'll hear them [out] and knowing how it's going to play out in the other room I will say "you know, unless you're completely wed to what you just said to me, how about the following?"

Notwithstanding this participant's emphasis on the mediator's role and purpose in understanding what the parties are communicating, there was also an emphasis on the parties "making a good decision with the benefit of legal advice" through encouraging sharing and listening, between the parties, during joint session. Stating clearly that "the reason for that is very simple, from listening comes understanding, from understanding comes the ability to find a settlement agreement that makes sense." This participant, unable to clearly articulate the style and approach that most closely aligned with their practice, did offer up the desire to refrain from being directive. Despite a desire to refrain, this participant suspected that it (a directive approach) was still regularly used in their practice. This same participant, when responding to the survey and selecting a combination of styles and approaches to position with, indicated a desire to refrain from being *evaluative*, not directive. Perhaps reinforcing opinions in the literature referring to evaluative and directive as synonymous.

Outside of the lack of clear articulation of a combination approach, two other participants switched their positioned style and approach entirely between the survey and the interview. One of the two participants, having initially indicated facilitative on the survey, explained during the interview that they saw the options as a "spectrum" based on context (dispute type) and therefore could not choose one that accurately represented their style and approach. The other participant who changed from evaluative to a combination (unspecified) explained during the interview that in regular day-to-day practice (for this participant), all were being drawn upon at different stages of the mediation process. This participant described their approach as "fairly balanced." Lastly, another participant, also claiming to take a combined approach, changed from a combination of facilitative/evaluative to directive/evaluative, dropping any connection to a facilitative style and approach all together.

Across the survey and interview data, there were six instances where participants demonstrated consistency in their positioning with the different styles and approaches. Specifically, there were two instances each for evaluative and facilitative and one each for directive and transformative. Like the informing literature, there was evidence of crossover as well as distinction between the evaluative style and approach and the level of mediator directiveness.

The two participants positioning themselves with an evaluative style and approach referenced the importance of the subject matter expertise they bring to their practice, specifically knowledge of the applicable law. They also emphasized the use of risk assessment in their practice, clarifying they *do* provide opinions on risk and options for settlement but *do not* claim to know or share how a judge would decide a case. Highlighting the role of directiveness in their evaluative style and approach, one of these two participants shared, "I am very directive with the process," emphasizing they do not direct the outcome based on their assessment. They stated:

> To me, I direct. I help the parties, I coach them. But, at the end of the day if the results are different than what I think they should be, it doesn't bother me … that's one of the barriers that I try and work against. It's not my deal; it's the client's deal. So, whether I think the lawyer is too weak or too strong or someone is giving in, I recognize there are many reasons people settle, and the legal risk is only part of it.

These two participants emphasized incorporating their knowledge and expertise of the law to support their claimed evaluative stye and approach, with one also highlighting the distinction and role of the level of directiveness.

The one participant, who exclusively positioned themselves with a directive approach across the survey and interview data provided an explanation for this choice. Focusing on the use

of shuttle diplomacy extensively and directing the process and the numbers based on messaging from the parties, they offered the following detailed explanation:

> If I am working with experienced people, and I have worked with them before and know their style and approach, I just carry the water for the first little bit. Back and forth - here's what is being said and so forth. It can be different if I am working with young people, people who haven't mediated very often and they are doing something that I think is ill considered, I will make suggestions for opening offers.

This same participant highlighted their focus on guiding and coaching based on how each side may respond, explaining, "so occasionally I will do that in the early stages …if I sense that if I don't do anything it may get off the rails too quickly." The participant's explanation may also demonstrate a desire to actively manage the process to ensure a favourable outcome. Additionally, they also pointed out that, given their years of experience, they have become more directive in certain cases, specifically referring to the use of mediator proposals for settlement purposes. For example, they described feeling impatient when parties were not progressing towards a resolution and therefore would intervene more actively to guide them. However, their degree of directiveness was separated from any leaning towards an evaluative style and approach, stating that it is reserved for retired judges and would not work in their practice.

Prioritizing the normalization of conflict, the only participant who consistently positioned themselves with a transformative style and approach explained a focus on sharing with the purpose of gaining a mutual understanding of actions, perspectives and needs. While actual examples of what this participant does within the chosen approach were not provided, the emphasis on understanding is represented in the following excerpts:

- "adequately using their counsel to make good decisions or understanding the consequences of what they're saying"
- "help people have a better understanding of the reason someone [is taking] a position that they do. Not just for purposes of resolving but also for the needs that it's actually addressing"
- "when people have interest- based discussions there is a sense of understanding"

Finally, the last of the participants who was consistent between the survey and the interview, positioning with a facilitative approach, described their chosen style and approach briefly. Explaining that they were focused on aiding the conversation around a "range of outcomes," they shared the following:

> If they come without the facts, then the potential resolution, the continuum, is broad. But, if the facts are agreed to or not much is in dispute or there has been discovery, with good counsel who knows what the law is and should know what the range of potential outcome is at trial, I should be facilitating, as I said, the conversation between the possible range of outcomes. And, I hopefully have a reputation as to being knowledgeable in the law, so we often have conversations about the law and about potential outcomes … once we've agreed on the facts, the range of possible outcomes are [sic] pretty narrow so that's why I see it as facilitative.

Another participant choosing facilitative on the survey, but who could not clearly articulate both their positioning or description of the style and approach in the interview process, described their focus to be one of preparation and sharing experiences for the purpose of creating solutions. This is demonstrated in the following quote:

> I'm a stickler for pre-mediation and everyone being completely prepared. Otherwise, I think it's not as full of an outcome as it could be … I support the parties in describing the context, as much as possible, as much as they are able to about what happened.

A couple of the participants, in explaining the style and approach they most closely positioned themselves with, included offering examples of what they try *not* to do.

- "What I think people might want is not always what I [would] choose, so I think it really is that importance of accepting people's answers and *not* directing people down pre-determined paths."
- "I try *not* to have people dwell on the past too much, but I do include look-backs instead of rushing to look for solutions."
- "So, I help them work with their lawyers evaluating the case, but I *don't* tell them 'well, I think if you hold your guns, you will recover so many dollars'. To me, that would be negligence."

These quotes represent aspects of both directiveness and evaluation that participants sought to avoid in their practice.

As demonstrated in this section, participants exhibited a varying degree of clarity in their positioning within the options of different styles and approaches available to choose from. This was further evident when they were asked to define or explain the options. The following section delves into how participants defined and described the styles and approaches, revealing significant variations in their interpretations.

Definitions: A Range of Perspectives

The findings on participants' self-reported alignment with the different styles and approaches, as presented in the survey and interview data, hint at a lack of consistent

understanding of the theoretical styles and approaches to mediation. When focusing on the definitions and descriptions of the same styles and approaches, the lack of consistency is reinforced. This section reveals the variety of definitions and descriptions offered by the participants, illustrating a range of similarities and disparities. For consistency and ease of reference, the section is organized in keeping with the order in which the styles and approaches were covered in the literature.

Facilitative

In seeking a definition or description of facilitative mediation from the participants, three prominent themes emerged. The most common responses included aspects of how the mediation process was managed; however, a focus on resolution was also a popular response. Aspects of supporting and encouraging the sharing of information for mutual understanding and knowledge-building also arose but with less frequency. There were a couple of outliers and also instances where the participants could not offer a description or definition.

Specific to managing the process, a number of participants described facilitative mediation as one that takes a rather passive approach with a limited purpose. As one participant explained, other than shuttling numbers back and forth between the parties, there was no active participation in the process. A similar sentiment offered by another participant referred to the facilitative mediator as being an "invisible hand" helping the parties along. Emphasizing a limited amount of control over the process or outcome, one participant described the facilitative style and approach as one where the mediator would "sit back and let nature take its course and see what happens mostly," adding that any "interventions are kept to an absolute minimum." This same participant prefaced this description with the suggestion that a facilitative mediator should limit their engagement so as to not affect the discussion, and shared the following:

> So, if they want to yell at each other [or] share or not share certain information, that's okay. I think of [a] facilitative [mediation] as being a lot less involved in prescribing how that should work and more giving people the opportunity to have the discussion the way they want to have it.

This last quote essentially sums up the majority of the responses that defined a facilitative mediator as generally taking a passive approach to the process.

Contrary to this more passive and less purposeful description of a facilitative style and approach, a number of participants offered descriptions encompassing tighter control over the process and an active focus on resolution. The term "facilitated negotiation" or variations thereof was frequently used to describe this style and approach to mediation. One participant described facilitative mediation as one where the mediator "facilitates people staying and not giving up" on reaching a resolution. The notion of a facilitated negotiation also touched on another theme surrounding a focus on building knowledge through understanding.

One participant, previously referenced insofar as the negotiation aspect to a facilitative style and approach, identified helping parties to understand not just what they want or need but also the impact of any decisions they make, shared the following:

> A facilitative approach would strictly be, in my mind, helping people understand what they want, how to facilitate them in the negotiation *and* their life. It's about them more than the case; that's how I would describe facilitative. To really help them understand what they want, how they can accomplish that and how they [will] feel if the case settles or if it doesn't settle.

Building knowledge and understanding through sharing was an opinion shared by a few of the participants. One participant summed up the opinion well when revisiting their positioned style

and approach, stating, “I like to invite the [parties] to describe the experience so that we can learn about it in a different way other than just reading about it.”

While reference to effective communication was raised throughout the responses related to a facilitative style and approach, only one participant defined it solely as one where training, coaching, or skill building was the main focus. For example, this participant shared:

> [Facilitation] comes in when I use training as part of the process. Lots of people don’t like this either, but I do a bit of training in the room with people in terms of using [communication] models that have been successful in terms of how to talk about something.

For another participant, effective communication as part of a facilitative style and approach was focused almost entirely on the means to an end. According to this participant, agreement and understanding of the facts must occur first, almost as a prerequisite to the mediation, where the focus should be on outcomes. Here is where this participant sees the facilitative mediator, through effective communication and expert knowledge guiding “the conversation between the possible ranges of outcomes” to reach an agreement. This aspect of focus or purpose of the facilitative style and approach also touches on managing the process, themes covered earlier in the literature as well as in the findings.

As mentioned in the introductory paragraph of this section regarding definitions of a facilitative style and approach, two of the participants could not offer any definition. Another, notwithstanding explaining in detail their positioning with a facilitative style and approach, when it came to answering the question specific to their understanding of the theoretical definition, they clarified, “I would have a very hard time with that because I just see them on a spectrum … it’s really hard to silo things like that, in my mind, into distinct categories.” Another outlier of

sorts described a facilitative style and approach as one where the mediator is an "empathetic type who listens carefully and couldn't close a deal if their life depended on it." Lastly, a select few referenced the debate describing good and bad mediation practice, specifically referring to the facilitative/evaluative debate covered in the literature. The next section will cover the findings as they related to participants descriptions or definitions of an evaluative style and approach.

Evaluative

Unlike the multiple themes stemming from the responses sought to define a facilitative style and approach, only two main themes evolved from asking participants to define or describe evaluative mediation. The majority of responses fell into either "mediator as decision maker" or "mediator as opinion giver" with the latter focused on predicting outcomes or impacting risk assessments. Two participants could not offer a definition but attempted a best guess, while another participant, not fully fitting within either of the two main themes, offered a softer hybrid version of the two.

Five out of the thirteen descriptions of an evaluative style and approach expressed that such an approach would be similar to that of an arbitrator. Specifically, either deciding the appropriate outcome or driving the parties to specific outcomes based on the mediator's assessment of the matter. This sentiment is articulated by one of the five participants, who also offers an opinion, stating:

> And maybe it's just the word I don't like. I don't know, because I probably do it. I probably have some evaluative aspects. I'm almost one hundred percent sure of it, but when I hear [evaluative], I hear arbitration … I'm assessing how or where this should go, and I know I do that in mediation. I do an evaluating piece, an assessment piece.

Another participant expressing discomfort with an evaluative style and approach, described it by referring to their knowledge of another mediator's practice. Here, defending the evaluative style and approach, it was explained as:

> There's nothing wrong with being evaluative … [insert name] was the most evaluative person you'd ever meet in your life. He'd sit down at the beginning and tell you what you should do. He was doing more early neutral evaluations than real mediations but there was a group of clients who wanted that. That's what they wanted. Maybe they wanted it because they were lazy, and they didn't want to do the work and they knew he would do it for them.

This last description could also fall into the theme, mediator as opinion giver, capturing the provision of mediator opinions regarding risk assessment around strengths and weaknesses of the parties' case, and potential outcomes. In addition to these categories of opinions, another was offering advice or opinions on how to negotiate within the mediation process.

As one participant explained, "you look at the facts, you look at the law and you tell them what you *think* [emphasis added] a judge will do" and going a step further insofar as what the parties might do with that opinion, another participant stated, "if I feel someone is jeopardizing the process, I will mention that."

While two of the participants had to venture a best guess in defining an evaluative style and approach, both guesses aligned with the first theme of mediator as decision maker and aligned it with the role of an arbitrator or what would occur in med-arb.[43] Finally, one participant, who positioned themselves consistently with the evaluative style and approach in

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[43] A med-arb is a process whereby, if the parties are unable to agree on a resolution, the mediator transitions to an arbitrator role and delivers a decision (binding or non-binding). Parties consent and agree to the process in advance.

both the survey and interview data, emphasized the critical role of expert knowledge in the relevant legal issues. This same participant argued that such expertise is essential for effectively coaching parties toward their desired outcomes within an evaluative framework.

Transformative

Seeking definitions or descriptions of transformative mediation did not produce any one popular theme. Instead, for the most part, participants were equally split in their descriptions. That said, it was the one style and approach that garnered the most amount of uncertainty.

Five out of the 15 participants either outright denied knowing anything about transformative mediation, conjectured, posed the question back to me, or googled the definition during the interview. With the exception of two participants who provided extensive explanations of transformative mediation, the remaining participants offered descriptions organized into themes of "laissez-faire," relationship, skill building, and mutual understanding of perspectives.

Specifically, using phrases like "laissez-faire" and "let things fly," one participant emphasized the lack of direction and purpose brought to the process through a transformative style and approach. Two other participants shared this view, suggesting transformative mediation lacked a focus on solutions or outcomes, allowing the parties to decide how the process unfolded without any structure or direction.

Another small number of participants interviewed suggested that a transformative style and approach focuses mainly on the relationship between the two disputing parties and emphasized that it would only be appropriate if the relationship was an ongoing one. This is demonstrated in the statement, "transformative is where there is an expectation by the end of [the mediation] the relationship, which is an ongoing one, will change into a more cooperative

relationship." Conversely, another participant, while recognizing there may be an inherent problem with use of the word *transformative*, also highlighted that the parties would leave the mediation having a different opinion of each other, changing their view to a more informed or even positive one, regardless of whether or not the relationship was ongoing. This participant countered that a change in perspectives between the parties, even without an ongoing relationship, would still align with the goals of transformative mediation.

One more theme addressed a skill-building aspect of a transformative style and approach explaining that it focused on refreshing or learning new communication skills for use in the mediation and beyond. Skills for how they can approach conflict in their lives moving forward. One participant described it as "really helping people transform who they are and how they approach life and conflict beyond this matter … it's about helping people." This same participant was also quick to clarify that they did not believe this type of support was the responsibility of the mediator.

The last obvious theme for the transformative style and approach was specific to shared or mutual understanding between the parties. Here, participants focused on the importance of hearing and understanding different perspectives, recognizing differences in order to gain an increased understanding. In one instance, the participant shared a story to demonstrate this aspect, ending it with "… and the guy says, you know what? I just needed to see him recognize. Recognizing me has met most of my needs. I don't care about anything else." Another participant, less focused on direct mutual understanding between the parties, spoke about seeking understanding to share when moving back and forth between caucus rooms. According to this participant, achieving mutual understanding in that context seemed like an aspect of the transformative style and approach.

Directive

The final option the participants were asked to describe was the directive approach. Compared to all others, this one generated the most consistent responses. Control, whether it was specific to the process, content, or both was raised by eight of the participants. Notwithstanding this consistency in eight of the responses, five of the participants were unsure how to define or describe it. For the remaining two participants, directive was defined as being synonymous with an evaluative style and approach.

Looking more closely at the responses for those participants highlighting control as the fundamental aspect of a directive approach, three perspectives were revealed. The first perspective was focused on control of the process, with one participant, who described themselves as directive within a facilitative style and approach shared "I don't let things go and allow or wait for things to happen." This same participant shared their opinion that a mediator should control the process, but not the content.

Opposing this description was another participant who described a directive approach as one that does control the content through influencing opinions, decisions, and ultimately the outcome. Marrying these two, the remaining participants falling into this theme described the directive approach as one where both the process and the content are controlled by the mediator. Placing themselves in the role of a directive mediator, a participant described the approach as being:

> One where I would have a louder voice in the process and so my louder voice in the process would be because I always hope to influence people to a place that is more help than harm or have them stop and hear themselves.

This was echoed by another participant who shared the following:

> It means having more input into the process right from the word go. So, sharing opinions, really being firm and structured in terms about the process, about the actual mediation process itself, and being very involved and using their influence in a very specific way.

For these participants connecting both process and content control with a directive approach, the aspect of intentional influence on the part of the mediator was also present as demonstrated in these two quotes. Notwithstanding this common aspect of control, there were varying degrees as to the extent of control and influence especially as it related to the outcomes.

The last descriptions offered for a directive approach were brief and simply alluded to being one of the same with an evaluative one. For example, one of the two participants responded to the question with "there's not much of a difference between directive and evaluative. Directive is telling people what to do, and in an adamant way telling them what's going to happen in court."

Having explored participants' understanding of mediator styles and approaches from the more practical perspective, I will now turn to presenting the findings focused on uncovering participants' values, beliefs, and experiences.

The Essence of a Mediator: Motivations and Meanings

The first two interview questions - "will you tell me about your decision to practice mediation? and "what motivated or influenced you the most when you decided to practice mediation?" yielded data rich in identifying the underlying values and interests of the participants. While there were a number of different answers in a range from the efficiencies of the process to a profound sense of purpose, three main motivational themes arose: the practical

aspects of mediation, a desire to help the parties, and an alignment of the process with the needs of the participant. A fourth, less prevalent theme identified a higher calling to the practice.

Mediator as Pragmatist

Of the three main themes, practical aspects of the mediation process were the least coded theme in the data. In describing these types of motivators, participants used words or phrases with meanings such as "flexible," "solution-focused," "practical," "efficient," and "timely." Addressing some of these aspects, one participant shared, "I like the flexibility of mediation and a lot of the different ways you can practice it, [and] I enjoy the problem-solving aspect."

Participants also presented these types of motivators by explaining the inefficiencies of the courts or legal system, identifying mediation as the preferred alternative. For example, one participant shared "I became convinced that the [legal] system was too slow, too inefficient for just results," expanding on the timeliness factor this participant continued with "I think that the time it takes to get to the issues in a litigation matter is terrible … that's part of the inefficiency." Further, these participants described the efficiencies such as timeliness, both the brevity of the process compared to hearings or trials as well as the availability to schedule a mediation in a relatively short period of time as factors that attracted them to the practice. In addition, the simplicity of the process as compared to trial or hearings, with a concentrated focus on resolution was equally as appealing.

For some of the participants who had previously practiced law and had experienced the efficiencies of the mediation process as a party advocate or representative, they wished to have a greater role in delivering what they described as a better more efficient process. These participants shared the opinion that mediation was the better "vehicle" for settlement and much

of that support stemmed from the practicalities of it. One of these participants, in alignment with this motivational theme, described themselves as, “I’m very practical; I’m very pragmatic.”

Mediator as Teacher

The second theme, more popular than practical aspects of the mediation process motivating the participants, is one I have labelled here as “mediator as teacher.” The word teacher is intended to capture all similar roles or descriptors such as coach, guide, mentor or helper as expressed during the interviews. When asked to explain their reasons for becoming mediators, participants most frequently used the word “help”’ and its various forms. While this desire to help others was a prominent theme, the focus on the type of help varied. Some participants referred to helping people more broadly, including complex aims such as promoting agency, self-determination, and social justice. Others referenced more specific goals such as helping to resolve issues or helping parties through skill building. This latter aspect also included a focus on communication skills emphasizing sharing, listening, and understanding as well as other skills involved in assessing risk.

Referencing help more broadly, one participant explained how they believed their practice would help:

> [Mediation] was a way of contributing to social justice …contribution in the sense that it was going to help people resolve their issues outside of the court system, and just to alleviate some of the taxing of all those cases that probably should never have gone to court to begin with; helping people resolve it in another way.

Mirroring similar motivations and directly linking them to their underlying values, another participant explained “concepts of harmony, concepts around justice, concepts around fairness, dignity, and respect … those are some of the values that are underlying in my own practice.”

This motivation theme also related to one of the more practical benefits of mediation, specifically the achievement of a favourable outcome. One participant, explaining the motivations behind their practice used the word help multiple times to reinforce helping parties resolve matters. This included sharing they had sacrificed their fees so as to not stand in the way of a resolution. In their words:

> I am never going to be the barrier to a settlement. I have, on more than one occasion, thrown my fee in, because we're down to the last couple of thousand bucks, just to get it done. I am here to help people, that's what I do.

For this participant, the emphasis on helping was focused on achieving a resolution. Other aspects of helping, which may or may not lead to resolution, focused on skill building in the areas of communication, risk, and conflict.

One participant, touching on multiple aspects of helping through teaching expressed this motivation most comprehensively as:

> I educate, right? So, it's helping people recognize bias. It's recognizing the struggles that they're having, and I think a lot of it is conflict theory. I can educate about conflict theory, about process, communication, those sorts of things. And then there's facilitating the discussion that allows people to gain and share information that is necessary to make the decisions they're trying to make. They may not realize that they didn't have all the information or knowledge but now they do, and they can come to a more effective solution.

Other participants reinforced this message entirely or in part, but either way, the emphasis on teaching and skill building, as a motivation to practice, was shared amongst many of the participants.

Mediator Needs

In explaining the motivations and influences driving them to the practice, an equally prominent theme to helping others was the desire to meet their own needs. Participant responses were categorized broadly into sub-themes, touching on needs around values alignment, skill utilization, stress reduction, and social connection. For many of the participants, the motivations cut across the different categories of this theme.

Values Alignment. A number of the participants expressed being motivated to the practice of mediation because the process aligned with, or directly supported, their values. These values were expressed differently. Some focused on explaining their values around "harmony" and "fairness" as well as of honouring voice, agency, and self-determination. At the same time, reinforcing that the mediation process, in their opinion, also promoted these values. One participant, not expanding on the different values to explain why, simply stated "it [mediation] defined who I was." Another participant, referring to lyrics from old country songs, shared, "I discovered I was a lover, not a fighter," once again, reinforcing the belief that the practice of mediation aligned more closely with who they are as a person.

Skill Utilization. Many participants felt that their skillset was important to the role of a mediator. This motivated them to pursue the practice, citing both inherent qualities like empathy, patience, persistence, and active listening as well as acquired skills like negotiation and problem-solving. A number of participants identified themselves as having either strong negotiation or facilitation skills and when combined with other inherent skills such as patience and persistence, felt this set them up to be effective mediators**.**

There was some disagreement expressed here as it related to skills versus the purpose of the process. Distinguishing between negotiation and mediation, one participant, highlighting

strong negotiation skills, stated, “I am *just* [emphasis added] the facilitator more than a mediator,” while another participant, emphasizing their natural propensity towards empathy, opined “because you don’t really need a mediator to shuffle around money.” Despite referring to the process as mediation, the first quote above suggests that the participant was identifying what they did as more of a facilitated negotiation, and the second participant’s quote reinforces that mediation requires more than simply negotiation skills.

Stress Reduction. This sub-theme captures all of those instances where the participants were motivated to simplify their lives. For many of the participants, simplifying meant avoiding certain aspects of what they were doing before becoming mediators. The majority of these participants had previously been practicing lawyers.

For this group of participants, explaining the challenges associated with dealing with clients for long periods of time, managing billings and other partner responsibilities, or a variety of risks had taken its toll or simply expired. Simplification was provided by the relative shortness of the mediation process, or as one participant explained “it was a one-off situation where I would be completely immersed in a particular matter for the day and if it settled, I sent a bill and if it didn’t settle, I sent a bill.”

Other participants in this sub-theme spoke about avoiding the litigation culture while for others, the avoidance was less tangible and more circling back to the tension caused by a misalignment with their values. With one participant, involved in litigation but not as an advocate, emphasizing that they were naturally conflict avoidant. Another participant in sharing the reasons for leaving their law practice, explained in detail what they had been experiencing. In an effort to summarize, I restated what I was hearing as “so, when I am listening to you, I hear there was perhaps a bit of running away from something that wasn’t aligning with your own

values and towards something that did align." The participant agreed with this summary. While these examples could also be categorized under the values alignment sub-theme, their emphasis on avoidance suggests a distinct theme. In contrast to this emphasis on avoidance, a common thread among participants was their need for a strong social connection.

Social Connection. Based on my observations and experience as the interviewer, I would categorize all of the participants as outgoing, approachable, and friendly – how many would describe qualities of being a "people-person." For some of the participants, this aspect of their personality was highlighted as a motivator for choosing the practice and for others, it was their existing connection with people that was the catalyst.

One participant repeatedly focused on the "people" aspect of their mediation practice and the desire to participate based almost exclusively on this connection. The connection centred around a curiosity regarding people's actions and choices as well as a compelling desire to work with and help people to realize increased understanding and change. Another participant explained "I realized that I thrived on human interaction." These are further examples where the cross over of sub themes can be seen.

Another participant, answering the question as to what motivated them to practice, started with "People. I just connected with people." Similarly, another participant reflected on the opinions and statements of others making the connection for them; ultimately influencing them to consider the practice. This participant referred to their connections being like "the universe was telling me I should be doing this." This idea of a manifestation leads into the far less common motivational reason, but one worth exploring given its uniqueness and significance.

Mediator Calling

Only a few participants emphasized a deeply inherent or strongly intrinsic motivation to practice. Despite the small percentage of participant motivations captured in this theme, the data could not be ignored considering the potential connection to how the different mediator styles and approaches are defined and positioned with by the participants. This theme can also be considered a more profound category of the mediator needs covered above, which has led to the order in which these themes have been presented.

Giving title to this theme, one participant, in responding to the motivational question, simply stated "I felt that I had found that which I was called to do – if that doesn't sound too grandiose, that's really how it started [for me]." Two participants referred to the practice as a response to a desire to impact humanity, as stated in an earlier section, "bringing humanity" to the process. This same participant also noted that the process results in a permanent change to oneself, across the parties to the mediation, including the mediator. As explained by this participant, it is not a conscious effort to change but an uncontrollable effect of the process—an idea that everyone is changed by every interaction, regardless of significance, with another human being.

Another participant, focusing on the sharing of human vulnerabilities in a desire to transcend as a motivation to practice mediation, highlighted the unique opportunity presented by the mediation process. In their description, this participant spoke of transcending adversarialism, conflict, limitations, and personal biases all to help parties resolve matters in a "better way."

Mediator as Influencer

During the interview, participants were asked if they perceived themselves as having an influence on the parties to a mediation. Parties were defined as all persons present, including

counsel and representatives if applicable. Thirteen of the participants responded affirmatively almost immediately, and the remaining two, who initially denied influence, changed their response on reflection. While this was an overwhelmingly supportive response, there was variation insofar as the type of influence.

Much of the objection or limitation to influence was focused on outcomes as well as the degree of influence. For these participants there was comfort with influence on the process insofar as helping with risk assessment exercises or communication in the process, whether it was coaching or teaching. They objected, however, to influencing the specific outcomes or thinking their influence would extend beyond the mediation session. Emphasizing the influence on process, one participant explained "my mantra is, among other things I have said to people, I am agnostic as to whether or not you settle this case or not, but I am fervently religious about you making a good decision." Highlighting the importance and influence of the mediator providing the best process to make an informed decision. This, informed decision, was a requirement or condition shared by other participants as well.

The extent of the influence was a struggle for some participants. One, who had initially responded with a resounding "no" in answer to the question but on reflection decided the role of the mediator was one of influence, could not state to what degree, staying clearly "so, the answer is yes, but I don't know to what degree." The cause of difficulty in answering this question was partly because of the nuance between the parties, specifically counsel or representatives of the disputants. In discussing the aspect of mediator influence, sharing the perspective that the influence is limited, one participant was very clear it is specific to the process only, the current problem and nothing more, sharing:

> My job is to help settle this lawsuit. My job is not to help people become better people or anything … I'm not going to solve all the problems in their lives either. I just try to help them solve this particular problem. They may be completely dysfunctional and go on to have a dysfunctional life, but they'll have one less dysfunction in their life.

This opinion was shared on the heels of explaining this participant's "profound" influence on the parties.

Contrary to some of these opinions concerning mediator influence, others opined that the very existence of the mediator in the process has an influential impact on both process and outcome. Emphasizing that any assistance, as benign as it may seem, influences the outcome. Referring specifically to aiding in risk assessment, one participant shared "helping people understand the sort of full thinking of the consequences of choices [is] an influencing tactic" supporting any potential decision they may make. This same participant cautioned of the dangers of mediators not acknowledging their influence in the process and emphasized the importance of knowing the *why* behind how they practice.

A small number of participants pointed to qualities of the mediator as well as the mediation model as adding to or reducing the degree of influence. Qualities of the mediator expected to have more influence were advanced age and a law background. Gender was not raised as a quality. Participants reflecting on their roles as mediator pre-pandemic, perceived having less influence carrying out mediations remotely via video conference as opposed to mediating in person.

I will now turn to the findings from the stories shared by the participants of their most meaningful mediation experiences.

Stories: Through the Lens of Empowerment and Recognition

Relying on the content of participants' stories and Bush and Folger's (1994) examples of how empowerment and recognition objectives are met, I compared examples of either the mediator's or parties' behaviours to the different objectives.[44]

Analysis of the parties' empowerment and recognition behaviours involved considering and counting regardless of whether they were directed at the other party in a joint session or towards a mediator in caucus. It is imperative to recognize that as the researcher I had to interpret the data, including making assumptions about the actions and the outcomes, in order to code them with examples of the empowerment and recognition objectives. Some of the participants unknowingly highlighted specific examples of empowerment or recognition; however, to avoid biasing the responses (or results) by leading the participants, I did not refer to or ask questions specific to these objectives or the transformative style and approach. It was essential to the validity of this exercise that the responses and stories were authentically their own. When needed, in order to gain a better understanding of what the participant was sharing, clarification was sought, or requests were made to have the participant expand on what was being shared.

Table 4 lists practical examples of transformative mediation's objectives based on concepts of empowerment and recognition. These examples were used as the pre-determined themes in which to analyze participants' most meaningful mediation stories. The numbers on the right indicate the number and percentage of instances in which an example of empowerment or recognition was presented in the story based on my interpretation.

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[44] Considerable assumptions were drawn from the analysis and interpretation of the stories. Specific examples were not sought in an effort to avoid leading or biasing the interviewee. Literary freedom was taken at the backend for analysis purposes.

Table 4

Story Characteristics	*n*	*%*
Empowerment		
Goals – did either party reach a clearer realization of their most important goals?	11	73
Options – did either party become more aware of the situation and the choices available to them as well as maintain control over the process?	11	73
Skills – did the process increase or enhance skills such as listening, communicating, organizing ideas, evaluating risk?	3	20
Resources – did parties come to realize the resources available to them to make choices that supported their most important goals?	11	73
Decision making – did parties actively reflect, deliberate, and make conscious decisions on their own behalf (to resolve or not)?	11	73
Recognition		
Giving recognition – were the parties able to acknowledge and recognize the experience or situation of the other? As demonstrated by non-verbal communication.	11	73
Desire to give recognition – did the parties actively communicate recognition, as acknowledged (above).	8	53
Reframing – did the parties demonstrate an ability to reframe the past experience in consideration of a new understanding or acceptance of perspectives?	10	67
Active recognition (includes words and/or actions) – considering thoughts, sharing, and reframing, offer an apology and/or choose to resolve the issue because of recognition.	11	73

One of the main impacts on the total number, associated with either empowerment or recognition, is that of the 15 participants, there were four who either did not share a particular story or the shared story was brief and difficult to understand and break into the individual components associated with empowerment or recognition. Therefore, of the actual comprehensive stories told, all of them contained elements of either empowerment or

recognition. Despite the request for one only, perhaps signalling a predisposition to storytelling and acknowledging the deep meaning to be discovered, many of the participants either expressed an interest in sharing multiple stories or proceeded to share more than one with me.

The majority of the shared stores contained characteristics associated with recognition, with slightly more consistency and less variation than with respect to empowerment. While empowerment was demonstrated consistently, the least shared aspect was that of the skill characteristic. The following provides a few summaries and examples of either party empowerment and recognition or specific actions by the mediator to support those objectives. Examples and summaries of the stories are being shared in a manner to protect the anonymity of the participant as well as the parties to the most memorable mediations.

Multiple stories focused on the impact of sharing and listening, in an effort to gain understanding. Gaining a deeper understanding allowed the parties to engage in empowerment shifts, including the realization of their goals based on interests, and ultimately leading to informed decision making. In one particular story a party came to understand the situation more fully, which ultimately impeded their preferred outcomes; however, the increased understanding presented an alternative list of creative options, and an unexpected outcome for both parties to the dispute. Both parties demonstrated control over the process and the outcome, ultimately in deciding if they would participate and how they would resolve the dispute. The mediator facilitated the parties interests by creating options on the physical space of the mediation session, which when agreed upon by the parties, was more encouraging of facilitating shifts in empowerment and recognition than the perceived coldness of a corporate boardroom. The mediator, acknowledging the emotional impact of the events leading to the dispute, also created a space where parties felt safe in expressing and acknowledging emotions. The free expression and

recognition of emotions helped create the environment necessary for the parties to make their own choices in the process. Emphasizing the importance of control by the parties, one participant, reflecting on one of their two most memorable mediations highlighted that they believed the parties embraced the mediation because "they would get a process that they had control over."

Participants' stories focused on sharing, listening, and understanding, emphasizing the importance of informed decision making, an element of empowerment and self-determination, was a recurring theme in these meaningful events. In one particular interview, where the focus of the participant was on what they had specifically done in the mediation, rather than the resulting behaviours of the parties, they stated quite emphatically that they "wanted to change their lives through a process … because it wasn't just about settling the case." This participant also stressed the importance of bringing empathy and humanity into the process and recognized that mediations such as the one shared, are also a catalyst for changes in themself, both as a mediator and as a fellow human being.

Not indicated on Table 4, because a focus on outcome does not align with a transformative style and approach, yet worthy of attention, is that the majority of the stories shared also included elements of outcome. The aspect of an outcome, specifically a settlement or agreement, reinforced the meaningfulness for the participants. Further, the amount of the settlement as part of the resolution presented as more meaningful than either timeliness or creativity. Lasty, in keeping with a primary focus on the outcome, specific to the four participants who either did not share a specific story or it was difficult to connect the story with characteristics of empowerment and recognition, general comments around memorability included facilitating a settlement of a large sum of money for a participant and avoiding trial.

Summary of Key Findings

This chapter highlights four key findings when exploring mediator understanding of the most common theoretical styles and approaches to mediation. The first is that the majority chose to position themselves with a *combination* of the different styles and approaches. Insofar as a combination approach, if the participants chose to break down the approach, most incorporated the facilitative, evaluative, and directive options presented. The transformative style and approach was incorporated into the chosen combination approach in only a couple of instances. When participants aligned themselves with only one, facilitative and evaluative were the most common, with directive and transformative only being chosen once respectively.

The next and related key finding is that overall, there was a lack of consistency when defining or describing the theoretical styles and approaches. Lines were generally blurred between a directive approach and an evaluative style and approach and while facilitative mediation garnered the greatest level of description, some participants described it in ways that aligned more closely with definitions of transformative mediation. Further, despite the participants choosing a style and approach they aligned with in the survey and again in the interview, when it came to defining them, almost a quarter of the participants could not. Lastly, specific to the first two key findings, in some instances, there was a change in where participants aligned themselves with a style and approach between the time the survey was completed and when the interview occurred: anywhere from two to four months later.

The third key finding emerged from questions intended to explore what motivated the participants to the practice of mediation. This finding revealed a significant number of intrinsic factors, including an inherent need to help or make a difference in the lives of others. While more practical and extrinsic motivators were also present, they rarely appeared independently or

without mention of corresponding intrinsic motivators. Similarly, when interpreting participants' stories of their most meaningful mediations through a lens of empowerment and recognition, the fourth key finding identified that most of the stories contained these two key elements of transformative mediation. These four key findings suggest a possible disconnect between *why* mediators practice and *how* they practice.

Before moving on to the next chapter to discuss and explore these findings, it is essential to note that all of these findings sit amongst a resounding affirmation of belief amongst participants. That is, in their role as a mediator, they are in a position of influence over both the parties and the process.

CHAPTER 9 – DISCUSSION

This research journey was inspired by a curiosity about whether a transformative style and approach to mediation is possible within the context of government-implemented mediation programs. As covered in earlier chapters, these programs aim to achieve a variety of goals, categorized here as efficiency and non-efficiency goals. Given the mediator's central role in conducting the process necessary to achieve such goals, this study focused on exploring how mediators understand the different common theoretical styles and approaches. To gather rich qualitative data, interviews were conducted with mediators from Saskatchewan, Manitoba, and Ontario, allowing for an interprovincial perspective within a defined area of practice.

Two key findings emerged from a comparison of mediators' self-reported styles and approaches with their underlying values and experiences, coupled with an in-depth analysis of how they understand the styles and approaches. First, based on inconsistent descriptions and definitions, along with an inability to consistently position within one, there is a general lack of understanding of the theoretical styles and approaches. Second, while transformative mediation was the least understood and the least positioned with, the underlying values of many of these mediators aligned with this style and approach. These findings raise important questions about how mediators make decisions about their practice and how they integrate their values into their self-reported style and approach. An additional finding brought attention to mediators' inherent influence within the process, regardless of their style and approach. This influence, together with a thorough understanding of theoretical styles and approaches, is crucial for achieving diverse program goals. Such an understanding includes a conscious alignment of values and practice and allows mediators to make informed decisions that support these goals.

To fully explore these findings, this chapter will first analyze how participants define and describe the different styles and approaches to mediation, followed by an examination of where they position themselves. Next, the chapter will explore participants' motivations for choosing the practice of mediation, uncovering underlying values, and analyzing their stories through the lens of empowerment and recognition. These analyses will offer potential explanations for the findings, drawing on the presented literature and comparing the findings with similar research studies. Finally, this chapter ends with a brief exploration of mediator's perceived and actual influence on the mediation process, supporting an argument that the mediator is instrumental to outcomes and is ultimately best positioned to influence the process to achieve all program goals.

Illuminating the Gap

This section explores the first main finding of this study: a general lack of understanding of the theoretical styles and approaches to mediation resulting in an inability to consistently position with any one style and approach. These participants are not unique in this respect as this finding echoes similar findings in other similar studies. This section will examine the nature of the inconsistencies evident in this study and consider potential reasons for these inconsistencies.

Mediator Misconceptions

Evidence of this lack of understanding could be found in the varying definitions and descriptions of the different styles and approaches. A clear understanding of theoretical styles and approaches is essential for mediators to practice intentionally and effectively. It allows them to make informed choices about their interventions, adopt their approach, and critically reflect on their practice. The nature of these variations and the potential reasons for their occurrence will be examined in this section.

These results may seem alarming at first glance; however, it is important to note that these findings are not unique to this study. Previous research studies have highlighted a range of discrepancies in mediators' understanding, description, and application of the different styles and approaches (Charkoudian et al., 2009; Hanycz, 2005; C. Picard, 2002). These earlier findings align with the present study's findings which revealed that the participants demonstrated variations in how they defined and described the different styles and approaches.

The lack of consistency, or variation, included the more commonly known styles and approaches such as facilitative and evaluative. As covered in Chapter 8, descriptions and definitions of facilitative mediation varied the most between participants. Differences were presented in themes of process management, focus on resolution, and information sharing.

With respect to process management, some participants described facilitative mediation as requiring minimal intervention from the mediator, with one participant likening the mediator's role to an "invisible hand" and another suggesting that if the parties choose to yell at one another, a mediator prescribing to a facilitative style and approach would not intervene. In contrast, other participants describing a facilitative style and approach emphasized the mediator's role as actively engaging in the negotiation process. Reinforcing the commitment to the negotiation process, and ultimately resolution, one participant highlighted that the facilitative style and approach means the mediator "facilitates people staying and not giving up."

I would suggest that these two descriptions are at odds with one another as it would be difficult to disappear into the process, allowing the parties to communicate in any way they see best, while at the same time taking on a role that urges parties to stay engaged. These contrasting views are just a few examples that highlight a lack of shared understanding of the facilitative

style and approach. Similarly, variations were also provided in the descriptions of an evaluative style and approach wherein some definitions, even mirrored those offered for facilitative.

The findings suggest overwhelmingly that while the participants agreed that an evaluative style and approach involved a mediator providing an opinion, there was disagreement insofar as what that opinion applied to. Many participants described evaluative mediation as one where the mediator, acting like an arbitrator or decision maker, would provide an opinion on the best, appropriate, or likely outcome at trial. One of those participants referred to the evaluative mediator as wearing an "arbitration hat." In some cases, the participant went a step further and suggested the evaluative mediator also drives the outcome based on their opinion. Conversely, other participants described the evaluative style and approach as one where the mediator offers an opinion but clarified that it was not related to the outcome but instead focused on aspects of risk assessments based on the strengths and weaknesses of the dispute type. Regardless of the disparity in how an evaluative approach relies upon a mediator's opinion, there was agreement that an evaluative mediator would need to have both subject matter expertise and a law background. Despite the disparity in defining facilitative and evaluative mediation, responses were sufficient enough to create clear themes. The same cannot be said for descriptions of transformative mediation.

While the transformative style and approach lacked in any type of consistent definition or description, it also garnered the most amount of uncertainty, with a number of participants confessing that even a guess was not possible. What was clear for the few that did offer a description was that they viewed it similarly to how some had described facilitative mediation. In other words, lacking active intervention by the mediator and letting the process unfold how the parties see fit. Here, the transformative style and approach was described as somewhat "laissez-

faire" or being solely focused on parties who are expected to have a relationship beyond the mediation. Lastly, a few participants commented that transformative mediation was intended to change people through the experience specific to skill building or skill enhancement. One participant, seemingly concerned about the weight of any approach suggesting transformation as a goal, quickly pointed out that this was not the responsibility of a mediator.

While definitions and descriptions of the facilitative, evaluative, and transformative styles and approaches varied considerably, one that is not a 'stand-alone' theoretical style and approach as explored in Chapter 6, had the most consistent responses. This approach presented to the participants was directive.

The majority of participants agreed that a directive approach was almost entirely related to the degree of control exercised by the mediator. This level of control was specific to either the process and the content or both and involved various degrees of control. Regardless of what type of control, like the evaluative style and approach, a number of the participants saw a directive approach as one that should be avoided. Despite a desire to avoid being directive, many of them felt as though their practice had an element of directiveness to it. Others saw a directive approach as an expected and necessary reality of the process and actively practiced it. A small number described a directive approach as synonymous to evaluative mediation.

These inconsistencies in how the participants in this study define and describe the common theoretical styles and approaches raise important questions. What might be the cause for the lack of consistency will be explored further; however, it is first helpful to consider the findings in the context of other studies. Such a comparison will shed light on the extent to which these inconsistencies, suggesting a general lack of understanding, are prevalent in the field.

As noted earlier, the findings in this study are not unique. Hanycz's (2005) study is particularly relevant to this research because it also focused on mediators in a Canadian context, specifically those involved in the Ontario Rule 24.1 program. Using a conversational interview approach[45] with mediators who had a mixed professional background,[46] Hanycz (2005) found that mediators, when asked about their orientation towards settlement and the use of power, described facilitative and evaluative approaches in varied and sometimes contradictory ways. This resonated with the present study's findings, which revealed inconsistencies in how mediators defined the facilitative and evaluative styles and approaches.

Like the participants in this study who provided a range of definitions for facilitative mediation, with some defining it similarly to transformative mediation, another Canadian study noted this same issue. Picard's (2000) research, which relied exclusively on survey data, also found that the mediators' descriptions of a facilitative approach encompassed elements s of both facilitative and transformative approaches. This blurring of boundaries between the two may contribute further to the inconsistencies observed in this study. These inconsistencies may occur due to mediators unknowingly amalgamating components from the different theoretical styles and approaches. Alternatively, it is more probable that participants are deliberately selecting a combination approach instead of confining themselves to a single one, which may be regarded as restrictive to their practice.

Whereas Hanycz (2005) referred to facilitative, evaluative, and transformative approaches, Picard (2002) referred to a variety of approaches including directive. Similarly, directive was used to categorize participants in a U.S. study (Charkoudian et al., 2009), which

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[45] A conversational interview approach would be expected to obtain rich data for purposes of analysis.

[46] Hanycz described the 17 participants as either lawyer or non-lawyer and provided brief descriptions of background.

initially relied upon survey data from 250 mediators and aimed to determine if where mediators positioned themselves within an approach was consistent with their actual practice. While this will be explored more thoroughly in the next half of this section of exploring the gap between theory and practice, at this point, what is most important to highlight is that Charkoudian et al. (2009) found that there was no agreement among participants as to the definitions of the most common approaches. A report on the findings states emphatically, "the study finds that even the names *facilitative* and *evaluative* are almost useless because there is not agreement among practitioners on the definitions of these approaches in terms of f*acilitative*, *evaluative* and *transformative*" (pp. 308–310).

Although these studies differed somewhat in the context, aims, and methods, the similarities support the present study's findings, which contribute to a deeper understanding of this area of study. Notwithstanding the similarities, it is important to uncover the key distinctions between this study and previous research to fully appreciate the unique contribution of this work.

While Hanycz (2005) focused specifically on roster mediators working in the Ontario Rule 24.1 program, with research aims focused on the mediator's orientation towards settlement and whether or not mediators harnessed power to achieve such outcomes, the context was similar to this study, albeit limited to one province. Further, Hanycz also relied on interview data with a similar number of participants;[47] however, the interviews were slightly less structured and were described as more "conversational" (2005, p. 834). While the style and length of semi-structured interviews, as used in this study, also collects rich data, the amount of data flowing from a less structured interview like the one used in Hanycz's study may have produced a greater level of data and interpretation, resulting in more variation.

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[47] Hanycz's study involved interviews lasting approximately 90 minutes with 17 participants.

The interviews in this study utilized a slightly more structured format, with a greater focus on specific theoretical styles and approaches. This resulted in more detailed insights into the variations in mediators' definitions and descriptions as compared to those in Hanycz's (2005) study. For example, while Hanycz found that mediators spoke of facilitative and evaluative approaches, sometimes as similar and other times, differently, this study revealed far more explicit variations.

Picard's (2002) Canadian study, relying on open-ended survey question data[48] followed up by a small number of observations, involved considerably more participants and had national representation. While the total number of participants varied greatly in comparison to this study, the geographical split was not entirely dissimilar. In Picard's study, 43% of the participants were based in Ontario and the combined percentage from Saskatchewan and Manitoba was just under 15%. Similarly, this study had participants with experience in Ontario's program making up 66%, whereas the combined Saskatchewan and Manitoba program experience made up the remaining 34%. Outside of participant numbers and data collection methods, there were two other significant differences to this study: gender and the area of practice or context.

Unlike this study, Picard's (2002) research participants included *all* areas of practice including family law matters and community mediation and had almost equal representation between two genders.[49] Additionally, all participants were both mediators and trainers of mediation. Regardless of these differences, the findings were quite similar. In consideration of the trainer component of Picard's participants, the results and similarities are most shocking

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[48] Picard's study relied on survey responses from 87 mediators across Canada. Inclusion criteria required the participant mediator to also be a trainer in the field.

[49] As per Table 2 on p. 173 in Chapter 7, this study was comprised of 5 participants identifying as female and 10 identifying as male.

when taken in comparison. I do not think it is unreasonable to believe that trainers in mediation would have more clear and concise descriptions of the different styles and approaches.

Lastly, the study by Charkoudian et al. (2009), while based in the United States, included participants from a range of practice types, similar to Picard's (2002) study. Despite the differences between this study and others mentioned here, the similar findings are significant. Charkoudian et al. (2009) concluded that "there is little consistency between the labels mediators give their approach and the cluster into which they actually fall." (p. 293), a finding that aligns with the results of the present study. While this study cannot definitively determine the causes of these inconsistences, it is important to consider some possible contributing factors which may offer an explanation. For instance, factors such as training type, including recency of training, as well as provincial program experience may offer some explanation.

Insofar as the other studies referred to here, details of the type of mediation training or how recently it had been completed was not clear. Of course, as mentioned, Picard's (2002) study included trainers although even the type and recency of their training was not provided or referred to. For just over half of the participants in this study, any initial training had occurred in excess of 20 years prior to the interviews. At that time, much of the debate concerning the different theoretical styles and approaches had waned, and although some could recall learning about them, recollecting the definitions or the differences between each may have been difficult given the passage of time. One participant, relying on extensive experience as a party to mediation rather than formal training, having attended many industry conferences, noted that topics such as theoretical styles and approaches were not presented.

For the roughly half of the participants with less than 20 years of experience, some had much clearer recollections, even if the definitions and descriptions were not accurate. Interesting

to note, however, is that the one participant with the most recent training had no greater clarity with respect to the definitions or descriptions than the others. Similar to some of the literature, as conflicting as it may be, the tension between theory and practice was touched upon. A few participants shared opinions regarding theory, stating emphatically that it was neither important nor practical. One participant, recalling a rare instance of a session on transformative mediation at an industry conference, shared that the session was presented in such a way that was not in touch with reality. Thus, reinforcing the idea that theory and practice are disconnected or at odds.

The factor of mediation training and education may have contributed to these findings, yet it is difficult to conclude with any certainty. Further, as the other comparable studies have not provided this type of background information, the data is simply insufficient. Considering whether or not program experience can lead to inconsistencies in describing the different theoretical styles and approaches presents a slightly varied explanation.

Highlighting the fact that only one third of the participants had experience outside of Ontario's Rule 24.1 uncovers one potential explanation for the transformative style and approach garnering the least attempts or knowledge in describing. As uncovered in Chapter 3 of this thesis, both the Saskatchewan and Manitoba programs have consistently, and more recently, highlighted program goals outside of the more easily measured efficiency goals. Awareness of these goals, and the various ways in which the different styles and approaches to mediation may impact these goals, may have reinforced the knowledge or understanding for the smallest portion of the sample. Although the participants with Manitoba and/or Saskatchewan program experience could more easily recall and describe the transformative style and approach, there were still variations amongst them. The lack of consistency even amongst participants with this experience

underscores the general lack of understanding found between provinces and reinforces the finding of other studies notwithstanding the different context.

Wavering Positions

As noted in the last chapter, both survey and interview responses demonstrated that the majority of participants positioned themselves with a combination approach rather than choosing just one. Interestingly, positioning with a transformative style and approach was the least common response and for some participants, responses changed in the short period of time between the completion of the survey and the time of the interview. A simple explanation, especially in consideration of the findings just discussed, is that 1) in absence of a clear understanding of the different theoretical styles and approaches, one is more apt to simply choose an easy response such as combination and 2) given transformative mediation garnered the least amount of effort to define or describe it, would be the least likely to be chosen. While these may have been the motivating factors, other interesting explanations were also evident.

Firstly, to serve as a reminder, Table 3[50] referenced in the last chapter, showed that seven out of the 15 participants chose the combination option in the survey, more than double of either facilitative or evaluative and considerably more than either a directive approach or the transformative style and approach which garnered only one each respectively. Not indicated in Table 3 is that some participants elaborated on the combination approach, with the most popular being a facilitative/evaluative combination, and one participant responding with "all." By the time of the interviews, no more than three months later, the combination option remained the most popular, having increased from seven to nine. This dropped the self-reported positioning

[50] See Table 3 on p. 182 in Chapter 8.

with a facilitative and evaluative style and approach by one, leaving one each for transformative and directive intact. It is very possible that the interview process, both the act of preparing for as well as the active discussion, resulted in the change increasing the combination of style and approach numbers. Regardless, the combination option remained the most popular amongst the 15 participants.

Not unlike the findings specific to how the participants defined or described the different theoretical styles and approaches, these findings on where they positioned themselves was also not entirely surprising in light of other studies. While this study was seeking a far more in-depth exploration of how mediators understand the theoretical styles and approaches, which included exploring aspects such as motivations and values, another study, referenced earlier, was very specifically focused on the differences in where mediators positioned themselves against how they were actually practicing (Charkoudian et al., 2009).

In title of the 2009 study, "Mediation by Any Other Name Would Smell as Sweet– or Would it? The Struggle to Define Mediation and Its Various Approaches," signals a lack of understanding found in the research study, revealing that rarely did the self-reported approach align with participants' behaviours observed in actual mediations. While this present study did not include observations, comparing participants' positioning with their corresponding descriptions, it did demonstrate either inconsistency or an absence of discernable description, like Charkoudian et al. (2009) suggests a lack of understanding of the different styles and approaches.

With respect to the effort to try and discern what the participants meant insofar as the theoretical styles and approaches they utilized in their practice, because of the general lack of understanding, it was often difficult to make the connection. For example, one of the participants

choosing the combination option, emphasized repeatedly their role of bringing "humanity" into the process and "making a difference in people's lives" and that "it's not just about settling the case" was not familiar with directive as an approach and objected to using any elements of the transformative style and approach. Although their combination approach was presumably meant to refer only to facilitative and evaluative, their emphasis on having an impact on the parties and minimizing outcome would suggest elements of other styles and approaches, namely transformative.

Despite clearly indicating a combination of evaluative and facilitative styles and approaches, another participant spent considerable time emphasizing other aspects of their approach to practice. In particular, this participant, one of many who stressed the importance of knowledge and skill building, also focused their attention on supporting the parties in gaining a mutual understanding of perspectives and actively seeking recognition of those perspectives contributing to the dispute. While the description of their approach included aspects of shuttle diplomacy and active participation in risk assessment and options for resolution, behaviours that have been described as both facilitative and evaluative, their focus on recognition also represents a more transformative style and approach. Interestingly, in describing their style and approach, the use of transformative mediation was referred to in the past and based on the context of the matter in which they were mediating. For example, stating "I always saw myself as facilitative, maybe moving towards transformative depending on the type of file. Now, I would say I'm facilitative, definitely moving towards evaluative because of the type of work I am doing."

For many of the participants, regardless of how they positioned themselves, a persistent theme underscoring their approach was one of informed decision making, whether it was described as "good decision," "best decision" or "best informed decision." Of particular interest

is that the only participant positioning themselves with a transformative style and approach, this aspect of informed decision-making was identified as a fundamental cornerstone of transformative mediation. The notion that becoming informed required a transition into a more profound or significant level of understanding on the part of the parties. Further, this transition or change, resulted in an increased awareness of understanding of both self and others.

The tendency of choosing combination as an easy default position, omitting styles and approaches based on the type of matter, or the inability to recognize qualities of less popular styles and approaches, are similar to some of the findings in the other studies mentioned.

Again, referring back to the Canadian national study, over half of the participants fell into what could be described as a combination category using multiple approaches throughout the course of a mediation (Picard, 2000). In the other Canadian study (Hanycz, 2005) where all of the participants were roster mediators working under the Ontario Rule 24.1, practicing along a spectrum of approaches was often dependent on the type of case. One of Hanycz's (2005) participants highlighting the unique nature of a personal injury disputes shared:

> It's all about the money. Relationship don't matter to parties, so I work hard to understand the facts of the case instead … I take a highly analytical and fact-based approach and use interventions that encourage parties to move towards compromise without much focus on the future. (p. 856)

This explanation is similar to some of this study's participants who also focused on matters falling under the government-implemented programs as simply being about money. This opinion surrounding the focus on money was consistent amongst participants positioning themselves with facilitative and evaluative mediation as well as the directive approach. Interestingly though, like mentioned earlier, there were also instances where the participants, positioning themselves

within these more popular styles and approaches, combination or not, emphasized that these same cases were, in fact, not just about the money. Another statement emphasizing this opinion, reinforcing that mediation is not intended to simply be a facilitated negotiation is "because you don't really need a mediator to shuffle around money." Contrary to this last expressed opinion, another participant in this study represented both the disagreement on the type of matter dictating the approach as well as the lack of understanding of the less popular approach, that being transformative.

Before providing evidence of this participant's perspective, what is most striking here is that this was the only participant who was consistent across *all* interview questions and the completed survey. Their positioned style and approach was indicated as evaluative in the survey as well as in the interview where they also defined and described evaluative mediation in a consistent manner with both the literature and other descriptions of it. While motivations and stories are yet to be explored here, I will offer in advance that the majority of this participant's motivations fell within pragmatic and extrinsic needs and their most meaningful story did not uncover one single example of either empowerment or recognition. This anomaly does not change the overall findings or conclusions; however, it does identify a potential for unpacking the meaning behind it. While this participant's consistent alignment presented as an anomaly, they held the same misconceptions about transformative mediation as other participants, which is also consistent with the literature covered earlier. One misconception, regarding the need for an ongoing relationship is highlighted in the following statement from this participant who also suggests that a transformative style and approach would be exclusive to family law matters:

> I don't purport to say what works in family law … what I do is not about an ongoing relationship. It is a final relationship. They don't want to see each other anymore …I

> totally acknowledge that it's different than family or partnership disputes where you're forced to get along with people.

This participant was also completely transparent insofar as their level of understanding, not unlike other participants, stating, "so, I don't know much about transformative [mediation]." Emphasizing reaching an agreement as the single most important outcome of a mediation, this participant, disagreeing with other participants, shared the opinion that a failed mediation is one where "you didn't get a deal."

In considering the reasons behind these findings – specifically, where participants positioned themselves when presented with different options – a lack of understanding of the theoretical styles and approaches, the default to a combination approach, and the least commonly understood style and approach (transformative) seems plausible. Furthermore, the type of case being mediated is also relevant when considering how participants position themselves with the different styles and approaches. Other possible explanations could also include gender differences as well as educational or experiential background. Additionally, similarly to the inconsistencies in the definitions and descriptions, the different provincial programs might also contribute to the lack of consistency in positioning with the styles and approaches.

First, looking at gender as a potential factor explaining how participants positioned themselves, in this study only one third of the participants identified as female. Based on Picard's (2002) study which had considerably more participants and was both national and included a variety of different dispute types, findings showed that those females who embraced a more facilitative approach, focused on *both* communication and process whereas the male participants positioning within a facilitative approach were focused solely on the process.

Picard's findings were in keeping with other studies aimed at understanding the differences between male and female mediators (2002).

In this study, there was no clear division specific to gender when examining the choice of a combination approach or a single facilitative style and approach. Relying on interview responses only, the two participants claiming to position themselves solidly within a facilitative style and approach exclusively were both male and practiced in Ontario. For one, there was an overwhelming emphasis on facilitating the process, whereas with the other participant, facilitating communication as well as the process was key in their approach. Focusing on their role in helping parties communicate, this same participant expressed their opinion regarding the importance of communication, stating, "if they're able to articulate and communicate effectively, it makes a big difference, and I do find that helps."

Of those participants who identified a facilitative style and approach in choosing the combination option, three were female. These three participants also positioned themselves with either an evaluative style and approach or a directive approach. The reference to directive and evaluative was used to identify the control of process among other aspects of the mediation process. These findings are oppositional to what Picard (2002) found and suggest that gender does not pre-determine the type of emphasis placed on process versus content in a facilitative style and approach. Interestingly, Picard did not look at any gender differences when describing or positioning with a transformative mediation; however, this study identified the sole participant positioning themselves with transformative mediation was male. The combined transformative and facilitative style and approach of one participant was specific to a female participant. Outside of provincial programs as a potential explanation, looking at educational and

experiential background may provide an explanation for the specific findings in positioning with the different styles and approaches.

The majority of the participants in this study have a law background. This was also the case for those participants with experience in the Ontario program, whereas for Saskatchewan and Manitoba, the split favoured either a non-law background or an equal split respectively. It is important to note that since Saskatchewan's foray into court-connected mediation, most of the mediators have not had a law background. Insofar as Manitoba, the program aims to achieve equal representation. The literature suggests that mediators with a background in law naturally lean towards an evaluative style and approach; however, the findings of this study do not support this claim. Among the eleven participants with a law background, only approximately one-third claimed to have an evaluative style and approach to their mediation practice.

Perhaps not surprisingly, one of the three who positioned themselves with an evaluative style and approach, continued to maintain a small law practice and had the least amount of mediation experience in comparison to all other participants. Suggesting that maintaining one's law practice, which would require advocating within the framework of more traditional adversarial means of resolving disputes, could easily seep into one's mediation practice. Another participant with a background in law choosing the combination option, commented on the survey, "I try not to be evaluative, but I am sure it comes through," suggesting not just the negative connotations of an evaluative style and approach covered in the applicable debate section of the informing literature, but also the recognition that a law background could cause one to be more evaluative in their style and approach.

Regardless of the differences in definitions, and notwithstanding that other studies and opinions have linked a law background with an evaluative mediation practice, this study did not

find consistent support for this association. Only three out of the 11participants with a law background positioned themselves with an evaluative style and approach. It is worth noting, however, that none of the participants with a background in law positioned themselves with a transformative style and approach, whether exclusively or as a component of a combination approach. Positioning with a transformative style and approach applied only to participants without a law background and even then, not overwhelmingly.

Similarly, participants without a background in law also fell into the most popular of response categories: that being a combination of styles and approaches and highlighted a leaning towards being both facilitative and directive. In one case, however, the participant also mentioned having an underlying "transformative bias" and another participant choosing the popular combination option expanded, stating they have a more facilitative style approach but will use "*all* [emphasis added] as may be required to assist in negotiations." This statement suggests that a facilitative style and approach may be inadequate to achieve resolution, a perspective that aligns with much of the informing literature, where scholars have argued that a flexible approach incorporating elements of multiple styles and approaches is most effective. Lastly, as alluded to and not surprisingly, the only participant who positioned themselves exclusively with a transformative style and approach fell into the non-lawyer category of participants.

Returning to the first key finding of this study, evidence reinforces and suggests there has been no material change in how mediators define or describe the theoretical styles and approaches to mediation. Generally, the lack of understanding persists across contexts and regardless of educational or experiential background, gender, or specific program experience. While there are suggestions that programs with a clear articulation of goals may support a more

varied understanding, the numbers outside of Ontario are too few to draw any definitive conclusions.

Other studies with similar findings have not pointed to any clear cause of the lack of understanding or inconsistent positioning with the different styles and approaches. Recognizing the extent of the literature, including the longstanding and ongoing debates, this body of work, while clarifying for some, has likely caused confusion amongst practitioners and possibly caused them to discount the theoretical styles and approaches as neither important, valuable, nor relevant, thus reinforcing the already significant divide between theory and practice.

Another cause could be the lack of emphasis on theory in training material, although this is speculation, as an exploration of training, outside of the scope of its timing has not been the focus here. Lastly, in Ontario, outside of a brief mention of other goals, the focus has mostly been on the efficiency goals such as a reduction in time and costs, specific to achieving a settlement. While this has been challenged by a few, the expectation of users also seems to align with this more popular emphasis and goal. In contrast, Saskatchewan and Manitoba have been clearer on other goals, though the focus on Saskatchewan's goals is nearly 20 years old and lacks recent evaluation.

Further, while other studies have observed mediator behaviours against how they describe their practice, this study was limited to self-reporting in the interviews and therefore could not make any comparison to actual practice. This limitation, combined with the lack of consistent definitions or descriptions, raises questions about the accuracy of participants' self-reported style and approach. This creates a significant level of uncertainty about whether participants accurately portray their style and approach, regardless of whether they understand how it is defined in the field.

In the absence of observation, this study chose to compare participants' understanding of the theoretical styles and approaches with their values derived from their motivations to practice and their most meaningful mediation experiences. While the earlier referenced literature makes explicit connections between values and the theoretical styles and approaches, searching for similar studies in the same context did not result in any clear precedent. As such, the comparison of mediators' underlying values with a specific theoretical style and approach, and within this context, represents a unique contribution. The results of this comparison will be explored next.

The Transformative Potential of Mediation

As explored, participants demonstrated a general lack of understanding of the styles and approaches to mediation as presented. This general lack of understanding is consistent with similar findings and reinforces the gap between theory and practice. Further, in addition to a general lack of understanding, the transformative style and approach was the *least understood* and also the *least likely to be positioned with*. This particular finding may be unique to this study, although not completely unexpected given the inspiration for this research, the context, as well as the misconceptions of the transformative style and approach covered in the literature.

Outside of other potential explanations for the general lack of understanding of the theoretical styles and approaches, and in absence of the added method of observation carried out in other studies, this study discovered an interesting connection. An analysis of participants' motivations for practicing mediation revealed a range of personal values. Additionally, an analysis of participants' most meaningful stories revealed frequent examples of empowerment and recognition, key elements of transformative mediation. The connection between motivations and meaning suggests an unrealized potential for transformative practices amongst mediators, despite their limited understanding, and will be explored here.

Mediator Motivations

By way of a reminder, uncovering the main motivators for the participants choosing to practice mediation, a range of themes emerged as covered extensively in Chapter 8. The most popular motivational themes were “mediator needs” and “mediator as teacher,” while “mediator as pragmatist” and “mediator calling” were the least popular. Mediator needs captured mostly intrinsic motivators focused on values alignment, skill utilization, stress reduction and social connection.

In looking at the needs of the participants, there were aspects of both avoidant behaviours to satisfy needs as well as a need for connection; whether the connection was to others, a certain environment or culture, or to actual skills they possessed. Insofar as avoidance, many participants, especially those with a law background, despite what they described as esteemed and successful careers, sought to escape the highly adversarial culture of litigation. They also sought to avoid the pressure of managing cases over the long term, such as challenges in managing client expectations and billing. For others, identifying as naturally conflict adverse, the mediation process was viewed as an opportunity within conflict to focus on resolution; something they considered to be far more positive. Connecting to their explicitly described values, rather than avoiding aspects at odds with their values, a number of participants spoke of how their personality and skillset naturally aligned with the mediation process.

These participants highlighted values around voice, agency, and self-determination and chose to practice mediation, and in their own words, described mediation as an opportunity to actively seek “harmony,” “fairness,” and “dignity.” Other participants expressed a desire to utilize their skills in communication, negotiation, and empathy, reflecting their ‘people-person’ orientation and their motivation to connect with others.

This honoring of values motivating participants to the practice indicates the need to use one's skills to make a difference or contribute to something meaningful within a culture that aligns with their values. Although the mediator calling theme was a less popular description of motivations to practice, it does have a close alignment with the mediator needs motivation and perhaps, for some, underscores or emphasizes the importance of values as motivators.

Mediator calling was the only theme using specific words offered by the participants. Given its potential meaning it seemed important to maintain the integrity of the wording rather than choose a synonymous term to capture it. This theme is captured most succinctly by the participant who offered "I felt that I had found that which I was called to do." Other participant motivations captured in this theme highlighted a desire for an impact on humanity, with one participant reflecting on the change the process has on all participants to the process, including the mediator. The other participant focused on humanity spoke of the potential for the process, describing mediation as the "better way," to transcend adversarialism, conflict, limitations, and personal biases. Yet, another participant, one whose main motivation was simplifying their life, emphasizing a desire to avoid stress, in reflecting on the question offered, "It's better to give so anyway, I am sure there was some intrinsic, altruistic stuff going on in the background, but it was more about simplifying my life." This both resonates and contrasts with findings from Picard's (2000) study wherein, motivations of "veteran" practitioners were compared with those of more recent practitioners.[51]

Picard (2000) shared a concern that the more recently a mediator joined the practice, the more likely they were to be motivated by factors such as "personal growth and job satisfaction"

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[51] Veteran mediators were characterized as having 6 or more years of practice experience. In 1999, the year of data collection, means that veteran mediators would have started practicing in 1999 or earlier. This categorization could apply to seven of this study's participants who had greater than 20 years of experience in 2023.

rather than the veteran mediators who were more motivated by “visions of social transformation and empowerment” (p. 222). The concern stemmed from a belief that a potential shift in mediators’ motivations - from broader societal goals to more individualistic ones - could influence both their understanding of their role and their actual practice. While these concerns may still be valid, particularly with respect to an individualistic view motivating outcome, the findings from this study suggest that most mediators do not solely focus on personal satisfaction needs. This is true at least within this context and sample where these findings reinforce that Picard’s (2000) more ideal motivations of social transformation and empowerment still exist amongst mediators today.

Although participants falling exclusively into the mediator calling theme made up a small percentage of the sample, like Picard (2000, 2002, 2004) and others referred to in the supporting literature, they touched on the profound ways in which the mediation process is considered to have the potential for change. Describing mediation as an overall better and preferred way to resolve conflict than the more adversarial processes, was not surprising, and this aspect showed up across all the motivational themes; however, what was a surprise is the style and approach the participants in the mediator calling theme positioned themselves with.

Based on the breakdown of where participants positioned themselves with the styles and approaches, none of participants falling into the mediation calling theme chose transformative. One positioned themselves with directive, one with facilitative, and two with combination. While this breakdown of styles and approaches is reflective of this sample group, the unexpected revelation is what some of these participants falling into this theme of mediator calling had to say about transformative mediation.

Despite having some recollection of it in their initial training, one of the participants was mostly unfamiliar with transformative mediation and seemed disinterested in describing it, suggesting it was not relevant to their practice. Whereas another had initially been curious about transformative mediation, suggesting an interest and openness to it but found that settlement rates had dropped in their practice when attempting to apply it which ultimately causing them to abandon it. Thus, reinforcing settlement as the top priority for outcomes or measurements of success. Of course, there is no way of knowing for certain if the change in style and approach caused settlement rates to drop during that time. Still, other interesting opinions were expressed concerning the elements of transformation in mediation.

One participant, while acknowledging permanent change as a natural outcome of the process, emphasized that such a goal is not the responsibility of the mediator. Similarly, specific to change or transformation, another participant provided an unsolicited opinion stating unequivocally that transformative elements occur from the process, regardless of whether or not a settlement is reached. This opinion is in clear opposition of another participant, presented earlier as an anomaly due to their unwavering commitment and consistency in their responses, who opined that no settlement at a mediation is to be considered a failed mediation. This brings us to the second and third most common motivations for choosing to practice mediation as described by the participants – mediator as pragmatist and mediator as teacher.

As mentioned earlier, mediator as pragmatist, motivations intended to capture aspects such as flexibility, practicality, and efficiency, was a less popular theme compared to the mediator needs and mediator as teacher themes. Many of the descriptions mirrored what the program evaluations highlighted: a less formal process, the opportunity for early resolution, and significantly reduced cost to the parties. This theme was noted across participant characteristics

(e.g. program/province, gender, lawyer/non-lawyer background), including the style and approach in which they positioned themselves. To clarify, despite spanning the different participant characteristics as a motivational theme, it was the least popular; meaning other themes were more discussed or detailed in participants' explanations of motivations to practice.

Given the emphasis placed on celebrating the success of mediation as an alternative to more formal processes, this finding was not entirely unexpected, although surprising in that it was not the most popular theme. While it may accurately support participants' inherent practical values, captured in the theme of mediator as pragmatist, it may also be indicative of the attention efficiency markers are given to support program success. Notably, the one participant who demonstrated the greatest consistency in defining, describing, and positioning within one theoretical style and approach, and who was firmly planted in the pragmatist theme for motivations to practice, did, however, also express more intrinsic motivations, such as a desire to have a meaningful "fruitful career" and to share knowledge and teach others.

This last theme to be explored was intended to capture those motivations reflecting the values of guiding, helping, coaching, or mentoring parties in the mediator process. One participant, who positioned themselves with a combination approach and identified elements of facilitative mediation with a directive approach, referred to facilitative elements as mainly focusing on teaching and coaching skills needed to navigate the process and beyond. For them, facilitating was mostly about skill building. While others may not have identified the facilitative approach close to the same way as the one participant, all participants expressed motivations that fell into this theme. Many participants emphasized a desire to help or coach the disputants and provide additional support to those less familiar with navigating the process. For the participants who mediate matters where disputants are unrepresented, this need to assist was heightened. All

participants, regardless of gender and background, also identified a desire to help representatives who are less experienced with advocating within the mediation process. Assistance to representatives was mainly focused on risk assessments and negotiation strategy rather than communication.

Uncovering values amongst participants' motivations to practice presents an interesting observation along with additional questions. Initial observations reveal participants who are driven by deep-rooted underlying needs, interests, and values, all aspects of which mediation as a process is intended to uncover. In choosing to practice mediation these participants are honouring their needs, interests, and values, and the result of meeting these motivations is an act of recognition and empowerment. Notwithstanding this personal accomplishment, the majority of the participants either position themselves with the more pragmatic mediation styles and approaches, namely evaluative, facilitative, directive, or some combination of the three, rather than a style and approach focused on empowerment and recognition, which, when achieved first, will often result in the much-coveted resolution.

There is some irony to this observation. For many mediators, recognizing there are always exceptions, emphasis is placed on moving parties to a greater level of understanding such that interests and even needs are uncovered, recognized, and acknowledged. Mediators, even those who take a directive approach or describe their role as simply facilitated negotiation and may rely on *Getting to Yes* (Fisher et al., 1991) as their main source of guidance, work actively at moving parties beyond their positions. Therefore, I argue that it is highly likely that the majority of the participants are choosing a position within a theoretical style and approach that does *not* align with their values. Thus, highlighting the importance for even mediators to explore their values, interests, and needs before taking a position regarding style and approach.

Reasons for this misalignment could be diverse and extend beyond this research; however, some factors that could explain this observation have been touched upon both in the context and the literature. Once again, the emphasis that has been placed on the success of government-implemented mediation programs, those efficiency goals capturing timeliness, cost, and resolution can influence where mediators consciously or unconsciously position themselves. Another possibility is the expectations of the predominant consumers of mediation, whether they be legal firms or corporate entities. As covered extensively in the facilitative/evaluative debate, mediation has been criticized for being assimilated into the litigation culture and, for many, seen as a mere extension of the adversarial system it was intended to replace or a tool of corporate culture used to take advantage of the more vulnerable and less powerful parties. Building on the analysis of mediator motivations and the uncovering of values, the next section examines participants' most meaningful mediation stories and explores how the stories reflect elements of empowerment and recognition.

Mediator Stories

Although participants were least likely to position themselves with a transformative style and approach, and although it was the least consistently described and most prone to the common misconceptions, multiple examples of the core elements–empowerment and recognition–were found in the majority of their most meaningful mediation stories. This rather intriguing finding could be attributed to the underlying values motivating participants to the practice. Prior to examining this finding, revisiting the application of the core elements of empowerment and recognition is necessary.

As previously explored in the informing literature in Chapter 5, Bush and Folger shared their transformative style and approach to mediation through two editions of *The Promise of*

Mediation and multiple articles, some a direct response to criticism, intended to clarify and teach transformative mediation. Proponents, many of whom contributed to the existing literature, authored a number of chapters in a 2001 book also intended to assist practitioners and trainers in applying the foundational principles of transformative mediation (Folger & Bush, 2001). Since then, and more recently with the toolbox debate, attempts have been made to explain the practical application of the transformative style and approach, focusing mainly on how to achieve empowerment and recognition in practice.

In applying a practical approach to transformative mediation, I was able to identify key aspects of empowerment and recognition in a large percentage of participants' stories by looking for those descriptive actions or moments that signal a change or a "shift" (Bush & Folger, 2005, p. 75). Empowerment shifts are reflected in a parties' ability to gain new understanding of their self or being, their situation, and their skills in addressing the situation they are facing. Recognition shifts are reflected in a parties' ability to acknowledge the other, gain a new understanding and appreciation, perhaps even empathize, and apply this new understanding directly to the situation they are facing. These aspects contribute to a change in the dynamics of the dispute which can then lead to a preferred and acceptable resolution by the parties. These shifts typically only occur with the guidance of the mediator and their ability to listen intently to identify those key moments which can lead to the necessary actions required for achieving empowerment and recognition.

Despite the critics, and the general misunderstanding that mediators practicing transformative mediation are not as engaged in the process as a more directive, facilitative or evaluative mediator, a mediator who aligns with the transformative style and approach is as engaged as any other mediator committed to the process. With an in-depth understanding of

transformative mediation and applying different empowerment and recognition shifts, the findings suggest that mediations containing multiple examples of empowerment and recognition are the most meaningful for the research participants. The following provides specific examples of either party empowerment and recognition, as well as, or specific actions the mediator carried out based on the stories shared in the interview. These examples are based on my interpretation and are being shared in a manner to protect the anonymity of the participant as well as the parties to the most memorable mediations.

Multiple stories focused on the impact of sharing and listening, in an effort to gain understanding, such that the parties could engage in empowerment shifts which included the realization of their goals based on interests, the options that were created from this realization and how best to use the resources available to them in order to make informed decisions.

In one particular story a party came to understand the situation more fully which ultimately impeded what was their preferred outcome at the start of the process. This deeper understanding, facilitated by the mediator's focus on communication between the parties, allowed the parties to re-evaluate their goals and consider alternative options. This shift in perspective reflects a key element of empowerment: the ability to make informed decisions based on a clearer understanding of oneself, the other, and the situation. The realization presented an alternative list of creative options and ultimately an unexpected outcome for both parties to the dispute.

In this case, parties also demonstrated control over the process in addition to the outcome. The mediator further facilitated such control by creating options for the physical space of the mediation session. Moving away from the perceived coldness of a corporate boardroom to a more comfortable and inviting environment fostered a sense of safety and encouraged open

communication. This change in environment, agreed upon by the parties, symbolized a shift away from the adversarial dynamics of the dispute and towards a more collaborative interaction. The mediator, acknowledging the emotional impact of the events leading to the dispute, also created a space where parties felt safe in expressing and acknowledging emotions. The free expression of emotions allowed for mutual recognition, thus creating an environment necessary for the parties to make choices about whether or not, and how the case may be resolved. This acknowledgement of emotions, often overlooked or discouraged in some styles and approaches, reflects a key principle of transformative mediation: recognizing and valuing the parties' emotional experiences as an integral part of the mediation process.

This participant described their style and approach as a combination of facilitative and directive, explaining that they were quite directive with the process, but practiced leaving the content to the parties. Their story, however, actually highlighted giving up control of the process and creating options for the parties to choose the best process within the mediation model. In other words, active engagement in supporting empowerment in mediation. Another participant in reflecting on one of the two memorable mediations shared with me, highlighted that they believed the parties embraced the mediation because "they would get a process that they had control over." The facilitation of parties having control of the process is an essential element of empowerment.

The majority of participants' stories focused on mutual sharing, listening, and understanding, recognizing that informed decision-making by the parties, an element of empowerment and self-determination, made the events in the stories meaningful to them. These actions create a space for parties to fully express themselves, acknowledge each other's perspectives, and gain a deeper understanding of the issues contributing to the dispute. This

process fosters a sense of agency and control, resulting in empowerment and motivating parties to actively participate in shaping the outcome of the mediation.

In one particular interview, where the focus of the participant was on what they had done in the mediation rather than any resulting behaviours of the parties, the participant stated quite emphatically that they "wanted to change lives through a process … because it wasn't just about settling the case." This statement may reflect the earlier emphasis on mediation or a potential shift in perspective for this participant, from viewing mediation solely as a means to resolve a dispute to recognizing its potential for personal growth and transformation. While this participant might not explicitly identify with a transformative style and approach, their emphasis on changing lives through the process reflects an understanding of mediation's capacity for achieving societal good.

This same participant also affirmed the importance of bringing empathy and humanity into the process and recognizing that such experiences, like the one shared in their story, can be catalysts for personal and professional growth. This recognition highlights the potential for transformative experiences not just for the disputing parties but also for their representatives and the mediator. It suggests that mediation can be a process of mutual growth and learning, where everyone has the opportunity to develop new perspectives and skills. Notwithstanding this participant's desire to change lives through the process in the most meaningful mediation story, when describing the styles and approaches of mediation, they also pointed out that "it's not our job to change people." This seemingly contradictory statement might reflect a tension between the participant's values, maybe even their desires, and what they believe they are hired to do within the context of their practice. It also highlights the complexities of balancing the desire to

help parties achieve personal growth with the need to respect their autonomy and self-determination.

Yet another participant, referring back to some of the ego-centric motivations for choosing to practice mediation, referred to a multi-party case that was resolved in four hours. This participant attributed the swift resolution to all of the parties participating in sharing, listening, and understanding, on the foundation of a temporary relationship based on mutual recognition.

Another participant who shared multiple stories and who focused mainly on creative outcomes, highlighted the importance of developing relationship and trust with parties to a dispute. These efforts were centered on building trust and relationship with the participant and less about establishing trust and relationship between the disputing parties. Even though this participant focused on their trust and relationship with the parties, their actions still facilitated some aspects of empowerment and recognition, likely contributing to the openness for the creative outcomes which made the mediation so meaningful.

In several stories, active recognition was demonstrated through an apology from one party to the other. This act of apology, often arising organically from a deeper understanding of the issues and the other party's perspective, signifies a powerful shift it recognition. It can represent a willingness to acknowledge responsibility, express remorse, and seek forgiveness, fostering a sense of empathy and connection between the parties.

In one story, for example, mutual sharing revealed a misunderstanding caused by one party's representative who had unknowingly intensified the dispute. Once this misunderstanding was uncovered, the mediator stepped back while gently guiding the parties toward a shared understanding of the true events. This approach, characterized by gentle guidance rather than

directive intervention, allowed the parties to take ownership of the dispute and explore their own solutions. By creating a safe space for open communication and providing subtle guidance, the mediator fostered an environment where the parties could reach a deeper understanding of themselves, the situation, and each other. This process of self-reflection and mutual understanding are key aspects of both empowerment and recognition, ultimately allowing parties to control the outcome. In this particular case, the outcome involved reaching an agreement and repairing the relationship, both being a by-product of acts of empowerment and recognition.

In sharing this particular story in the interview, the participant specifically noted that both parties to the mediation had demonstrated an increase in skill related to addressing conflict through communication. This observation highlights the potential for mediation to not only resolve disputes but also to equip parties with valuable skills they can use beyond the mediation setting.

In one of the other stories that involved an apology, the interview participant, responding to the request for the apologizing party to address the other directly in joint session, trusted in the parties' ability to control the process and invited the direct communication, including the apology. This decision to deviate from the program's typical mediation model and utilize a joint session reflects the mediator's trust in the parties' capacity for constructive interaction and their willingness to take ownership of the process. By facilitating this direct communication, the mediator created an opportunity for the parties to move beyond individual narratives, towards a relational view and engage in a shared dialogue, fostering recognition through mutual understanding.

In this case, the parties carried out the entire mediation in joint session following the apology, which, the interview participant highlighted, is not the normal process in that particular

program's mediation model. The successful use of joint session, despite not being the norm, suggests that mediators can effectively leverage their influence to create a process that best suits the needs and dynamics of the parties involved.

Of particular note in this story is that the interview participant felt personally fulfilled by the entire process and reflected that they were "happy that maybe something [they] had done allowed this to happen." This personal fulfillment, stemming from facilitating a process of empowerment and recognition, is similar to the participant mentioned earlier who commented on the potential for their cases to change and transform them just like the parties. Both examples emphasize how a process focused on empowerment and recognition can equate to growth and transformation. Perhaps it was intuition or perhaps it was an alignment with their underlying values, or maybe both, that guided the interview participant to depart from their normal process and create a unique and empowering experience for the parties. This highlights the importance of mediators being simultaneously attuned to their values and guided by their intuition. This enhanced awareness can inform their decisions and contribute to creating transformative spaces for the parties involved.

The finding of multiple examples of empowerment and recognition throughout participants' most meaningful mediation stories implies a strong connection between mediators' underlying values and these transformative elements. This connection is further emphasized by the fact that even when a mediator's most meaningful story does not explicitly reflect aspects of empowerment and recognition, it still reveals something important about their values and how those values shape their practice. As an example, one participant, the only prominent outlier, consistently demonstrated an alignment between their self-reported style and approach, motivations, and the values reflected in their most meaningful story. This story, focused solely

on the achievement of a considerable settlement, highlighted the participant's values based on efficiency, pragmatism, and tangibility. This consistency, though not typical in these findings, reinforces the connection between values and meaning-making.

The presence of empowerment and recognition in the majority of the stories shared suggests that these fundamental elements of transformative mediation are indeed valued by most mediators, even if their self-reported style and approach does not explicitly identify with the foundational principles of transformative mediation. This apparent contradiction may reinforce the beliefs of the proponents of a toolbox approach or those who suggest that an expert mediator is one who is capable of moving between the different theoretical styles and approaches depending on context. Conversely, it also lends credence to proponents of transformative mediation who state that there is no such thing as a value-free practice and that one's values invariably inform their practice.

It is important to acknowledge that despite the prevalence of empowerment and recognition in the stories, a concurrent theme of resolution, particularly settlement, also emerged. This might seem like a contradictory point to make given transformative mediation is associated with a de-emphasis on resolution. However, this observation actually reinforces a key principle of transformative mediation: when mediators focus on empowerment and recognition, resolution is the most likely outcome. In other words, in addition to other important goals, the much-coveted resolution goal was also achieved and, perhaps most importantly, not at the expense of the others. Nevertheless, the findings suggest that for most participants, the meaning and value of their shared mediation experiences extended beyond simply reaching a resolution.

Building on this analysis of mediator stories and the transformative potential they reveal, the next section concludes this chapter by briefly exploring the concept of mediator influence. It

examines how mediators leverage this influence in their choice of style and approach and the potential impact such a choice has on program goals.

Leveraging Influence

As established in the prior chapter, while a couple of participants initially wavered in their response, ultimately all participants strongly affirmed their belief in their influence as mediators. This unanimous conviction underscores the significant role mediators play in shaping the direction and outcome of the mediation process.

Despite acknowledging their influence, the type and extent of this influence were understood and expressed in diverse ways. Some participants readily embraced their influence on both process and outcome, viewing it as an inherent and essential aspect of their role. Others, however, expressed reservations or limitations, emphasizing their influence on the process while downplaying their impact on the outcome. For some, process and outcome are inextricable, with one participant asserting "the very existence of the mediator in the process has an influential impact on both process and outcome." These variations in perspectives underscore the complex and nuanced nature of mediator influence, prompting further exploration of its implications for practice; nevertheless, it is reasonable to suggest that mediators, at the very least, are in a position of power to influence the process.

This finding of a mediator's power to influence process and outcomes aligns with Hanycz (2005), who opined that the mediator's power far outweighs any that the parties or their representatives may hold. As referred to earlier, Hanycz's (2005) study was within the context of Rule 24.1 in Ontario and found that there is a "mediator self-interest in achieving high rates of settlement." (p. 819) While Hanycz explored various concepts concerning the philosophy of power, which are beyond the scope of this thesis, themes identified as causes for the inherent

influence of the role, also noted by some of the participants in this study, ranged from mediators being viewed as experts in the subject of conflict, to being skilled in the process, and driving outcomes based on a set agenda.

Another theme highlighted by Hanycz (2005) was a focus on using power to serve a variety of interests, including those of the program, with "interests" used to describe program goals. Interestingly, the use of power, specifically in managing the process, often underscored an element of directiveness as explored earlier. The use of power to manage the process and drive outcomes can be seen as an exertion of influence, a finding that resonates with this study, where participants overwhelmingly agreed on their influence as mediators.

Notably, despite agreement on the reality of their power and influence, a number of Hanycz's participants were uncomfortable with it and looked for opportunities to transfer it to the parties or seek ways to minimize it. Noting some irony, one participant admitted to garnering power early in the process but with the hope of not having to use it. Given Hanycz's study occurred within five years of mandatory mediation in Ontario becoming a permanent feature of the litigation landscape, perhaps the influx in mediation had not yet allowed mediators to reconcile or become comfortable with the notion of having power in the process, especially given the importance of mediator neutrality.

With the increase in practice and experience over the last 20 years, the idea of power and influence may be more familiar to mediators, even if they differ in their opinions on whether it lies in process, outcome, or both. Further, it is important to note that while Hanycz's study was confined to Ontario, the participants had varied backgrounds and experiences, similar to this study. In this study, there was no variation in responses between the lawyer and non-lawyer participants in this study on the question of influence; however, it is interesting to note that the

two participants who initially objected to having influence both had a law background. The other interesting finding here is that the main reason given by the participants for being unable to actively influence the parties or the process was the presence of legal representatives.

This convergence of findings underscores the power and influence mediators have in choosing how they practice, their choice of style and approach, and how that choice positions them to directly determine the achievement of a variety of goals, including those program goals that go above and beyond efficiency-based outcomes.

This chapter progresses beyond simply presenting the findings to analyze the gap between theory and practice. It reinforces that a clear understanding of the theoretical styles and approaches is essential for mediators to practice intentionally and effectively. This knowledge allows them to make informed choices about their interventions, adopt their style and approach, and critically reflect on their practice. It explores how aligning practice with personal values may facilitate the integration of empowerment and recognition into the mediation process. If mediators have a greater awareness of how and why they practice, supported by a fully informed repertoire of theoretical approaches, the opportunity to achieve the more complex goals becomes purposeful rather than simply by chance and not at the expense of the efficiency goals for which mediation has proven to be successful in achieving.

Further, these findings also highlight the significant influence mediators hold within the mediation process. This ability to influence, coupled with a thorough understanding of theoretical styles and approaches and a conscious alignment of values and practices, equips mediators to make informed choices regarding the process aimed to support the achievement of diverse program goals. By recognizing and leveraging their influence, mediators can facilitate

not only resolution but empowerment and recognition; outcomes that are more likely to result in personal, cultural and systemic change. These outcomes align with the non-efficiency program goals that mediation is in a perfect position to assist in achieving. This transformative potential is why many have referred to the promise of mediation, highlighting the possibility for change and growth through the process.

CHAPTER 10 – CONCLUSION

Looking back, it is fascinating to reflect on how a spark of curiosity 25 years ago ignited a journey of inquiry, culminating in this thesis. This journey both answered questions and raised new ones, deepening my understanding of the theory and prompting me to contemplate my values and goals as a mediator. While this research has been personally transformative, the findings and implications for the field are also meaningful.

To arrive at the findings and determine the implications for the field, this research sought to explore how mediators in Saskatchewan, Manitoba, and Ontario understand the different theoretical styles and approaches to mediation. In exploring their understanding, this study also uncovered how they position themselves within that understanding and how their underlying values inform their practice. Conducted almost 30 years after debate was sparked within the field, it captures the current state of mediation within the context of government-implemented programs that prioritize goals beyond mere efficiency.

In this final chapter, I will present a summary of the key findings from this research, followed by an acknowledgment of the biases inherent in this study as well as limitations to be considered when examining the findings. The chapter then details the implications of this study on the field and identifies opportunities for future research. Finally, I offer some concluding reflections on the research journey and the insights it has generated.

Prior to summarizing the key findings of this study, it is imperative to first emphasize that these findings do not suggest mediators are practicing poorly or ineffectually. Rather, the findings reinforce a gap between the theoretical knowledge available to mediators and their claimed practice. Eliminating the gap, however, could result in a *more* effective practice. The cause of the gap may be that the plethora of literature, opinions, and longstanding debates have

confused or obscured understanding for practitioners, perhaps even underscoring a belief that theory is not relevant to practice. While there is a question as to whether or not educational, training, and certification programs are also contributing to the knowledge gap, the existing scholarly literature, while extensive, could be considered esoteric, for both the new and experienced practitioner.

Further, the mediators in this study, like many others, demonstrated a level of passion for their vocation that is both obvious and admirable regardless of their underlying values and chosen style and approach. The findings simply highlight a general lack of theoretical knowledge and the potential for practitioners to lack a deeper understanding of how their values influence their practice. These gaps are relevant when practitioners engage in self-reflection, examine their values and motivations, and recognize the unique role they play in achieving desired outcomes.

It is also important to emphasize that this research is not intended to critique individual mediators' practice or dedication. Rather, it aims to highlight opportunities for change and growth by equipping practitioners with knowledge and self-awareness to make informed decisions and achieve diverse program goals. The following section summarizes the key findings, focusing on the identified disparities among theoretical understanding, personal values, and the impact on practice.

Summary of Key Findings

The key findings of this research reveal a complex interconnection between mediators' theoretical knowledge, personal values, and practical application, highlighting the importance of each in achieving desired outcomes. One finding revealed a significant inconsistency in how mediators define and describe the common theoretical styles and approaches to mediation. Reinforcing this inconsistency, various understandings were applied to the role of the mediator,

the purpose of any intervention and the desired outcome or goal. A lack of consistency and familiarity was most evident with respect to transformative mediation, where mediators have been influenced by general misconceptions causing them to disregard or dismiss it. These findings echo previous studies' findings, indicating a persistent and longstanding gap between theoretical knowledge and practical application within the field. This lack of shared understanding of theoretical styles and approaches may hinder mediator's ability to make informed decisions to practice intentionally and practically, potentially limiting their capacity to achieve diverse program goals.

Furthermore, the wavering in positioning with a particular style and approach is another finding consistent with previous research that has highlighted discrepancies between mediators' self-reported approaches and their actual practice. Potentially underscoring the lack of knowledge and understanding of the theoretical styles and approaches, and otherwise unexplored, a finding in this study demonstrates a tendency to align with a toolbox approach, rather than a specific theoretical framework. This preference for a less defined style and approach may further indicate a lack of understanding or a tendency to default to a more ambiguous option when faced with uncertainty. Regardless of the cause, these findings reinforce the need for greater clarity and understanding of the theoretical styles and approaches within the field. Building upon this need for clarity, this research also explored the values underlying mediators' practice in an effort to better understand how those same values they may influence their style and approach.

An analysis of motivations and meaningful stories was carried out to explore underlying values. Focusing on motivations for entering the field, it was discovered that mediators are driven by a range of personal values such as fairness, self-determination, and making a

difference in the lives of others. Many also sought to escape the adversarial culture of litigation and contribute something meaningful within a culture that aligned with their values. These motivations highlighted a desire to utilize skills in communication, negotiation, and empathy to help parties achieve resolution. This suggests that while mediators may not consciously identify with a transformative style and approach, their underlying values resonate with key elements of transformative mediation. Furthermore, the analysis of the most meaningful stories shared indicates that these motivating values are supported by values of empowerment and recognition.

Analysis of the most meaningful mediation stories reveals a prevalence of the core pillars of transformative mediation—empowerment and recognition—regardless of a lack of understanding and positioning with this style and approach. These stories contained numerous examples of empowerment and recognition demonstrated through actions such as, creating a safe space for open communication and emotional expression, facilitating party control over the process and outcome, encouraging mutual understanding and perspective-taking, and fostering opportunities for apology and forgiveness. These findings suggest that mediators, through their practice, already embody key values associated with transformative mediation. Beyond demonstrating these transformative values, mediators also wield significant influence within the mediation process, influence capable of shaping its direction and potential outcomes.

This study confirmed the significant influence mediators hold within the mediation process. While variation may exist in how influence is perceived to impact, specifically process, outcome, or both, it is broadly acknowledged that mediators have the ability to shape all aspects. This recognition of mediator influence underscores their capacity to not only facilitate resolution but also to guide the process in a way that supports the achievement of diverse program goals. This highlights the potential for wider adoption of transformative practices within the field,

which can support diverse program goals without sacrificing the more coveted goals of settlement or resolution. Despite these findings and important insights, it is crucial to acknowledge certain limitations inherent in the study's design and scope.

Limitations

One of the first limitations of this study was intentional. Even though the findings of this study are not lacking in breadth, as identified earlier, this research was always intended to be exploratory in nature and served only to generate preliminary insight and understanding to be used in future studies. More extensive research would be best served by a methodological approach such as grounded theory or an action research study respectively with the intention to either develop or test a theory or practice. Prior to embarking on more robust research like suggested, a supporting study using focus groups could provide an even greater level of insight. Such a study could explore this study's findings and how mediators understand the different theoretical styles and approaches to mediation, specifically in relation to their underlying values, beliefs, and program goals.

Secondly, while significant effort was invested in helping protect validity through participant selection, thus limiting the potential for selection bias, two issues still arise. One stems from the nonprobability sampling method and the reality that respondents choosing to participate in research do not necessarily represent the general population being studied. The other stems from my role as a practicing mediator along with my longstanding experience in the mediation community. Despite consideration given to the type and order of the interview questions, participants may have been influenced in their responses in keeping with interviewer bias (Neuman, 2012). There are several factors that play into such a bias; however, one factor is that participants can perceive, consciously or unconsciously, what the interviewer wants to hear

and will deliver responses accordingly. In the absence of using a structured interview approach with multiple interviewers, this is an expected limitation. On reflection, there were instances where participants assumed I was taking a position insofar as the application of transformative mediation, with some assuming support and others not. At the stage of the interviews, I held no such position and confirmed such, simply reiterating the focus of the research.

Regardless of any position I might take concerning the application of transformative mediation, any assumption by a small number of participants does, however, touch on a concern I had from the outset of this research. Notwithstanding the popularity of action research and the imperative role of the reflective practitioner, turning the focus on one's own practice could call objectivity into question (Stringer, 2014). Action research has addressed this challenge and insofar as other qualitative methodologies, according to others (McNiff & Whitehead, 2011; Stringer, 2014; Willig, 2013) the researcher who shares an environment with the participants is motivated and invested in the research. This investment should not be interpreted as a bias to be managed but instead as a frame in which the research is shaped. The awareness of this reality has informed all aspects of this study and brings me to the third limitation.

As outlined in Chapter 7, a combination of inductive and deductive thematic analysis was applied to the interview data. While an interpretivist paradigm and phenomenological design positions this research to gather rich information and generate greater knowledge and understanding, the extent of interpretation at multiple levels, and the impact of subjectivity is not insignificant. As the sole researcher and based on my belief that a researcher is like a mediator who brings values and potential biases to the process, I cannot guarantee the findings can be entirely duplicated. This is not unique to this study and is a common critique of all qualitative research.

Lastly, the most evident and obvious limitation of this research is specific to the number of participants; however, limitations also exist concerning participant characteristics specific to the recency of their training as well as the representation of the provincial programs. While 15 participants is considered sufficient, and is in keeping with other similar qualitative studies, a larger sample could have provided a more diverse range of perspectives and experiences. Additionally, the sample is quite limited in mediators with more recent and formal training. This limitation is potentially significant because more recently trained mediators may have benefited from updated training curricula and professional development opportunities that incorporate current research and practice developments regarding theory in the practice of mediation. Their perspectives may have impacted the overall findings related to mediator understanding.

Specific to the provincial programs, mediators with experience in the Manitoba program were under-represented. This is unfortunate because the Manitoba program is relatively new compared to those in Saskatchewan and Ontario, and based on its evaluation has a greater emphasis on non-efficiency goals. A larger Manitoba sample could have provided more nuanced understanding of how these program goals might influence mediators' values as well as understanding their alignment with the different theoretical styles and approaches. This could have enriched the comparison between provinces and provided a deeper understanding of the relationship between program goals, mediator values, and theoretical frameworks.

Notwithstanding these limitations, and in consideration of similar findings from earlier research, this study reinforces an opportunity for greater learning on the part of practitioners, trainers and government program administrators.

Implications

Although similar research exploring mediators' understanding of the styles and approaches to mediation has been conducted, the majority of the studies have been based in the United States. Any significant Canadian studies are now in excess of 20 years and used either different data sources or sought to address a different research question. To my knowledge, this is the first study to explore how mediators working with general civil matters across several provinces understand the more prevalent theoretical styles and approaches within the context of government program goals and objectives. Furthermore, in accepting the debate around the different styles and approaches to mediation, there is currently no research exploring the values of mediators, motivating their practice, and how they may align with the theoretical styles and approaches, thus opening the door to how best to achieve the important and somewhat elusive non-efficiency goals of government programs. As such, this study's findings highlight four implications for the field with the first two specific to practicing mediators and the last two related to training and program administration respectively.

Mediator Self-Reflection

These findings suggest that mediators should prioritize self-reflection. As Cloke (2001) suggests, the act of self-reflection ensures clarity and a deep understanding of one's practice. By engaging in critical self-reflection, mediators can examine their knowledge and understanding of the theoretical styles and approaches available to them, increase awareness of their values and how they may or may not align with their practice, and lastly, recognize how their knowledge and values may influence the process. This self-reflection can help mediators gain a deeper understanding about their style and approach and make more informed choices regarding their practice.

Any effort at self-reflection should also include an exploration of how external factors, such as program goals and objectives, party dynamics, and the influence of lawyers or representatives, might influence their choices which can potentially lead to a disconnect between their values and their practice. Further research is needed to explore the specific impact of these factors and how they may contribute to mediators' practice. Nevertheless, by engaging in this self-reflection, mediators can gain a deeper understanding of their practice and identify areas for growth and development.

Continuing Education and Professional Development

This study highlights the need for ongoing education and professional development for mediators. Regardless of whether mediators choose to subscribe to a single style and approach or a toolbox approach, a thorough understanding of theoretical frameworks is essential for informed decision-making concerning one's practice. As Corbin (2009) emphasizes, "we can't have practitioners walking around doing things without having a body of theoretical knowledge, along with their experience, to guide their actions" (p. 40). This underscores the vital connection between theory and practice, a connection that was both central and necessary for methodological choices made in this research. Just as a strong theoretical framework guided the research design and analysis, so too should a deep understanding of theoretical styles and approaches inform and enhance mediator practice.

This is further supported by Lande (2023), while advocating for a dispute system design (DSD) theory that prioritizes practical considerations and "high-quality decision making" (p. 351), still emphasizes that "traditional mediation models would be elements of mediators' actual mediation systems" (p. 349). This suggests that knowledge of the theoretical styles and approaches is fundamental to a mediator's practice, regardless of their preferred approach.

Continuing education opportunities should provide mediators with in-depth knowledge of the theoretical styles and approaches, allowing them to critically evaluate their own practice and adjust if required. This ongoing learning can enhance mediators' effectiveness and contribute to improved outcomes for clients and programs.

Training and Curriculum Development

Building on the discussion regarding the importance of continuing education and professional development for mediators, this study may also highlight the potential need for mediator training programs to critically evaluate their curricula. Such an evaluation could ensure they are accurately and comprehensively covering all theoretical styles and approaches, with particular attention to addressing any misconceptions or lack of understanding of transformative mediation. Given that the formal training of most participants in this study occurred more than 15 years ago, some over 25 years ago, it was not surprising they had difficulty recalling specifics of the training. Nevertheless, the findings reveal a general lack of understanding and a prevalence of misconceptions surrounding transformative mediation.

This suggests a potential ongoing need for training programs to not only provide comprehensive content on each theoretical style and approach but also to actively address common misconceptions to ensure that students of mediation, regardless of any experience or background, have the opportunity to develop a clear and accurate understanding of each. Future research could analyze existing training curricula and explore effective learning strategies for addressing misconceptions and fostering a deeper understanding of all theoretical styles and approaches. This is particularly crucial for transformative mediation, with its emphasis on empowerment and recognition, as it has the potential to best achieve the non-efficiency goals of government-implemented programs, such as those focused on systemic or cultural change.

Program Administration and Support

This study reinforces that there continues to be a lack of understanding of the theoretical approaches to mediation amongst mediators practicing in government-implemented programs. This key finding is relevant for program administrators who need to understand the potential impact on the achievement of program goals. Given the findings of this study, and in keeping with the need for mediators to engage in self-reflection and continuing education and development, it is essential for program administrators to clearly articulate and emphasize all program goals and expected outcomes. This clarity can help mediators better understand the program's goals and make informed choices about their approach to mediation. Program administrators can achieve this through various means such as:

- Developing clear and concise program documentation that outlines the program's goals, objectives, and expected outcomes.
- Providing regular reporting and measurement of program outcomes to reinforce the importance of achieving both efficiency and non-efficiency goals.
- Offering ongoing training opportunities that explore the relationship between different theoretical styles and approaches and the achievement of various program goals.

While program administrators can provide guidance and support, the choice of which style and approach is practiced ultimately rests with the individual mediator who, as confirmed in this study and in previous research (Hanycz, 2005), has significant power and influence over the process. This autonomy allows mediators to tailor their approach to the specific needs and dynamics of each case. By fostering a clear understanding of program goals and providing opportunities for ongoing learning, program administrators can assist mediators in making

informed choices that align with the program's goals and objectives, thus contributing to the achievement of all desired outcomes.

The findings of this study are relevant to mediators, training curricula, and program administrators. As proposed, mediators can benefit from engaging in self-reflection and pursuing continuing education opportunities to deepen their understanding of theoretical styles and approaches in order to make fully informed choices about their practice. Training programs should critically evaluate their curricula to ensure they are accurately and comprehensively covering all theoretical styles and approaches, focusing on the purpose, practice, and premise of each. Program administrators play a crucial role in clarifying and emphasizing program goals and supporting mediators to make informed choices about their style and approach to mediation. Building upon these implications for the field, several opportunities exist for deepening and expanding on this research to further inform the practice.

Future Research Opportunities and Questions

To address the limited representation of Manitoba mediators in this study, a valuable future research opportunity would be to conduct a follow-up supplementary study solely targeting mediators within the Automobile Injury Mediation Program. A focused study would utilize the same interview questions and analysis techniques as the current study, ensuring comparability of data and allowing for direct comparison of findings across provinces. This comparison could reveal important insights into the influence of program-specific factors, such as the voluntary nature of the program and its explicit non-efficiency goals, on mediators' understanding and self-reported application of the theoretical styles and approaches. The results of this supplementary study could strengthen the overall findings and enhance their generalizability across multiple Canadian provinces or identify additional opportunities for

research. Mitigation of potential bias due to exposure to this study's findings is both possible and manageable with the appropriate study design.

Given the significant finding of this study that many mediators' actual practices seem to diverge from the values and motivations they espouse, further elevating the disconnect between theory and practice, important questions arise regarding the factors that influence this discrepancy. Future research should prioritize investigating this disconnect, exploring the reasons why mediators' practices deviate from their values, and examining the implications of this divergence for both mediators and clients. Focus groups or in-depth interviews could be used to explore questions such as:

- What specific factors (i.e. time constraints, party or representative expectations, program goals) create barriers to practicing in alignment with one's values or preferred style and approach?
- How do mediators experience and reconcile any disconnect between values and practice?
- Does this disconnect lead to internal conflict or ethical dilemmas for mediators?
- What strategies or support systems can be implemented to help mediators better align their practice with their values?

In light of the implications for training and curriculum development in the field, an additional research opportunity could involve analyzing training curricula across various settings. Additionally, interviews with trainers focused on the topic of theoretical styles and approaches to mediation could potentially identify gaps that contribute to the longstanding and widespread lack of knowledge and understanding identified in

Lastly, as previously referred to, Lande (2023), reporting on Kressel's (2013) work, noted that as mediators gain experience, they may increasingly rely on intuition. This reliance on intuition may be needed to address the range of decision-making necessitated in a single mediation session; however, it may also lead to a distancing from any theoretical styles and approaches learned in training prior to entry into their practice. Given that most participants in this study had extensive experience and were far removed from their initial training, a valuable avenue for future research would be to explore how experience in mediation, coupled with a reliance on intuition, affects mediators' ability to explicitly define and explain theoretical styles and approaches, even when their practice might implicitly inform them. This investigation could utilize observations of mediators in practice to determine whether their behaviours align with the theoretical styles and approaches, despite their difficulties in articulating them. By incorporating observational data, which has consistently been recognized as mostly absent in the study of mediation practice, future research could expand upon the findings of this study and others to offer a more comprehensive understanding of the relationship between theoretical knowledge, experience, intuition, and actual practice.

This deeper understanding could inform the development of enhanced training programs that bridge the gap between theory and practice and encourage greater self-reflection among mediators regarding the role of intuition and its alignment with theoretical frameworks. Ultimately, such research has the potential to enhance mediator practice and improve outcomes for clients, including government programs, by fostering a more conscious approach to mediation. The journey that began with a simple question 25 years ago has led me here—to answers but also to a whole new set of ideas and more questions. I'm excited to see where these questions may lead.

Concluding Reflections

My hope is that this research sparks further inquiry and reflection within the field of mediation and provides valuable insights and inspiration for a renewed commitment to theory and the potential of mediation. Whether you are a student delving into the nuances of the theory behind the practice, a program administrator seeking to ensure diverse goals are met, an academic crafting comprehensive training curricula, or a practitioner seeking to deepen your understanding, I encourage you to find value in the findings explored in this thesis.

This research journey has been personally transformative for me, deepening my understanding of the complex interplay between theoretical knowledge, personal values, and practical application. The conversations with fellow practitioners, the stories they shared, and the insights into their motivations to practice have deepened my understanding of the potential of mediation and reinforced my hope that it will continue to serve as the intended alternative to adversarial processes. As I continue on my path as a mediator, I am committed to embracing these insights, fostering greater self-awareness, and contributing to a field through support of empowerment and recognition. Just like the participant who eloquently quoted Ulysses and acknowledged the profound impact of each mediation encounter, I too am a part of everything I experienced in this research journey.

As I reflect on the title of this thesis and the overarching question driving this research, I am reminded of William Ury's latest book: *Possible: How We Survive (and Thrive) in An Age of Conflict* (2024). In this book, Ury shares an unwavering belief in human potential and emphatically states that reaching an agreement is no longer enough. According to Ury, "the new *yes* is a transformative yes" (p. 11). Reading these words and being encouraged by the

exploration of mediator values, I believe the answer to my question is a resounding yes: Transformative mediation *is* possible in a numbers game.

To conclude, I offer an inspiring quote by Joseph B. Stulberg. In this quote, Stulberg (2021) reinforces the fundamental purpose of mediation and expresses great hope and encouragement for the practice of mediation:

> I believe there is something majestic and noble about the mediation process and the privilege of serving as a mediator within it. That majesty is tied to the dominant democratic values and principles – equality, personal responsibility, and dignity – that structure participant engagement in it. But sustaining public confidence in mediation comes only by having reflective, responsible persons participate in it and who, informed by that experience, thoughtfully examine and adjust mediation's format to incorporate developing social innovations and practices to ensure that mediation's use continues to meet the unmet and emerging social needs of our fellow citizens. (p. 149)

References

Aiwazian, A. (2008). Transformative mediation: Empowering the oppressed voices of a multicultural city to foster strong democracy. *The Scholar*, *11*(1), 27.

Alberstein, M. (2007). Forms of mediation and law: Cultures of dispute resolution. *Ohio State Journal on Dispute Resolution*, *22*(2), 321–376.

Alexander, N. (2008). The mediation metamodel: Understanding practice. *Conflict Resolution Quarterly*, *26*(1), 97–123. https://doi.org/10.1002/crq.225

Alfini, J. J. (1991). Trashing, bashing, and hashing it out: Is this the end of good mediation? *Florida State University Law Review*, *19*(1), 47–76.

Alfini, J. J. (1997). Evaluative versus facilitative mediation: A discussion symposium. *Florida State University Law Review*, *24*(4), 919–936.

Antes, J. R., Folger, J. P., & Della Noce, D. J. (2001). Transforming conflict interactions in the workplace: Documented effects of the USPS redress program. *Hofstra Labor & Employment Law Journal*, *18*(2), 429–468.

Antes, J. R., & Saul, J. A. (2001). Evaluating mediation practice from a transformative perspective. *Mediation Quarterly*, *18*(3), 313–323. https://doi.org/10.1002/crq.3890180309

Billikopf, G. (2009). *Party directed mediation: Helping others resolve differences* (2nd ed). University of California.

Birke, R. (2000). Evaluation and facilitation: Moving past either/or symposium. *Journal of Dispute Resolution*, *2000*(2), 309–320.

Bogdan, R. C., & Biklen, S. K. (2007). *Qualitative research for education: An introduction to theories and methods.* (5th ed.). Allyn & Bacon.

Bowling, D., & Hoffman, D. (2000). Bringing peace into the room: The personal qualities of the mediator and their impact on the mediation. *Negotiation Journal*, *16*(1), 5–28. https://doi.org/10.1111/j.1571-9979.2000.tb00199.x

Bowling, D., & Hoffman, D. (Eds.). (2003). *Bringing peace into the room: How the personal qualities of the mediator impact the process of conflict resolution* (1st ed). Jossey-Bass.

Brooker, P. (2007). An investigation of evaluative and facilitative approaches to construction mediation. *Structural Survey*, *25*(3/4), 220–238. https://doi.org/10.1108/02630800710772818

Brown, C. J. (2004). Facilitative mediation: The classic approach retains its appeal. *Pepperdine Dispute Resolution Law Journal*, *4*(2). https://digitalcommons.pepperdine.edu/drlj/vol4/iss2/9

Bryman, A. (2008). *Social research methods* (3rd ed). Oxford University Press.

Bush, R. A. B. (2023). Beyond the toolbox: Values-based models of mediation practice. *Cardozo J. Conflict Resolution*, *24*, 255.

Bush, R., & Folger, J. (1994). *The promise of mediation: Responding to conflict through empowerment and recognition* (1. ed). Jossey-Bass.

Bush, R., & Folger, J. (2005). *The promise of mediation: The transformative approach to conflict* (Revised). Jossey-Bass.

Bush, R., & Folger, J. (2013). Response to Condlin's critique of transformative mediation. *Cardozo Journal of Conflict Resolution*, *15*(1), 231–241.

Canadian Forum on Civil Justice. (n.d.). *Saskatchewan Queen's Bench mandatory mediation.* Retrieved August 31, 2024, from https://cfcj-fcjc.org/inventory-of-reforms/saskatchewan-queens-bench-mandatory-mediation/

Carrel, A. (2021). Dismantling the “facilitative” “evaluative” dichotomy: Reflecting on Riskin’s grid and predicting the future. In A. Hinshaw, A. K. Schneider, & S. R. Cole (Eds.), *Discussions in dispute resolution: The foundational articles* (pp. 188–191). Oxford University Press.

Carter, A., & Watts, S. (2016). The role of language interpretation in providing a quality mediation process. *Contemporary Asia Arbitration Journal*, *9*, 301–318.

Chan-Serafin, S., & Wall, J. A. (2010). Do mediators walk their talk in civil cases. *Conflict Resolution Quarterly*, *28*(1), 3–22.

Charkoudian, L., Ritis, C. D., Buck, R., & Wilson, C. L. (2009). Mediation by any other name would smell as sweet—or would it? The struggle to define mediation and its various approaches. *Conflict Resolution Quarterly*, *26*(3), 293–316. https://doi.org/10.1002/crq.234

Clark, M. E. (1990). Meaningful social bonding as a universal human need. In J. W. Burton (Ed.), *Conflict: Human needs theory*. Macmillan.

Clarke, S. H., Ellen, E. D., & McCormick, K. (1995). *Court-ordered civil case mediation in North Carolina: An evaluation of its effects* (p. 94). North Carolina: Institute of Government. https://www.aboutrsi.org/files/CourtOrderedMedNC.pdf

Cloke, K. (2001). *Mediating dangerously: The frontiers of conflict resolution*. Jossey-Bass.

Cloke, K. (2004). Journeys into the heart of conflict other contributions. *Pepperdine Dispute Resolution Law Journal*, *4*(2), 219–250.

Colatrella, M. T. (2021). True enough. In A. Hinshaw, A. K. Schneider, & S. R. Cole (Eds.), *Discussions in dispute resolution: The foundational articles* (pp. 183–187). Oxford University Press.

Condlin, R. (2013). The curious case of transformative dispute resolution: An unfortunate marriage of intransigence, exclusivity, and hype. *Cardozo Journal of Conflict Resolution*, *14*(3), 621–682.

Corbin, J. (2009). Taking an analytic journey. In *Developing grounded theory: The second generation* (Vol. 3). Left coast press. https://research-proposal.ir/wp-content/uploads/2019/06/Developing_Grounded_Theory__The_Second_Generation.pdf#page=128

Corman Aaron, M. (1996). ADR toolbox: The highwire art of evaluation. *Alternatives, 14*(5), 62–64. CPR Institute for Dispute Resolution. https://doi.org/10.1002/alt.3810140506

Crabtree, B., & Miller, W. (2023). *Doing Qualitative Research: Vol. Third edition*. SAGE Publications, Inc.

Creswell, J. W. (2009). *Research design: Qualitative, quantitative, and mixed methods approaches* (3rd ed.). SAGE Publications Ltd. https://www.ucg.ac.me/skladiste/blog_609332/objava_105202/fajlovi/Creswell.pdf

Crocker, C. A., Osler Hampson, F., & Aall, P. (2003). Introduction. In *Herding cats: Multiparty mediation in a complex world* (3rd ed.).

Della Noce, D. J. (1999). Seeing theory in practice: An analysis of empathy in mediation. *Negotiation Journal*, *15*(3), 271–297.

Della Porta, D. (Ed.). (2014). *Methodological practices in social movement research* (First edition). Oxford University Press.

Erez-Navot, D. (2021). The Riskin grid: A mixed legacy. In A. Hinshaw, A. K. Schneider, & S. R. Cole (Eds.), *Discussions in dispute resolution: The foundational articles* (pp. 192–196). Oxford University Press.

Feerick, J., Izumi, C., Kovach, K., & Love, L. (1995). Standards of Professional Conduct in Alternative Dispute Resolution Symposium. *Journal of Dispute Resolution*, *1995*(1), 95–128.

Fisher, R. (1990). Needs theory, social identity and an eclectic model of conflict. In J. W. Burton (Ed.), *Conflict: Human needs theory*. Macmillan.

Fisher, R., Ury, W., & Patton, B. (1991). *Getting to yes: Negotiating agreement without giving in* (2. ed). Penguin Books.

Folberg, J., & Taylor, A. (1984). *Mediation: A comprehensive guide to resolving conflicts without litigation* (1st ed). Jossey-Bass.

Folger, J., & Bush, R. (1996). Transformative mediation and third-party intervention: Ten hallmarks of a transformative approach to practice. *Mediation Quarterly*, *13*(4), 263–278. https://doi.org/10.1002/crq.3900130403

Folger, J., & Bush, R. (Eds.). (2001). *Designing mediation: Approaches to training and practice within a transformative framework*. Institute for the Study of Conflict Transformation.

Folger, J., & Bush, R. (2005). A response to Gaynier's "transformative mediation: In search of a theory of practice." *Conflict Resolution Quarterly*, *23*(1), 123–127. https://doi.org/10.1002/crq.128

Franz, P. L. (1998). Habits of a highly effective transformative mediation program. *Ohio State Journal on Dispute Resolution*, *13*(3), 1039–1070.

Friedman, Y. (1990). The role of knowledge in conflict resolution. In J. W. Burton (Ed.), *Conflict: Human needs theory* (pp. 257–264). Macmillan.

Furlong, G. T. (2005). *The conflict resolution toolbox: Models & maps for analyzing, diagnosing, and resolving conflict*. J. Wiley & Sons Canada.

Gaynier, L. P. (2005). Transformative mediation: In search of a theory of practice. *Conflict Resolution Quarterly*, *22*(3), 397–408.

Gelinas, L., Pierce, R., Winkler, S., Cohen, I. G., Lynch, H. F., & Bierer, B. E. (2017). Using social media as a research recruitment tool: Ethical issues and recommendations. *The American Journal of Bioethics*, *17*(3), 3–14. https://doi.org/10.1080/15265161.2016.1276644

Golann, D. (2013). *Sharing a mediator's powers: Effective advocacy in settlement*. American Bar Association, Section of Dispute Resolution.

Golann, D., & Corman Aaron, M. (2019). Beyond abstinence: The need for safe, impartial evaluation in mediation. *Dispute Resolution Magazine*, *22*, 5.

Gold, L. (2003). Mediation and the culture of healing. In D. Bowling & D. A. Hoffman (Eds.), *Bringing peace into the room: How the personal qualities of the mediator impact the process of conflict resolution* (1st ed, pp. 183–214). Jossey-Bass.

Hann, R., Baar, C., Axon, L., Binnie, S., & Zemens, F. (2001). *Evaluation of the Ontario mandatory mediation program (Rule 24.1): Final report—The first 23 months*. Queen's Printer. https://digitalcommons.osgoode.yorku.ca/faculty_books/115

Hanycz, C. M. (2005). Through the looking glass: Mediator conceptions of philosophy, process and power special issue - civil justice and civil justice reform. *Alberta Law Review*, *42*(3), 819–886.

Harper, C. (2006). Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation. *Journal of Dispute Resolution*, *2006*(2).

Hedeen, T., & Coy, P. G. (2000). Community mediation and the court system: The ties that bind. *Mediation Quarterly*, *17*(4), 351–368.

Herrman, M. S., Hollett, N. L., Eaker, D. G., & Gale, J. (2003). Mediator reflections on practice: Connecting select demographics and preferred orientations. *Conflict Resolution Quarterly*, *20*(4), 403–428.

Hoffman, D. A. (1999). Confessions of a problem-solving mediator. *Society of Professionals in Dispute Resolution News*, *Summer*.

Hoffman, D. A. (Director). (2009, July 2). *David Hoffman: Using tools in a toolbox* [Video recording]. Mediate.com. https://mediate.com/david-hoffman-using-tools-in-a-toolbox-video/

Holstein, J., & Gubrium, J. (1995). *The Active Interview*. SAGE Publications, Inc. https://doi.org/10.4135/9781412986120

Keet, M. (2005). *Developing frameworks for the evaluation of mandatory mediation: Considering systemic transformation in Saskatchewan* [Master's thesis, Saskatchewan University, College of Law]. https://harvest.usask.ca/items/878aeaeb-943e-4207-acfb-edda9a8d4336

Keet, M. (n.d.). *Mandatory mediation*. Encyclopedia of Saskatchewan. https://esask.uregina.ca/entry/mandatory_mediation.html

Keet, M., Heavin, H., & Lande, J. (2020). *Litigation interest and risk assessment: Help your clients make good litigation decisions*. American Bar Association.

Keet, M., & Salamone, T. B. (2001). From litigation to mediation: Using advocacy skills for success in mandatory or court-connected mediation challenges for the legal profession. *Saskatchewan Law Review*, *64*(1), 57–98.

Kidner, J. (2011). The limits of mediator labels: False debate between facilitative versus evaluative mediator styles. *Windsor Review of Legal and Social Issues*, *30*, 167–192.

Kovach, K. K. (2021). Growth from the Grid? In A. Hinshaw, A. K. Schneider, & S. R. Cole (Eds.), *Discussions in dispute resolution: The foundational articles* (pp. 197–200). Oxford University Press.

Kovach, K. K., & Love, L. P. (1996). "Evaluative" mediation is an oxymoron. *Alternatives*, *14*(3), 31–32. CPR Institute for Dispute Resolution. https://doi.org/10.1002/alt.3810140304

Kovach, K. K., & Love, L. P. (1998). Mapping mediation: The risks of Riskin's grid. *Harvard Negotiation Law Review*, *3*(71), 71–110.

Kressel, K. (2007). The strategic style in mediation. *Conflict Resolution Quarterly*, *24*(3), 251–284.

Kressel, K. (2013). How do mediators decide what to do: Implicit schemas of practice and mediator decisionmaking. *Ohio State Journal on Dispute Resolution*, *28*(3), 709–736.

Kuttner, R. (2006). Striving to fulfill the promise: The purple house conversations and the practice of transformative mediation. *Negotiation Journal*, *22*(3), 331–349. https://doi.org/10.1111/j.1571-9979.2006.00105.x

Lande, J. (2000). Toward more sophisticated mediation theory. *Journal of Dispute Resolution, 2000*(2), 15.

Lande, J. (2023). Real mediation systems to help parties and mediators achieve their goals. *Cardozo Journal of Conflict Resolution*, 347–387.

Lederach, J. P. (2003). *The little book of conflict transformation*. Good Books.

Lederach, J. P. (2005). *The moral imagination: The art and soul of building peace*. Oxford University Press.

Lederach, J. P., & Thapa, P. (2018). Staying true in Nepal: Understanding community mediation through action research. In T. P. d'Estrée & R. J. Parsons (Eds.), *Cultural Encounters and Emergent Practices in Conflict Resolution Capacity-Building* (pp. 33–58). Springer International Publishing. https://doi.org/10.1007/978-3-319-71102-7_2

Liebmann, M. (1997). Community and neighbourhood mediation: A UK perspective. In J. Macfarlane (Ed.), *Rethinking disputes: The mediation alternative* (pp. 169–199). Emond Montgomery Publication.

Little, J. A. (2007). *Making money talk: How to mediate insured claims and other monetary disputes* (1st ed). American Bar Association, Section of Dispute Resolution.

Love, L. P. (1997). The top ten reasons why mediators should not evaluate. *Cardozo Law Review*, 385–396.

Love, L. P. (2021). A star to steer her by. In A. Hinshaw, A. K. Schneider, & S. R. Cole (Eds.), *Discussions in dispute resolution: The foundational articles* (pp. 131–135). Oxford University Press.

Macfarlane, J. (1997). The mediation alternative. In J. Macfarlane (Ed.), *Rethinking disputes: The mediation alternative* (pp. 1–21). Emond Montgomery Publication.

Macfarlane, J. (2002). Culture change: A tale of two cities and mandatory court-connected mediation. *Journal of Dispute. Resolution, 2000*(2), 241-325.

Macfarlane, J., & Keet, M. (2005). Civil justice reform and mandatory civil mediation in Saskatchewan: Lessons from a maturing program. *Alberta Law Review*, *42*(3).

Macfarlane, J. (with The Ministry of the Attorney General in Ontario). (1995). *Court-based mediation for civil cases: An evaluation of the Ontario Court (General Division) ADR Centre*. Queen's Printer. http://archive.org/details/mag_00007535

Mackie, K. (1997). Mediation futures. In J. Macfarlane (Ed.), *Rethinking disputes: The mediation alternative* (pp. 371–379). Emond Montgomery Publication.

Macleod, L. H., Fleischmann, E. H., & DeMelo, A. (1998). The Future of Alternative Dispute Resolution in Ontario: Mechanics of the Mandatory Mediation Program. *Advocates' Quarterly*, *20*(4), 389–402.

McCormack, J., & Lanyon, S. (1997). Alternative dispute resolution in labour relations: A tale of two provinces. In J. Macfarlane (Ed.), *Rethinking disputes: The mediation alternative* (pp. 87–127). Emond Montgomery Publication.

McDermott, E. P. (2012). Discovering the importance of mediator style: An interdisciplinary challenge. *Negotiation and Conflict Management Research*, *5*(4), 340–353. https://doi.org/10.1111/j.1750-4716.2012.00111.x

McDermott, E. P., & Obar, R. (2004). What's going on in mediation: An empirical analysis of the influence of a mediator's style on party satisfaction and monetary benefit. *Harvard Negotiation Law Review*, *9*, 75–114.

McEwen, C. A., & Maiman, R. J. (1981). Small claims mediation in Maine: An empirical assessment. *Maine Law Review*, *33*, 237–268.

McNiff, J., & Whitehead, J. (2011). *All you need to know about action research* (2nd ed). SAGE.

Menkel-Meadow, C. (1995). The many ways of meditation: The transformation of traditions, ideologies, paradigms, and practices book review. *Negotiation Journal*, *11*(3), 217–242.

Menkel-Meadow, C., Love, L. P., Schneider, A., K., & Sternlight, J., R. (Eds.). (2011). *Dispute resolution: Beyond the adversarial model* (2nd ed). Aspen Publishers.

Merriam-Webster. (n.d). *Merriam-Webster.com dictionary*. Retrieved May 18, 2024, from https://www.merriam-webster.com/

Mitchell, C. R., Mitchell, C. R., & Banks, M. (1998). *Handbook of conflict resolution: The analytical problem-solving approach*. Pinter.

Moberly, R. B. (1997). Mediator gag rules: Is it ethical for mediators to evaluate or advise? *South Texas Law Review*, *38*(2), 669–680.

Moore, C. W. (1996). *The mediation process: Practical strategies for resolving conflict* (2nd ed). Jossey-Bass Publishers.

Nabatchi, T., & Bingham, L. B. (2001). Transformative mediation in the USPS Redress program: Observations of ADR specialists. *Hofstra Labor & Employment Law Journal*, *18*(2), 399–428.

Neuman, W. L. (2012). *Basics of social research: Qualitative and quantitative approaches* (3rd ed). Pearson.

Ontario Bar Association (n.d.) *Expanding mandatory mediation in Ontario*. Ontario Bar Association. https://www.oba.org/CMSPages/GetFile.aspx?guid=4f756ca7-2962-417b-aec6-18e1ae760d12

Owen, B. (2010, December 9). Province touts MPI mediator to expedite outstanding claims. *Winnipeg Free Press*. https://www.winnipegfreepress.com/local/2010/12/09/province-touts-mpi-mediator-to-expedite-outstanding-claims

Oxford University Press. (n.d). Transform. In *Oxford English dictionary*. Retrieved October 2024.

Panter, M. R. (2018). Is your mediator the one negotiating? *Chicago Daily Law Bulletin*, *164*(125), 2.

Pappas, B. A. (2021). Just settlement? Rethinking the mediator's goals. In A. Hinshaw, A. K. Schneider, & S. R. Cole (Eds.), *Discussions in dispute resolution: The foundational articles* (pp. 136–140). Oxford University Press.

Picard, C. (2000). *The many meanings of mediation; a sociological study of mediation in Canada.* [Doctoral dissertation, Carleton University]. https://doi.org/10.22215/etd/2000-04590

Picard, C. (2002). Common language, different meaning: What mediators mean when they talk about their work. *Negotiation Journal*, *18*(3), 251–268. https://doi.org/10.1111/j.1571-9979.2002.tb00743.x

Picard, C. (2004). Exploring an integrative framework for understanding mediation. *Conflict Resolution Quarterly*, *21*(3), 295–312.

Picard, C., & Melchin, K. R. (2007). Insight mediation: A learning-centered mediation model. *Negotiation Journal*, *23*(1), 35–53. https://doi.org/10.1111/j.1571-9979.2007.00126.x

Pinnegar, S., & Daynes, J. G. (2012). *Sage research methods - handbook of narrative inquiry: Mapping a methodology*. https://methods-sagepub-com.uml.idm.oclc.org/book/handbook-of-narrative-inquiry/n1.xml

Poitras, J., & Raines, S. (2013). *Expert mediators: Overcoming mediation challenges in workplace, family, and community conflicts*. Jason Aronson.

Pynchon, V. (2005, May 2). *Can transformative mediation work in commercial litigation? A conversation with Joseph P. Folger and Robert A. Baruch Bush*. Mediate.com. https://mediate.com/can-transformative-mediation-work-in-commercial-litigation-a-conversation-with-joseph-p-folger-and-robert-a-baruch-bush/

Raines, S. S. (2005). Can online mediation be transformative? Tales from the front. *Conflict Resolution Quarterly*, *22*(4), 437–451. https://doi.org/10.1002/crq.114

Reimer, L. E., Schmitz, C. L., Janke, E. M., Askerov, A., Strahl, barbara T., & Matyók, T. G. (2015). *Transformative Change*. Lexington Books.

Ries, H. & Power, P. (2020, February 20). *Community mediation research summary report*. St. Stephen's Community House and Winkler Institute for Dispute Resolution. https://www.osgoode.yorku.ca/wp-content/uploads/2021/01/Report-on-Community-Mediation.pdf

Riskin, L. (1994). Mediator orientations, strategies and techniques. In C. Menkel-Meadow (Ed.), *Foundations of Dispute Resolution* (Vol. 1, pp. 485–488). Ashgate.

Riskin, L. (1996). Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed. *Harvard Negotiation Law Review*, *1*, 7–52.

Riskin, L. (2003). Decisionmaking in mediation: The new old grid and the new new grid system. *Notre Dame Law Review*, *79*(1), 1–54.

Riskin, L. (2005). Replacing the mediator orientation grids, again: Proposing a 'new new grid system.' *Alternatives to the High Cost of Litigation*, *23*(8), 127–132. https://doi.org/10.1002/alt.20089

Schulz, J. L. (2018). Evaluating Manitoba's automobile injury mediation pilot project. *Manitoba Law Journal*, *41*(1), 21.

Scimecca, J. A. (1993). Theory and alternative dispute resolution: A contradiction in terms? In D. J. D. Sandole & H. Van der Merwe (Eds.), *Conflict resolution theory and practice: Integration and application* (pp. 211-221). Manchester University Press.

Senehi, J. J. (2000). *Constructive storytelling: Building community, building peace* [Doctoral dissertation, Syracuse University].

Senehi, J. (2020). Thery-building in peace and conflict studies: The storytelling methodology. In S. Byrne, T. Matyók, I. M. Scott, & J. Senehi (Eds.), *Routledge companion to peace and conflict studies* (pp. 45–56). Routledge, Taylor & Francis Group.

Senft, L. P. (2015). Transformative mediation: Transforming the adversarial ethic. *Experience*, *24*(3), 8–15.

Seul, J. R. (1999). How transformative is transformative mediation: A constructive-developmental assessment. *Ohio State Journal on Dispute Resolution*, *15*(1), 135–172.

Silbey, S. S., & Merry, S. E. (1986). Mediator settlement strategies. *Law & Policy*, *8*(1), 7–32.

Silverman, D. (2013). *Doing qualitative research* (Fourth edition). SAGE Publications Ltd.

Sites, P. (1990). Needs as analogues of emotions. In J. W. Burton (Ed.), *Conflict: Human needs theory* (pp. 7–33). Macmillan.

Stitt, A. (2003). *Mediating commercial disputes*. Canada Law Book.

Stringer, E. T. (2014). *Action research* (Fourth edition). SAGE.

Stulberg, J. B. (1997). Facilitative versus evaluative mediator orientations: Piercing the grid lock symposium. *Florida State University Law Review*, *24*(4), 985–1006.

Stulberg, J. B. (2021). Revisiting mediator neutrality. In A. Hinshaw, A. Schneider K., & S. R. Cole (Eds.), *Discussions in dispute resolution* (pp. 145–149). Oxford University Press.

Suri, H. (2011). Purposeful sampling in qualitative research synthesis. *Qualitative Research Journal*, *11*(2), 63–75. https://doi.org/10.3316/QRJ1102063

TED. (2016, June 21). *David Hoffman: Lawyers as peacemakers. Really?!? Yes, really.* [Video]. YouTube. https://www.youtube.com/watch?v=JKXv1_Sqe_4

Umbreit, M. S. (1997). Humanistic mediation: A transformative journey of peacemaking. *Mediation Quarterly*, *14*(3), 201–213. https://doi.org/10.1002/crq.3900140305

Umbreit, M. S. (1998). Restorative justice through victim-offender mediation: A multi-site assessment. *The Western Criminology Review*, *1*(1).

United States Postal Service. (n.d.) *Resolve Employment Disputes Reach Equitable Solutions Swiftly [REDRESS]*. Retrieved September 16, 2024, from https://about.usps.com/who/legal/redress/

Ury, W. (1993). *Getting past no: Negotiating your way from confrontation to cooperation* (Rev. ed). Bantam Books.

Ury, W. (2024). *Possible: How we survive (and thrive) in an age of conflict* (First edition). Harper Business, an imprint of HarperCollins Publishers.

Waldman, E. A. (1998). The evaluative-facilitative debate in mediation: Applying the lens of therapeutic jurisprudence. *Marquette Law Review*, *82*, 17.

Walker, J. (1997). Family mediation. In J. Macfarlane (Ed.), *Rethinking disputes: The mediation alternative* (pp. 53–86). Emond Montgomery Publication.

Weinstein, L. (2018). *The 7 principles of conflict resolution: How to resolve disputes, defuse difficult situations and reach agreement* (First edition). Pearson.

Weldon, J. P. (2012). Transformative mediation: Putting party self-determination into practice. *ADRIC Journal*. 30-36.

Welsh, N. (2004). Stepping back through the looking glass: Real conversations with real disputants about institutionalized mediation and its value. *Ohio State Journal on Dispute Resolution*, *19*(2), 573–678.

Willig, C. (2013). *Introducing qualitative research in psychology* (3rd ed). McGraw-Hill Open University Press.

Winslade, J., & Monk, G. (2000). *Narrative mediation: A new approach to conflict resolution* Research Gate.

Wissler, R. L. (2002). Court-connected mediation in general civil cases: What we know from empirical research. *Ohio State Journal on Dispute Resolution*, *17*(3), 641–704.

Woolford, A., & Ratner, R. S. (2009). Mediation frames/justice games. In D. J. D. Sandole, S. Byrne, I. Sandole-Staroste, & J. Senehi (Eds.), *Handbook of conflict analysis and resolution* (pp. 315–326). Routledge.

Zumeta, Z. (2018, February 27). *Styles of mediation: Facilitative, evaluative, and transformative mediation*. Mediate.com. https://mediate.com/styles-of-mediation-facilitative-evaluative-and-transformative-mediation/

Appendix A – Participant Recruitment Survey Questions

Introduction

Thank you for showing an interest in this important Canadian-based research!

The purpose of this academic research study is to understand the various styles and approaches mediators use to assist clients in mediation connected with government programs in Ontario, Manitoba, and Saskatchewan. This survey is intended to identify research participants only. Selected individuals will be contacted by

the Principal Researcher for consent to participate in interviews. The interviews, conducted in English, and the potential and option for focus groups will form the basis of a Master's Thesis titled "*Transformative Mediation: Is it possible in a numbers game?*".

Completing the full survey should take less than 8 minutes. Participation in this survey is voluntary and you can leave the survey at any time by closing the browser session. Incomplete survey results will not be recorded. If you cannot complete the survey at one time, simply leave the page and return to it later.

By participating in this survey, you are agreeing that any contact information provided can be used by the researcher for the purpose of participant selection only. Response data is anonymous and has no personal identifiers **unless** you provide contact details. All information provided in this survey will be held in the strictest form possible and will be destroyed no later than August 31, 2023.

The survey will remain open until 11:59 pm March 31, 2023.

If at any time you have questions about this survey or the participant selection, please contact Kimberly Cork, Principal Researcher, at corkk@myumanitoba.ca or Dr.

Jessica Senehi, Associate Professor, Peace and Conflict Studies, University of Manitoba, Thesis Advisor & Research Supervisor at jessica.senehi@umanitoba.ca.

- ○ Click here, followed by the forward arrow, if you **DO NOT** wish to participate at this time.
- ○ Click here, followed by the forward arrow, if you **CONSENT** to the above terms.

What province(s) or territories do you actively practice mediation in? Please check all that apply.

- ☐ British Columbia
- ☐ Alberta
- ☐ Saskatchewan
- ☐ Manitoba
- ☐ Ontario
- ☐ Quebec
- ☐ Newfoundland & Labrador
- ☐ Nova Scotia
- ☐ PEI
- ☐ Nunavut
- ☐ Northwest Territories
- ☐ Yukon
- ☐ New Brunswick
- ☐ Not in Canada

If you practice, or have practiced, in Ontario, Manitoba, or Saskatchewan, do you have experience with any of the

following programs? Please check any of the first three options that apply.

- ☐ Rule 24.1 Mandatory Mediation (Ontario)
- ☐ Automobile Injury Mediation Program (Manitoba)
- ☐ Mandatory Civil QB (Saskatchewan)
- ☐ I do not have experience with any of these programs

What term most closely describes your gender identity?

- ☐ Transgender
- ☐ Woman
- ☐ Non-binary and/or gender non-conforming (including gender-queer, gender-fluid, bi/poly-gender, agender)
- ☐ Man
- ☐ Prefer not to answer

How many years have you been practicing as a mediator?

- ○ less than 3 years
- ○ 3-5 years
- ○ 5-7 years
- ○ 7-10 years
- ○ 10-15 years
- ○ 15-20 years
- ○ more than 20 years

Do you primarily identify as Indigenous: that is, First Nations, Métis, or Inuk?

- ○ Yes, First Nations
- ○ Yes, Métis
- ○ Yes, Inuk
- ○ No
- ○ Prefer not to answer

What is the highest degree or level of school you have completed?

- ○ Less than a high school diploma
- ○ High school degree or equivalent (e.g. GED)
- ○ Some college, no degree
- ○ Associate degree (e.g. AA, AS)
- ○ Bachelor's degree (e.g. BA, BS)
- ○ Master's degree (e.g. MA, MS, MEd). Please specify in space below.

  [ ]
- ○ Professional Degree (LLB, JD, LLM) or Doctorate degree (PhD). Please specify in space below.

  [ ]

○ Other (please specify in space below)

If you have a Law Degree, please choose one of the following options that applies to you.

○ Have Law Degree, but never practiced.
○ Have Law Degree, previously practiced, not not practicing now.
○ Have Law Degree, and currently practicing.
○ I don't have a Law Degree

Are you a member (or have you been) of any of the following professional associations? Check all that apply.

☐ ADR Institute of Canada (or provincial branches)
☐ Canadian Bar Association Alternative Dispute Resolution Section
☐ American Bar Association Dispute Resolution Section
☐ International Academy of Mediators
☐ Other (please specify below)
☐ None

If you had to choose just one, what mediator style or approach do you most closely align with? Please choose

the one that first comes to mind.

- Directive
- Evaluative
- Transformative
- Facilitative
- Combination (please specify below)

Approximately how many mediations have you completed to date?

- Less than 60
- 60-100
- 100-150
- 150-200
- 200-250
- 250-500
- Greater than 500

Approximately how many mediations (including pre-mediations) on average do you complete each week or month?

- 1-5 per week
- 5-10 per week

- ○ 1-4 per month
- ○ 10 per month
- ○ 15 per month
- ○ Less than 12 per year

Are you interested in being a research participant? Agreeing to be a participant will involve a one-on-one interview, conducted in English, via video conference lasting approximately 30-60 minutes.

- ○ Yes
- ○ No
- ○ Unsure (willing to be contacted)

Thank you for agreeing to be a research participant in this important study. In order for us to contact you we need the following information.

First Name

Last Name

Email

Phone Number (including area code)

Powered by Qualtrics

Appendix B – LinkedIn Recruitment Post

Kimberly Cork (She/Her) • You
Mediator at ADR Chambers
1yr •

VOLUNTEER CANADIAN MEDIATORS NEEDED FOR A RESEARCH STUDY!

Are you a Canadian mediator practicing in non-family civil litigation (or similar formal processes) cases in Ontario, Manitoba, or Saskatchewan? If so, please consider participating in a research project aimed at exploring and understanding the different styles and approaches used by mediators.

This research is academic in nature and forms the basis of a Master's Thesis titled "Transformative Mediation: Is it possible in a numbers game?" and is intended to uncover what mediators practicing in non-family civil litigation, (or similar formal processes), understand about certain mediation techniques and to the extent their respective practices utilize such techniques.

If you would like to be considered as a participant in this research, please complete the survey through the following link:

https://lnkd.in/g6gg28tW

Please note, the survey is for recruitment purposes only and should you be selected to participate we will schedule a 30–60-minute confidential interview at a mutually convenient time prior to June 30, 2023. Participants will be chosen based on overall experience and in particular, experience in the three provinces mentioned above. It is expected that less than 20 participants will be selected, so please don't wait to respond via the survey. The survey will remain open until March 31, 2023, at 11:59 pm.

The Research Ethics Board of the University of Manitoba, Fort Garry campus has approved this research study.

Questions about this research? Contact Kimberly Cork, Principal Researcher at corkk@myumanitoba.ca or Dr. Jessica Senehi, Associate Professor, Peace and Conflict Studies, University of Manitoba, Thesis Advisor & Research Supervisor, at jessica.senehi@umanitoba.ca

Appendix C – Recruitment Email Wording

Email

[insert greeting here],

I am reaching out to inform you of a research project aimed at exploring and understanding the different styles and approaches used by mediators practicing in Ontario, Manitoba, and Saskatchewan titled *Transformative Mediation: Is it possible in a numbers game?*

This research forms the basis of my Master's Thesis in the Peace and Conflict Studies program at the University of Manitoba. The goal of the research is intended to uncover what mediators practicing in non-family civil litigation, (or similar formal processes), understand about certain mediation techniques and to the extent their respective practices utilize such techniques. This research is completely independent of any government department or agency offering mediation programs.

As you are aware, many governments and civil courts have been successful in addressing significant backlogs and increasing efficiency by introducing mediation into formal legal processes. This success can be seen in numbers, however, additional goals that don't translate to numbers have also been sought, however, are more difficult to measure, connect strongly to the manner in which the mediation is conducted, and ultimately may have a significant impact on the participants and the community as a whole. Understanding the experience and reflections of the mediators is the driving force behind this research.

If you would like to support my research project I would ask that you share this email along with the link below to your network of mediators.

Only mediators practicing in Manitoba, Ontario, and Saskatchewan, with more than three years of experience, and familiarity with certain government programs will be considered.

[INSERT LINK - Canadian Mediator Styles & Approaches - Participant Recruitment Survey]

Please note, the survey is for recruitment purposes only. If deemed eligible, based on the criteria noted above (mediators with more than three years of experience practicing in Manitoba, Ontario, and Saskatchewan), participants will be asked to consent to a confidential 30–60-minute semi-structured interview that will take place via video conference. The interview will take place on a date and time of their choosing prior to June 30, 2023. A copy of the consent document will be available to all selected participants before the interview.

I will be seeking less than 20 participants and therefore, should you wish to support this research I would ask that you provide this information and the survey link as soon as possible. The survey will remain open only until March 31, 2023.

The Research Ethics Board of the University of Manitoba, Fort Garry campus has approved this research study.

If you have any questions or would like to discuss this project further, please do not hesitate to contact me. Alternatively, you can also contact my Thesis Advisor and Research Supervisor, Dr. Jessica Senehi, Associate Professor, Peace and Conflict Studies, University of Manitoba, at jessica.senehi@umanitoba.ca.

Thanks!

Kimberly Cork
corkk@myumanitoba.ca
[redacted]

Appendix D – Semi-Structured Interview Questions

1. Tell me about your decision to practice mediation?
2. What motivated or influenced you the most when deciding to practice mediation?
3. Can you share a story of one mediation that stands out the most for you?
4. As a mediator, do you see yourself as having an impact or influence on how participants advocate for themselves or others?
5. As a mediator, do you see yourself has having an impact or influence of the claimants/plaintiff's independent of their representative/counsel?
6. In your initial training, what did you learn about the different styles and approaches to mediation? How has your understanding about different styles and approaches changed over time?
7. What style of practice do you most closely align with? Can you provide me with examples?
8. How would you briefly describe facilitative, directive, evaluative, and transformative mediation?
9. Tell me more about your understanding of the transformative approach?
10. Based on your understanding of transformative mediation, would you say that you use or incorporate these techniques into your practice? If so, how? If not, why?
11. If you answered yes to the above question, what did you perceive the response of the parties (counsel/representatives & claimants/plaintiffs) to be? If you answered no to the above question, what do you attribute to the main barrier to invoking transformative techniques in your practice.

Appendix E – Consent

Peace and Conflict Studies
Graduate Programs

252 St. Paul's College
70 Dysart Road, University of Manitoba
Winnipeg, MB R3T 2N2 Canada
Phone: 204.474-8894 Fax: 204.474.8828

Consent Agreement and Study Information

Research Project Title: *Transformative Mediation: Is it possible in a numbers game?*

Principal Researcher: Kimberly Cork, MA Candidate (7858501)
Peace and Conflict Studies Graduate Programs, University of Manitoba
Address: 252 St. Paul's College, 70 Dysart Rd., Winnipeg, MB R3T 2M6
Telephone: ([redacted] Email: corkk@myumanitoba.ca
Research Supervisor: Dr. Jessica Senehi, Professor, Peace and Conflict Studies
252-70 Dysart Rd., University of Manitoba, Winnipeg, MB R3T 2M6
Email: Jessica.Senehi@umanitoba.ca Telephone: (204) 474-7978

This consent form, a copy of which will be left with you for your records and reference, is only part of the process of informed consent. It should give you a basic idea of what the research is about and what your participation will involve. If you would like more detail about something mentioned here, or information not included here, you should feel free to ask. Please take the time to read this carefully and to understand any accompanying information.

The Research Ethics Board of the University of Manitoba, Fort Garry campus has approved this research study and may look at my research records to ensure the study is being conducted in a safe and proper way.

Participation is voluntary, anonymous and confidential. You are free to discontinue participation during the study.

Purpose of the Study

Government programs mandating or offering mediation as a means for resolving disputes, as an alternative to court litigation or other formal and adversarial processes, have become the norm across Canada. Objectives of these programs can include important, yet difficult to measure, outcomes. In this research project the researcher is seeking to understand the different styles and approaches mediators in Manitoba, Ontario, and Saskatchewan use and the relationship between those approaches/styles and government program objectives. This research is academic in nature, for a Master's Thesis in Peace and Conflict Studies at the University of Manitoba and is completely independent of any government department or agency offering these mediation programs.

What Will I Be Asked To Do?

- You will participate in an interview via video conference that will be approximately 30-60 minutes long. The video conference will take place using a password-protected Zoom session, utilizing the waiting room functionality, and locked once the interview begins. You will have the choice to have the camera on or off.
- In the interview, you will be asked to share your thoughts on your mediation approaches and experiences. We will explore together those factors that govern your style and approach in the mediation setting and I will ask you to share a story of one of your most meaningful mediations. Lastly, I will ask you to share your thoughts and opinions regarding transformative mediation. It is important to note that answers to questions may lead to additional follow-up or clarifying questions.
- With your permission, the interview will be audio recorded only, as well as auto transcribed, using Zoom recording capabilities or Otter Voice AI transcription services, to ensure accuracy in the information being provided. If you prefer not to be audio recorded, the interviewer will take notes during the interview.
- The interview will take place at a time that is convenient for you.
- At any point in the interview, should you have questions or concerns you are free to raise them.
- Participation in the interview is completely voluntary. You may refuse to participate altogether or end your participation in the interview at any time. You may also choose to decline answering any question.
- Please feel free to ask any questions regarding the procedures and goals of the study or your role.

What Type of Personal Information Will Be Collected?

- Should you agree to participate, you will be asked to provide information about the nature or type of mediation work you do. You will be asked not to share any identifying information about participants in mediation. Should you inadvertently provide this information it will be subject to the point below.
- To ensure confidentiality to the greatest extent possible, your name and/or other identifying features will be removed from all transcripts or interview notes. All transcripts will be coded, encrypted, and password protected. Audio recordings, your name and contact information will be stored in a separate and encrypted location. In addition, this consent form will be stored separately from the transcriptions of the interviews so that it will not be possible to associate your name with any given interview. All electronic information will be stored on the approved University of Manitoba cloud storage. Storage of any paper documents will be locked and only the principal researcher will have the ability to unlock and access.

- The information learned from this research project will form the basis of the Master's thesis referenced above. The thesis' expected date of completion is August 2024 and the information it is based upon may be published and presented at conferences or in journal articles or books in the future; your identity will not be disclosed in these reports or publications. Direct quotations from the interviews may be used, but you will be given a pseudonym, and all identifying information will be removed from any such publications.

There are options for you to consider if you decide to take part in this research. Please review each of these options and respond accordingly:

I grant permission to be audio recorded *(Please note, should you choose NO, notes will be taken by the interviewer*).

Yes: ___ No: ___

I understand I will remain anonymous and agree to be referred to by a pseudonym of the researcher's choice (eg. "Alex" and/or "male non-lawyer with less than 5 years experience"):

Yes: ___ No: ___

If you answered NO to the above, please indicate the pseudonym you choose for yourself using a fictitious first name (*Please note, whether you choose a pseudonym or not, general descriptors will be used when and if necessary).*:

_____ _____

Are there Risks or Benefits if I Participate?

- Any risk is considered to be no greater than you would experience on a day-to-day basis conducting and/or discussing your practice.
- You will receive no payment for participating in this study.
- Benefits are only speculative, however, may include improved outcomes for mediation programs, increased self-awareness of one's practice, and increased knowledge, all of which may benefit mediation clients.

What Happens to the Information I Provide?

- As noted earlier, this consent form will be stored separately from the transcriptions of the interviews so that it will not be possible to associate your name with any given interview.
- The only persons who will have access to the recordings, transcripts, and notes is the principal researcher and the research supervisor.

- Coded transcriptions and notes may be accessed by research assistants if utilized. Any access to information will require a signed confidentiality agreement prior to access.
- Quotations from interviews may be reported using a pseudonym if required.
- Should you wish to withdraw during the interview you may do so simply by voicing your intent, following which the Zoom session will be terminated and all audio recordings and transcripts will be immediately destroyed. If you wish to withdraw any or all of your responses after the interview, you may contact the researcher at the above-noted email address or phone number within 14 days of the interview taking place. After the 14-day deadline, it will no longer be possible to withdraw.
- Should you choose not to participate at any time, however, agree to any collected information being relied upon, the principal researcher will obtain written permission from you.
- The audio recordings will be stored in a secure location and will be destroyed as soon as they are fully transcribed and no later than August 31, 2023.
- Transcriptions, notes of the interviews, consent forms, participant ID key, and email communication will be stored in a secure location, only accessible by the researcher and research supervisor, and will be destroyed no later than October 2024.

Would you like to receive a summary (1-3 pages) of the study's results when available in August 2023?

Yes: ___ No: ___

If yes, please indicate how you would like to receive the summary (e.g., mail, email).

Mailing address: _____

Email address: _____

Are you interested in being contacted about participating in a focus group discussion, with the understanding you can always decline the request?

Yes: ___ No: ___

Questions/Concerns

If you have any questions or want clarification regarding this research and/or your participation, please contact:

Kimberly Cork, University of Manitoba, [redacted], corkk@umanitoba.ca,

If you have any concerns or complaints about this project, you may contact the above-named person or the Human Ethics Officer at 204-474-7122 or HumanEthics@umanitoba.ca . A copy of this consent form has been given to you to keep for your records and reference.

Signatures

Your signature on this form indicates that you have understood to your satisfaction the information regarding participation in the research project and agree to participate as a subject. In no way does this waive your legal rights nor release the researchers, sponsors, or involved institutions from their legal and professional responsibilities. You are free to withdraw from the study at any time in accordance with this consent document, and /or refrain from answering any questions you prefer to omit, without prejudice or consequence. Your continued participation should be as informed as your initial consent, so you should feel free to ask for clarification or new information throughout your participation.

Participant's Name: (please print) _____

Participant's Signature: _____ Date: _____

Researcher's Name: (please print) _____

Researcher and/or Delegate's Signature: _____ Date: _____

Appendix F – Interview Summary

Research Participant Interview Summary
July 31, 2023

Research Project Title: Transformative Mediation: Is it Possible in a Numbers Game?

Principal Researcher: Kimberly Cork, MA Candidate ([redacted]) Peace and Conflict Studies Graduate Programs, University of Manitoba Address: 252 St. Paul's College, 70 Dysart Rd., Winnipeg, MB R3T 2M6 Telephone: [redacted] Email: corkk@myumanitoba.ca
Research Supervisor: Dr. Jessica Senehi, Professor, Peace and Conflict Studies 252-70 Dysart Rd., University of Manitoba, Winnipeg, MB R3T 2M6 Email: Jessica.Senehi@umanitoba.ca Telephone: (204) 474-7978

Purpose of the Study: Government programs mandating or offering mediation as a means for resolving disputes, as an alternative to court litigation or other formal and adversarial processes, have become the norm across Canada. Objectives of these programs can include important, yet difficult to measure, outcomes. In this research project, the researcher is seeking to understand the different styles and approaches mediators in Manitoba, Ontario, and Saskatchewan use and the relationship between those approaches/styles and government program objectives. This research is academic in nature, for a Master's Thesis in Peace and Conflict Studies at the University of Manitoba and is completely independent of any government department or agency offering these mediation programs.

Volunteer mediators practicing in non-family civil litigation (or similar formal processes) cases in Ontario, Manitoba, or Saskatchewan were sought through distribution channels such as LinkedIn and mediation and mediator networks and organizations. Interested mediators were asked to complete a survey before April 1, 2023. The purpose of the survey was intended for participant selection only. Selected participants, with consent, would later participate in a one-on-one interview which would form the basis of the study.

A total of 22 completed survey responses were received. Of the 22 responses, 20 met the criteria, and of those, 17 indicated a willingness to participate in the research study. The criteria for participating were: 1) mediation experience in specific government programs in Ontario, Manitoba, and Saskatchewan; 2) a minimum of three years practicing as a mediator; and 3) greater than 12 mediations per year. All 17 were contacted to schedule an interview, and 15 were completed by June 30, 2023. Two interviews were not completed due to a withdrawal from the study and a scheduling conflict. Of the 15 interviews conducted, ten had experience working under Rule 24.1 Mandatory Mediation (Ontario), and the remaining five had experience with either the Automobile Injury Mediation Program (Manitoba) or the Mandatory Civil QB (Saskatchewan). Of the 15 participants, seven had more than 20 years of experience mediating, six had 10-20 years, and two had 5-7 years of experience. The two participants with the least amount of active mediation practice experience have greater than 20 years of experience in what would be referred to as the alternative dispute resolution field. While 11 of the 15 have a law degree and have practiced law, only two continue to practice law at the same time as practicing mediation.

In the survey and consent document, participants were informed of the intended length of the interview (30-60 minutes) and the focus of the questions. In addition to questions, each participant was asked to share one story of a meaningful mediation. The average length of time for the interviews was 45 minutes, and all participants actively engaged and responded to all questions. Some participants, finding it difficult to identify only one memorable mediation, shared multiple stories.

The interview questions focused on the following themes:

- understanding what motivated the participants to choose mediation as a practice as well as who or what influenced them in the decision.
- exploring the perception of a mediator's influence or impact on parties to the mediation during and after the mediation session(s).
- recalling, examining, and reflecting on training and experience, including own practice, with the different styles and approaches of mediation[1].

While there were various reasons why participants chose mediation as a practice, there was an overarching theme for those coming from a law practice. Specifically, tiring of or wanting to avoid many aspects of law and litigation. Some expressed an inherent disconnect between the traditional practice of law and their values and beliefs despite a successful law practice. Many saw mediation as a better, more humane way to resolve disputes, not to mention its effectiveness and efficiency.

Most participants responded immediately and affirmatively to questions regarding their influence or impact on parties to the mediation. There was some variation in responses in instances of represented parties, particularly when the participant (mediator) was a non-lawyer; however, this was not applicable to all. While the participants working in Manitoba and Saskatchewan had considerable experience working with unrepresented parties, the Ontario participants did not. Some participants considered their influence carrying on beyond the mediation and, in fact, included this as one of their personal goals in the practice. Others initially saw their impact as being contained to the mediation process only; however, on reflection and considering repeat "customers," acknowledged the extent of their influence.

For the most part, many of the participants' training, either initially or as continuing education, had included theory around the different styles and approaches to mediation. Over the years, any concrete definition had faded, and participants seemed to have developed their own personal definitions of the different styles and approaches. While participants aligned with one or two approaches, many took a "tool box" approach to their practice – meaning applying different approaches (tools) considering the situation and the parties' goals. Insofar as transformative mediation, while some participants consider this an integral part of their practice, modifications of the theoretical model are regularly made. Some participants did not consider transformative mediation in their practice for various reasons, including conclusions about its applicability when first introduced to it. With the odd exception, participants did not express strong feelings regarding the use of transformative mediation.

The stories shared by the participants were complex; however, in many cases simply reflected what motivated them to practice – a meaningful, effective, and efficient process.

Appendix G – Style and Approach Comparison

TABLE ONE:

FACILITATIVE	TRANSFORMATIVE	RESTORATIVE
Practices: -Manage/control/drive the process -Structure issues/agenda for settlement -Focus on future, avoid discussing past -Limit/discourage emotional expression -Ask probing questions to gain information and reveal interests -Exclude intangibles -Reframe expression to soften -Reframe positions to interests for problem-solving -Summarize to stress common ground -Act as devil's advocate to each party/seek what-if deals -Limit party decision-making to final outcome/terms	**Practices:** -Allow the parties to control/ drive the process -Follow the parties in whatever issues they raise -Allow/support emotional expression -Include intangibles if the parties wish to discuss them -Reflect expression without softening -Summarize to sharpen/highlight difference -Privilege party decision-making on all matters—content and process: "Support and never supplant" party decision-making/ perspective-taking	**Practices:** -Push parties to talk about incident and impacts (push expression/emotion) -Prevent anyone from withdrawing; compel listening by all -Shift focus from person to person, make sure to include all -Determine who speaks when -Seek admission of responsibility (confession) from each party - Suggest/push forgiveness by all -Use "momentum" of group (centripetal force) to get admissions/forgiveness -Intervene periodically to shift/ maintain focus on each party -Direct problem-solving at end for agreement
Purpose/Goal: Achieve agreement that settles the conflict on terms mutually acceptable to the parties *[and fair to the parties, and to affected outsiders]*.	**Purpose/Goal:** Support parties in changing their conflict interaction from negative/destructive to positive/ constructive; help them recapture strength and understanding (with agreement a likely by-product).	**Purpose/Goal:** Promote shared responsibility, but also promote understanding/ reconciliation, to repair breach in relationship or community, and move individuals from isolation/ alienation to connection/unity.
Premises/Beliefs: 1. Human Nature: My clients are separate individuals with desire for satisfaction in their own terms, but with inherent limitations of cognition/ rationality and empathy that block achieving satisfaction. 2. Experience of Conflict: Conflict frustrates satisfaction; it is volatile, explosive and harmful; but it is inevitable because social interaction is necessary to satisfy desires/needs. 3. What Clients Value from Mediator: M solves problem of frustrated satisfaction of needs that is obstructed by others' needs and own cognitive deficits; M *facilitates* deals and *protects* against individuals harming self or others due to limits on rationality and empathy.	**Premises/Beliefs:** 1. Human Nature: My clients are both individual and social by nature, with both inherent desire and inherent capacity for agency/ autonomy and empathy/ connection. 2. Experience of Conflict: Conflict temporarily disconnects capacities for autonomy and connection, but presents chance for reasserting those capacities, so it is not necessarily destructive but a potentially constructive opportunity for personal and social growth. 3. What Clients Value from Mediator: M helps them achieve positive conflict interaction and transformation, by supporting their inherent capacities for strength and compassion, agency and connection.	**Premises/Beliefs:** 1. Human Nature: My clients are essentially parts of a social entity/ organism, with desire for belonging, but limited capacity for connection and empathy, and tendency to become alienated/ vengeful. 2. Experience of Conflict: Conflict ruptures the social fabric, resulting in separation and loss of belonging, threat to the organic whole, and barrier to relationship. 3. What Clients Value from Mediator: M restores broken social connection, achieves reconciliation and belonging, ends hate/isolation/guilt.

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