

Settlement and Mediation in Canadian Legal Television

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Abstract

This article is a close cultural legal analysis of *The Associates*, a Canadian legal television program. It describes what *The Associates* reveals about popular understandings of settlement and mediation in Canada. The show portrays negative attitudes toward settlement and mediation, such as 'settlement is second best' or 'caving in'. Uniquely, however, *The Associates* also portrays positive attitudes, such as 'mediation is the future of law'. The tension between these negative and positive attitudes is highlighted through the character of Robyn Parsons, the female associate who most often advocates for mediation on the show. Through the character of Robyn Parsons, the problems that women lawyers, women negotiators, and women mediation advocates face are examined. The article concludes by suggesting the possibility that television may be able to create a larger cultural legal space for mediation in society and greater positive exposure for mediators.

1. Introduction and Context

Alternative Dispute Resolution (ADR) practitioners and scholars are firmly convinced, by experience and research findings, that negotiation and mediation are often the best processes to employ in order to settle legal disputes. However, negative attitudes toward settlement and mediation persist. What are those attitudes and why do they persist? How can we, as practitioners and scholars, combat them? How might we better highlight the advantages of mediation? If the general public does not have experience with settlement processes and does not read our scholarship on ADR's advantages, how do we convince people of the strengths and benefits of mediation? One way may be through popular culture.

In this article I will examine *The Associates*,¹ a Canadian legal television program broadcasted in 2001-2002, with a view to attempting to answer some of these questions. I will conduct close, cultural-legal readings of the series' episodes that depict attitudes toward settlement. I will also study the episodes that actually portray mediation interventions. I will examine *The Associates* to see what kind of attitudes toward settlement, both negative and positive, the show depicts, and how mediation processes are actually portrayed. I will also examine the character Robyn Parsons, one of the female associates on the show. Through the character of Robyn I will investigate some of the problems that women lawyers, women negotiators, and women mediation advocates face. Finally, I will canvass the possibility that popular culture might actually be able to create a larger cultural-legal space for mediation and mediators in society.

The theoretical foundation that underlies my approach to these questions and my analysis of the show is Cultural Legal Studies. Cultural Legal Studies brings the insights of Cultural Studies to law, aspiring to a

1. *The Associates*, Alliance Atlantis Communications and CTV. Created by Greg Ball, Steve Blackman and Alyson Feltes. Produced by Brian Dennis and Anne Marie La Traverse.

cultural study of law – to “call attention to the ordinary life of the law,”² and to “expand the traditional range of legal studies.”³ Some describe Cultural Studies as an “important branch of postmodern theory,”⁴ and others note that it is a “tendency across various disciplines, rather than a discipline itself.”⁵ According to MacNeil and Hutchings, one of the most remarkable developments in common law jurisprudence in the 2000s is its shift away from ‘critique’ to ‘culture.’⁶ The focus on culture includes both textual sources and interpretative method, and thus Cultural Legal Studies refuses strict disciplinary boundaries, embraces new, interdisciplinary connections, and deconstructs what it sees. Cultural analysis has been described as “a form of hermeneutic activity, in which the analyst uncovers and redescribes core features of overarching systems of meaning.”⁷ MacNeil and Hutchings note that, “cultural legal studies strays from the hermetically sealed space of ... the law school’s ‘laboratory’ – that is, the library, with its dull, dusty and dreary tomes – and turns to an array of *fictions*.”⁸ This turn toward fictions embraces novels and literary works, or Law & Literature, television, radio, and music, or Law & Popular Culture, and film, or Law & Film. All of these orientations or examples of “Law &” are illustrative of a cultural legal approach to law.

In this article I focus on a Canadian television show, and therefore the aspect of Cultural Legal Studies most relevant to my analysis is Law & Popular Culture. Popular culture comprises the commercial texts or media produced and marketed for popular consumption. It is generally associated with homogeneity, mass culture, and Americanism.⁹ Popular

2. J. Brigham, “Representing Lawyers: From Courtrooms to Boardrooms and TV Studios” (2003) 53 *Syracuse Law Review* 1165 at 1167.
3. R. K. Sherwin, “Introduction” (1996) 30 *University of San Francisco Law Review* 891 at 898, Symposium: Picturing Justice: Images of Law and Lawyers in the Visual Media.
4. J. Nafziger, R. Paterson and A. Renteln, *Cultural Law: International, Comparative, and Indigenous* (New York: Cambridge University Press, 2010) at 128.
5. Toby Miller, ed., *A Companion to Cultural Studies* (Malden, MA: Blackwell Publishers, 2001) at 1.
6. W. MacNeil and P. Hutchings, “Law’s Cultural Mediations: An Introduction by Way of Introduction” (2001) 10 *Griffith Law Review* 1 at 1.
7. J. Nafziger, R. Paterson and A. Renteln, *Cultural Law: International, Comparative, and Indigenous* (New York: Cambridge University Press, 2010) at 129, note 12.
8. W. MacNeil and P. Hutchings, “Law’s Cultural Mediations: An Introduction by Way of Introduction” (2001) 10 *Griffith Law Review* 1 at 1, emphasis in original.
9. J. Leach, “Reading Canadian ‘Popular’ Television: The Case of E.N.G.” in J. Nicks and J. Sloniowski, eds., *Slippery Pastimes: Reading the Popular in Canadian Culture* (Waterloo, ON: Wilfrid Laurier University Press, 2002), has written about Canadian popular culture as follows: “The Canadian cultural environment has historically been saturated with images and fictions originating south of the border, while alternative Canadian images have needed the support of government institutions and have often been associated with “high” rather than “popular” cultural traditions” (at 113).

culture comprises those forms of culture that are well liked by many people, are widely shared, and are often used in everyday life.¹⁰ Popular culture artefacts or texts, like TV shows, change over time, tend to have a commercial nature,¹¹ are class and gender coded, and vary in importance to different people in different regions. As with all current theories of culture, there is acceptance of the fact that popular culture is dynamic. Any popular cultural text can have more than one reading or meaning, and they are often a source of escapism, pleasure, or fun. Some argue that popular culture is devised to pacify the masses and accommodate them to the needs of capital,¹² while others argue that popular culture products are made by the people for themselves, and are a form of resistance.¹³ While it is true that most popular cultural texts support the interests of dominant groups, more recently, “popular culture itself has become a prime site for contestations of value.”¹⁴ Just like ‘culture’, popular culture “is not fixed but negotiated, the subject of dialogue and creativity, influenced by the contexts in which it is produced and used.”¹⁵

When one takes a cultural legal approach to law and dispute resolution one discovers that popular culture provides the images, stories, characters, metaphors, and scenarios with which people often make sense of ‘the law’.¹⁶ Increasingly, the cultural system of meaning in which North Americans operate can be said to be a popular cultural system. That is, our systems of meaning are greatly influenced by popular culture.¹⁷ A television series, such as *The Associates*, is an example of popular culture, or a popular culture artefact. The vast majority of legal

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10. Popular culture, like culture generally, is not equally shared by all members of society, and in multicultural North America there may be multiple popular cultures. A full investigation into the heterogeneous nature of popular culture is outside the scope of this article.
 11. We cannot underestimate the importance of the commercial aspects of popular culture. Popular culture is a commodity and its audiences are consumers, so profits, marketability and economics are important. Strinati argues that “production and consumption can themselves directly shape the texts of popular culture.” (See D. Strinati, *An Introduction to Studying Popular Culture* (London: Routledge, 2000) at 255).
 12. T. Edensor, *National Identity, Popular Culture and Everyday Life* (Oxford: Berg, 2002) at 13.
 13. J. Fiske, *Reading the Popular* (Boston: Unwin Hyman, 1989).
 14. T. Edensor, *National Identity, Popular Culture and Everyday Life* (Oxford: Berg, 2002) at 16.
 15. T. Edensor, *National Identity, Popular Culture and Everyday Life* (Oxford: Berg, 2002) at 17.
 16. R. Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (Chicago: The University of Chicago Press, 2000) at 5.
 17. Thus, not only do North Americans live in legally pluralist communities, but popular culture also informs our legal understandings.

scholarship that engages with popular culture focuses on American or British movies, and to a lesser extent, American or British television programs. My focus on a Canadian television program is therefore unique. In this article I will closely analyse *The Associates* in order to 'see' Canadian popular culture understandings of mediation and settlement. My cultural legal analysis of one popular culture artefact will demonstrate the importance of popular culture, and especially Canadian television, for developing understandings of mediation in Canada.

2. Literature Review and Methodology

Dispute resolution literature examines negotiation¹⁸ and mediation,¹⁹ and in so doing, often focuses on culture. Most of the literature that examines culture focuses on 'high' culture, national culture, traditional culture, ethnicity, or cross-cultural approaches to negotiation and mediation.²⁰ It does not focus on popular culture. As Pirie notes, "[m]uch of the recent work on culture and conflict has opted for the classical definition, one that essentially ignores more contemporary and critical perspectives."²¹ Researchers have not investigated whether attitudes toward

18. H. Raiffa, *The Art & Science of Negotiation* (Cambridge, MA: Harvard University Press, 1982); R. Fisher, W. Ury and B. Patton, 2d ed., *Getting to YES: Negotiating Agreement Without Giving In* (New York, NY: Penguin Books, 1991); J.W. Breslin and J. Rubin, eds., *Negotiation Theory and Practice* (Cambridge, MA: PON Books, 1991); R. Mnookin, S. Peppet and A. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge: Harvard University Press, 2000).
19. Gemma Smyth, "Mediation" in Julie Macfarlane, ed., *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery, 2011); S. Goldberg, F. Sander and N. Rogers, 3d ed., *Dispute Resolution: Negotiation, Mediation, and Other Processes* (Gaithersburg, MD: Aspen Law and Business, 1999); C. Moore, 3d ed., *The Mediation Process: Practical Strategies for Resolving Conflict* (San Francisco: Jossey-Bass, 2003); M. Deutsch and P.T. Coleman, eds., *The Handbook of Conflict Resolution* (San Francisco: Jossey-Bass Inc., 2000); K. Arrow and R. Mnookin et al., eds., *Barriers to Conflict Resolution* (Cambridge, MA: PON Books, 1999 (soft cover)); K. Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (San Francisco: Jossey-Bass, 2001); J. Winslade and G. Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (San Francisco: Jossey-Bass, 2000).
20. See: M. LeBaron, *Bridging Cultural Conflicts: A New Approach for a Changing World* (San Francisco: Jossey-Bass, 2003); K. Avruch, P. Black and J. Scimecca, *Conflict Resolution: Cross-Cultural Perspectives* (Praeger Publishers, 1998); G. Faure & J. Rubin, eds., *Culture and Negotiation* (Newbury Park, CA: Sage Publications, 1993); S. Ting-Toomey & J. Oetzel, *Managing Intercultural Conflict Effectively* (Newbury Park, CA: Sage Publications, 2001); J. Brett, *Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries* (San Francisco: Jossey-Bass, 2001); J. Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse, NY: Syracuse University Press, 1995).
21. A. Pirie, *Alternative Dispute Resolution: Skills, Science, and the Law* (Toronto: Irwin Law, 2000) at 288.

conflict and approaches to resolving it are influenced by contemporary popular culture. Despite the wide-ranging and multidisciplinary nature of ADR scholarship, it does not appear to concern itself with connections between dispute resolution and popular culture.²² This Cultural Legal Studies void in the ADR literature must be filled, and this article is an attempt to do so.

We must examine the nexus between popular culture and dispute resolution because many Canadians take their information about the legal system and all of its processes for dispute resolution from popular culture. William P. MacNeil argues that the popular culture object can explicate the theoretical subject,²³ and John Denvir notes that: “Just as no one would claim that the street map told the whole story, neither should we think that worthwhile insights on law [or mediation] are all contained in law libraries.”²⁴ Dispute Resolution scholarship tells us part of what mediation is about, and popular culture artefacts such as television shows tell us another part. Though they may contradict one another, the insights taken from both are richer than from either alone. What is important is that each perspective – classic conflict resolution theory and popular television approaches – may become enriched by entering into

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22. Only two legal/ADR scholars engage with popular culture, Carrie Menkel Meadow and myself. See Carrie Menkel-Meadow, “Is There An Honest Lawyer in the Box?: Legal Ethics on TV” in Michael Asimow, ed., *Lawyers in Your Living Room: Law on Television* (Chicago: ABA Press, 2009); “Legal Negotiation in Popular Culture: What Are We Bargaining For?” in Michael Freeman, ed., *Law and Popular Culture* (Oxford University Press, 2004); and Carrie Menkel-Meadow, “Can They Do That? Legal Ethics in Popular Culture: of Character and Acts” (2001) 48 *UCLA L. Rev.* 1305. My publications on the nexus between ADR and popular culture include: Jennifer L. Schulz, “Canada: ADR and *The Associates*” in Peter Robson and Jessica Silbey, eds., *Law and Justice on the Small Screen* (London, UK, 2011), forthcoming; “The Cook, the Mediator, the Feminist, and the Hero” (2009) 21 *Canadian Journal of Women and the Law* 177; “Girls Club Does Not Exist” in M. Asimow, ed., *Lawyers in Your Living Room! Law on Television*, (Chicago: ABA Press, 2009) at 243; “Law & Film: Where are the Mediators?” (2008) 58 *University of Toronto Law Journal* 233; “The Mediator as Cook: Mediation Metaphors at the Movies” (2007) 2 *Journal of Dispute Resolution* 455; and “Confectionery and Conflict Resolution? What *Chocolat* Reveals about Mediation” (2006) 22 *Negotiation Journal* 251.
23. William P. MacNeil, *Lex Populi: The Jurisprudence of Popular Culture* (Stanford, CA: Stanford University Press, 2007) at 9. MacNeil and I agree that we must also advocate for an enjoyment of that jurisprudential study (MacNeil at 9-10) and Jennifer L. Schulz, “The Cook, the Mediator, the Feminist, and the Hero” (2009) 21 *Canadian Journal of Women and the Law* 177 at 192-194.
24. J. Denvir, ed., *Legal Reelism: Movies as Legal Texts* (Urbana: University of Illinois Press, 1996) at vii.

a dialogue process.²⁵ I will begin this dialogue in this article. Michael Asimow writes:

The law and popular culture movement takes seriously works of popular legal culture, meaning stories about law, lawyers, or the legal system in film, television, or print. It treats these cultural artifacts as legal texts, as important in their own way as statutes, administrative rules, or judicial precedents. Those who write in this field believe that the public learns most of what it thinks it knows about law, lawyers and the legal system from the works of popular legal culture.They are convinced that popular culture mirrors, often in an exaggerated and caricatured form, actual popular attitudes and beliefs about the institutions and characters that it describes.²⁶

Assuming Asimow is right, that the public learns most of what it thinks it knows about law and dispute resolution from popular sources such as television, what does *The Associates* tell or show us about settlement and mediation in Canada?

In order to attempt to answer that question I watched all 31 episodes of the series on DVD with a view toward describing what attitudes toward settlement, both negative and positive, were depicted, and how mediation was actually portrayed. I took copious notes, and then, as suggested by Nafziger, Paterson, and Renteln, attempted to uncover and redescribe core features of systems of meaning in the show.²⁷ I observed that *The Associates*, as a series, had its own understanding of law. In *The Associates*, 'law' did not exclusively mean the courtroom. Unusually, the show understood law to include dispute resolution, and thus a significant feature of *The Associates* was its focus on mediation and settlement. Some of its episodes portrayed negative attitudes toward settlement and some portrayed positive attitudes. Extremely uniquely for North American television in the early 2000s, some episodes actually depicted mediation sessions. In this article I will closely examine all of these scenes and episodes. I will describe what a Canadian television program illuminates about settlement and what it might reveal about popular understandings of mediation in Canada.

25. Oscar Nudler, "On Conflicts and Metaphors: Toward an Extended Rationality" in J. Burton, ed., *Conflict: Human Needs Theory* (New York: St. Martin's Press, 1990) at 195 argues that: "each perspective may become enriched by entering the dialogue process, not necessarily by learning new answers but mainly by incorporating new questions."

26. M. Asimow, "Embodiment of Evil: Law Firms in the Movies" (2001) 48 *UCLA Law Review* 1339 at 1341.

27. J. Nafziger, R. Paterson and A. Renteln, *Cultural Law: International, Comparative, and Indigenous* (New York: Cambridge University Press, 2010) at 129, note 12. This is, of course, neither a scientific nor even a coding process, but rather the drawing out of themes, signs, metaphors, and recurring images.

3. *The Associates'* Attitudes toward Settlement and Mediation

The Associates is now off the air. This hour long prime time dramatic series ran for two seasons on CTV, in 2001 and 2002. It featured five new associates in a large, fictional, Bay Street, Toronto law firm called Young, Barnsworth & King. The series chronicled the legal and personal ups and downs of the new associates, and especially of Robyn Parsons. *The Associates* was unique because it was one of only two Canadian legal dramas ever produced, and it featured Canadian lawyers and clients addressing Canadian common law issues, in English Canadian court rooms. The other extraordinary thing about *The Associates* was how often it depicted settlement and mediation (almost half of the first season's episodes).²⁸ In the early 2000s in the American legal drama genre it was unheard of to focus on anything but the trial. The fact that *The Associates* focused on mediation to the extent that it did was exceptional. Most legally-themed television programs focus on criminal law, the courtroom, and climax with a trial. Yet, the vast majority of lawyers are not criminal lawyers, and since more than 90% of all cases – criminal or civil – settle in both Canada and the USA, most lawyers do not spend much time in the court room or at trial.²⁹ What most lawyers do, however, is negotiate with other lawyers and settle cases. By portraying this reality of legal practice, *The Associates* was unique.³⁰ By depicting the settlement activities that form the backbone of much legal practice,

28. As I note in "Canada: ADR and *The Associates*" in Peter Robson and Jessica Silbey, eds., *Law and Justice on the Small Screen* (London, UK, 2011), forthcoming, 42% of the first season's storylines focussed on mediation and other ADR processes. In the second season of *The Associates*, 28% of the storylines focussed on mediation. *The Associates* is also noteworthy for the time it spent on other aspects of real lawyering: associates becoming very stressed, collaborating, researching, worrying about politics and billable hours, all while working in shared offices, surrounded by highly stacked legal file boxes, and often drinking too much.

29. See T. Gleason, "Lawyer Stereotypes" in P.M. Lester, ed., *Images that Injure: Pictorial Stereotypes in the Media* (Westport, CT: Praeger, 1996) at 188 where the author notes that "[t]he public is left with the impression that a large percentage of lawyers work in criminal law and that a high percentage of criminal cases result in trials. Both of these impressions are false. In fact, only 2 percent of the members of the American Bar Association identify themselves as practicing criminal law and only about 6 percent of all criminal cases ever reach trial."

30. Nancy B. Rapoport argues that movie conventions, and I would add, television conventions, "force the discourse of film to filter most of 'real' law out, leaving only the most cinematically interesting parts. Those parts include the drama of the trial, the compelling image of the lawyer-hero, and the equally compelling image of the lawyer-devil." (Nancy B. Rapoport, "Dressed for Excess: How Hollywood Affects the Professional Behaviour of Lawyers" (2000) 14 *Notre Dame Journal of Law, Ethics and Public Policy* 49 at 58). This may be why we do not see much settlement or mediation depicted on television – producers incorrectly assume it is not compelling enough.

The Associates demonstrated that legal practice in Canada includes problem solving, settlement negotiations, and mediation.

Throughout its many settlement-focussed storylines,³¹ *The Associates* presented the differing attitudes – both negative and positive – toward mediation still prevalent in legal practice today. Negative attitudes toward settlement depicted in *The Associates* mirror those found in practice amongst some lawyers, who either have a “lack of interest in revisiting the profession’s core beliefs,”³² or continue to hold adversarial beliefs that value a good fight much more than a good negotiation. These negative attitudes include the attitude, famously articulated by Owen Fiss, that settlement is second best or caving, because one has settled.³³ A closely related negative attitude depicted in *The Associates* is that because settling is second best, settlement is an approach to employ only when one cannot win, or when one has made a mistake, rather than viewing settlement as a strategy of first choice.

One of the most common negative attitudes toward settlement is that settlement is second best or ‘caving’.³⁴ If you settle your dispute instead of litigating it to a win, by definition, this argument goes, you have settled for something less than an optimal (litigation) solution. *The Associates* included examples of this attitude in episodes 105 and 206. In episode 105, the client, a plaintiff in a defamation case, asks his lawyer, Dale, and the lawyer’s junior associate, Jonah, “If we take the offer, aren’t we kind of letting her win?”³⁵ This view – that by settling, we do not demonstrate strength, and instead, let the other side win – demonstrates that without education or advice, clients often do see settlement as caving. Later in the scene Dale tries to convince the client to settle. In so doing, he performs the educative task of the lawyer well. Dale, in accordance with the Canadian Bar Association’s *Code of Professional Conduct*, fulfills his positive, continuing obligation to canvass with his client, in a fully informed matter, all available dispute resolution processes.³⁶ Dale out-

31. In season one, see especially episodes 105, 106, 109, 112, and 113. In season two, see episodes 201, 203, 206, 207 and 209.

32. Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 14.

33. Owen Fiss, “Against Settlement”, (1984) 93 Yale Law Journal 1073.

34. Owen Fiss, “Against Settlement”, (1984) 93 Yale Law Journal 1073.

35. Episode 105, “CYA: Cover Your Ass”.

36. Rule 9, The Lawyer as Advocate, Commentary 8, Encouraging Settlements and Alternative Dispute Resolution: Whenever the case can be settled reasonably, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings. The lawyer should consider the use of alternative dispute resolution (ADR) for every dispute and, if appropriate, the lawyer should inform the client of the ADR options and, if so instructed, take steps to pursue those options.

lines the benefits of settlement, including speed, cost-efficiency, and relationship-maintenance, however, Jonah, in his zeal to litigate, returns the client to his pro-litigation stance. Dale says that Jonah's excitement to litigate (in other words, the *lawyer's* desire and process choice, not the best process choice for the *client's* dispute) moved the client away from settling, and in so doing, "blew it all to hell."

In episode 206 settlement is again denigrated for being second best to litigation. The opening two minutes of the episode demonstrate this attitude very effectively. Dale is working hard trying to decide which new associates should be assigned which work. Mitch, one of the associates, enters with a coffee that he has purchased as a gift for Dale, and Dale begins dispensing the work. Jonah, another associate, receives a very thick litigation file worth millions of dollars that will involve thousands of hours of billable work and good travel. Mitch gets excited when he sees the file Jonah is given and responds with, "I'm expecting something equally as exciting." Dale replies, as he hands a very thin file to Mitch, "Settlement. Quick in and out. A couple of hours." The contrast between Jonah's bulging litigation file and its perceived value and Mitch's skinny settlement file is palpable. Settlement is simply not as exciting or prestigious as litigation or 'real' legal work. Mitch is, to say the least, extremely disappointed, and he says to Dale, "Good to know I'm being taken seriously around here." The implication is that settlement is not for serious, real, or good lawyers. Mitch, as the lowest biller amongst the associates, receives the thin, unexciting, settlement file, and interprets that as a sign that he is not being taken seriously. Indignant, Mitch reclaims the gift of coffee he brought to Dale, saying as he takes the coffee back, "Dale, you don't deserve this." Mitch leaves the room with the thin settlement file under his arm and viewers are left with the impression, articulated by Jonah, that settlement is "totally minor."

Related to the view that settlement is second best is the idea that settlement is the strategy to use when your client does not have a strong legal position. Rather than viewing settlement as a strategy of first choice, settlement is depicted as the option of last resort. Episodes 112 and 203 demonstrate this negative attitude. In episode 112 Amy, one of the associates, is representing her friend Bronwyn, who is a horseback riding instructor. Amy notes, "if I don't find out something useful this afternoon, she's [Bronwyn] going to have to settle."³⁷ Thus, settlement is depicted as the thing lawyers do when they feel they cannot win. ADR approaches are not depicted as superior and good choices for their own sake. Rather, lawyers employ ADR processes and think about settle-

37. Episode 112, "Sirens".

ment when they fear they cannot win. Similarly, in season two, a more senior lawyer says to Amy, “The guys we’re going up against are total sharks – settling could be our only chance.”³⁸ Settlement is a strategy for Amy and a senior lawyer when they feel weak; it is not a strategy of first choice. If the lawyers on the other side are too strong, or too mean, the lawyers on *The Associates* choose settlement.

Finally, *The Associates* depicts an understanding of settlement that sees it as the option to choose when the lawyer has made a mistake. In episode 105, settlement is portrayed as a way to cover up lawyers’ mistakes – hence the title of the episode, “CYA: Cover Your Ass.” Amy is representing a client who has breached the standard of care in his industry and is likely to be found liable in negligence. However, because the plaintiff has very little information and is therefore unlikely to be able to prove negligence, Amy’s strategy is to defend the claim, and her client is very keen to go to court. However, Amy makes an error and sends the other side privileged documents by mistake.³⁹ These documents reveal facts that point toward her client’s negligence. Amy’s suggestion to her principal, the partner on the file, is to lie to fix her mistake. Amy and the partner agree not to tell their client about the error, and in order to cover up Amy’s mistake, the lawyers suggest settlement as their new legal strategy. The lawyers try to make their ethical breach feel more palatable by reminding themselves and viewers that their client *was* negligent, but this does not hide the fact that settlement is the strategy these lawyers chose when they make a mistake and breach their ethical responsibilities. All of these episodes portray negative attitudes toward settlement. The common thread in all of the scenes is that settlement leads to second best. Lawyers who choose settlement do not choose it as a first choice strategy because settling means missing out on a more optimal litigation solution.

Importantly, however, *The Associates* did not exclusively portray negative attitudes toward settlement and mediation. It also depicted positive attitudes. The tension between negative and positive attitudes toward settlement was most often highlighted through the character of Robyn Parsons, the associate who most often advocated for settlement and mediation on the show. In episode 106, entitled “Sue Everybody”, Robyn is working with her supervising lawyer, Dale, on an employment dispute. First, viewers see a positive attitude toward settlement because both Robyn and Dale are keen for settlement, but then, they see the tension, because the client is not. The corporate client views settlement as

38. Episode 203, “Take This Job....”.

39. Episode 105 “CYA: Cover Your Ass”.

“caving”.⁴⁰ Research undertaken at the same time as *The Associates* was on the air demonstrates that corporate litigators (especially in Toronto) often view settlement as ‘caving’, but here, it is the client, and not the lawyers, who holds this view.⁴¹ Because the client will not listen to Robyn when she tries to advocate for settlement, she asks Dale to talk to the client to try to convince him to attempt settlement. Importantly, both lawyers agree that this is a case where settlement could have brought justice but that litigation will not.⁴² Equally importantly, this scene demonstrates compliance with Ontario’s *Rules of Professional Conduct*. Rule 2.02 requires all lawyers to encourage compromise or settlement:

2.02 (2) A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings.

2.02 (3) The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.⁴³

By explicitly discussing the benefits of settlement and actively trying to convince a reluctant client to attempt it, even in the face of prevalent negative views equating settlement with caving in, *The Associates* went further than virtually all North American television of the time. The show explicitly described the benefits of settlement, depicted it as the optimal choice in this instance, and articulated the fact that settlement and justice are not antithetical.

In the final episode of the first season of the show, another scene featuring Robyn Parsons highlights differing attitudes toward mediation. In episode 113, the partners of the firm are discussing Robyn in the context of her performance review.⁴⁴ Cindy, one of the partners, is describing Robyn, and she says that Robyn “displays mediation skills beyond her years.” However, another partner, Walter, counters Cindy’s comment with, “mediation is half-assed lawyering for those who are scared

40. Episode 106, “Sue Everybody”.

41. Julie Macfarlane, “Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program”, (2001) report for the Law Commission of Canada.

42. Episode 106, “Sue Everybody”.

43. Law Society of Upper Canada, *Rules of Professional Conduct*. Also, s. 5 of the Alberta *Family Law Act* states that all family law lawyers have a duty to discuss ADR, collaborative law, and mediation with all clients, and they must sign a statement certifying that they complied with this duty.

44. Episode 113, “Should I stay or should I go?”

of a fight.” Cindy disagrees with him and says, “mediation is the future of law – good to have someone who is interested.”⁴⁵ This interchange clearly articulates the positive and negative attitudes toward mediation that exist in legal practice; ‘mediation is wonderful’ and ‘mediation is useless.’⁴⁶ It also raises the question whether it is best for lawyers to be problem-solving or adversarial in their approach to clients’ disputes.

Research demonstrates that it is better for lawyers to be problem-solvers. Andrea Kupfer Schneider’s 2002 study shatters the myth that adversarial bargaining is more effective than a problem-solving approach.⁴⁷ In her study, problem-solving behaviour is found by all lawyers to be highly effective. The adjectives that lawyers use to describe problem-solving lawyers are: upstanding, pleasant, interested in the other side, flexible, prepared, and confident.⁴⁸ These are all adjectives that describe Robyn in *The Associates* as well as most mediators. Problem-solving lawyers’ highest goal in negotiating is ethical conduct, followed by maximizing settlement,⁴⁹ which supports Cindy’s positive view of mediation, a problem-solving process.

Kupfer Schneider’s research also shows that lawyers view adversarial behaviour as ineffective. Indeed, taking an adversarial approach to lawyering, as Walter advocates for, is riskier than the problem-solving approach that Robyn attempts and Cindy admires. Ninety percent of lawyers perceived as *ineffective* negotiators by their peers took an adversarial approach.⁵⁰ This is in direct contrast to the

45. Interestingly, in season two, Cindy makes a comment about mediation that seems opposite her pro-mediation stance in season one. In episode 206, Robyn and Cindy have a client who hates his adversarial divorce, so Robyn asks Cindy, “What about mediation?” Cindy answers, “Our job is to beat them before they beat us.” Cindy’s response in season two harkens back to the negative view that suggests that justice via mediation is impossible.

46. Jennifer L. Schulz, “Canada: ADR and *The Associates*” in Peter Robson and Jessica Silbey, eds., *Law and Justice on the Small Screen* (London, UK, 2011), forthcoming.

47. Andrea Kupfer Schneider, “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style” (2002) 7 *Harvard Negotiation Law Review* 143.

48. Andrea Kupfer Schneider, “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style” (2002) 7 *Harvard Negotiation Law Review* 143 at 163.

49. Andrea Kupfer Schneider, “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style” (2002) 7 *Harvard Negotiation Law Review* 143 at 166.

50. Andrea Kupfer Schneider, “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style” (2002) 7 *Harvard Negotiation Law Review* 143 at 189, emphasis added.

ninety-one percent of lawyers seen as *effective* who took a problem-solving approach.⁵¹ Problem solving negotiators and mediation advocates like Robyn are not only more effective, but they are also perceived to be more effective by their peers. So, research demonstrates that Walter was wrong. Mediation is not “half-assed lawyering for those who are scared of a fight,” nor is it the process choice for losing cases or lawyers who cannot handle tough work. Rather, it is effective, empathetic, upstanding, confident lawyering; the future of law.

4. Mediation in *The Associates*

In addition to highlighting the tension between differing attitudes toward mediation, *The Associates* also actually depicted mediation. This is incredible, since most readers would be hard-pressed to think of any other primetime television drama that depicts, or has depicted, a mediation session. Nancy Rapoport notes: “You don’t see too many movies about lawyers who think that their clients should settle the case,”⁵² but in *The Associates*, Robyn is an excellent advocate for the process of mediation. Episode 109, entitled “Family Values”, portrays a mediation session in which Robyn acts as mediation advocate. Importantly, this mediation was depicted as every bit as exciting as a trial.

Two adult brothers are in a three year long dispute over a *Captain America* comic book. Robyn suggests mediation to resolve their dispute instead of filing an application in court, “before Captain America gets auctioned off on eBay.”⁵³ Robyn reasons that two brothers should not be in court against each other and that three years of bitter conflict and ineffective litigation is too long; the brothers need a new process. Indeed, an apology would likely assist in the resolution of this conflict. Apology legislation has been enacted in Ontario, the home province of *The Associates*, as well as in British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, Yukon, and Newfoundland and Labrador. The provincial apology acts allow defendants to apologize without their apologies being used against them in court.⁵⁴ Robyn knows that by expressing regret and

51. Andrea Kupfer Schneider, “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style” (2002) 7 *Harvard Negotiation Law Review* 143 at 167, emphasis added.

52. Nancy B. Rapoport, “Dressed for Excess: How Hollywood Affects the Professional Behaviour of Lawyers” (2000) 14 *Notre Dame Journal of Law, Ethics and Public Policy* 49 at 60.

53. Episode 109, “Family Values.”

54. For example, in Manitoba, *The Apology Act* (S.M. 2007, c. 25) states that making an apology does not constitute an admission of liability, and makes evidence of an apology inadmissible in court.

stating that one is sorry, conflict resolution can be facilitated. Apologies tend to lower litigation costs and reduce tension between the parties, which can lead to psychological benefits such as the restoration of trust and goodwill, even though liability is not admitted. Robyn suggests mediation to her client, perhaps hoping for an apology or some kind of a transformative result, and the brothers agree to attend. Unfortunately, however, there is an extremely serious problem with the mediation scene. The two brothers and their lawyers go into a boardroom, prepared to commence the mediation session. In keeping with facilitative mediation theory, they discuss their interests and not only their positions. However, there is no mediator present! *The Associates* depicts its first mediation scene, but the scene has no mediator. Going into a room with counsel and the other side, with good intentions to mediate, is simply not mediation unless a mediator is present. Otherwise, it is negotiations. It should be no surprise that this 'mediation' session falls apart completely.

So, on the one hand, for those of us who would advocate for greater use and depiction of dispute resolution processes both in practice and on television, mediation is not only highlighted in *The Associates*, but made to look as interesting and exciting as courtroom work. On the other hand, this 'mediation' is not really mediation at all, because there is no mediator. Does this matter? Is it enough that viewers are being introduced to the concept of mediation, and like everything else in TV, total accuracy is not required? Or is it a serious failing that the first time mediation is depicted on the show, the fundamental essence of mediation – the third party neutral – is not present? Certainly, by choosing not to depict a mediator, viewers are not able to see the creative, collaborative benefits of interest-based mediation. Although many dispute resolution scholars agree that facilitative, interest-based mediation is the preferred approach, and practitioners report great success with it, without a mediator in the room, viewers cannot be expected to glean this information, nor see the process in action. While the scene acknowledges the potential efficacy of mediation and even gets some of the language of facilitation right, it also promulgates the view that mediators themselves may be useless – so useless in fact, that they are not even needed in a mediation session.⁵⁵

55. In the second season of *The Associates* an arbitration is properly depicted in episode 207, "Revelations". Another female associate, Amy, has a bigamy case which she immediately determines must go to arbitration instead of court for confidentiality reasons. The parties choose Sandy Newton as their arbitrator because she is "fast and fair." Amy's arbitration is the first properly-depicted ADR process in the show. Amy's client wins and Amy explains that, "it was not about the money – that's why the legal system doesn't do enough."

In 2001 I was a colleague of Dr. Julie Macfarlane at the Faculty of Law, University of Windsor, and I was fortunate to be involved as a collaborator on her 2000/2001 Law Commission of Canada and Social Science and Humanities Research Council research project, "Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program."⁵⁶ The part of her data that I analyzed lent support to the view held by some lawyers that mediators might be totally useless in a mediation session. Some Toronto commercial litigators thought that mediation was so easy that anyone could do it. One quotation in particular highlighted this idea that mediation is so easy that mediators might be useless, and relates well to Robyn's mediator-less 'mediation' in *The Associates*. Toronto interview participant #3 noted:

There are other times when...the mediator is like a teddy bear. It doesn't matter whether he was there or whether there was a teddy bear on the table – it's just the process of getting the parties together...The real key is to have a teddy bear sitting there who can understand enough.

The suggestion that a mediator's presence and skills are not necessary in order to mediate is worrisome indeed. Yet this Toronto commercial litigator felt that the mediator was dispensable, merely a token teddy bear in the session. Similarly, in Robyn's comic book mediation in *The Associates*, no mediator is actually present, the session is useless, and Robyn is very disappointed.

Robyn's feeling of disappointment is pointedly demonstrated to viewers. On her way out of the unsuccessful mediation, Robyn throws her copy of *Getting to Yes* in the garbage. A bit later, however, some hope emerges. The brothers agree to recommence mediation because Robyn successfully convinces them that "sometimes a good deal is like a win." By this statement, Robyn equates successful settlement or mediation with litigation victory in terms of value. She hopes the brothers will consider a mediation agreement to be just as valuable as a win in court. Sadly, however, no mediation agreement is reached. By the end of the episode, the mediation, and the comic book, are both in tatters. During the mediation session the brothers physically struggle over the comic book and wind up tearing it in half, thereby ending the mediation session, and ostensibly, their relationship. Robyn is devastated, leading her to reveal to her friends, the other four associates, that she is scared of litigation.⁵⁷

56. Julie Macfarlane, "Culture change? A tale of two cities and mandatory court-connected mediation" (2002) 2 *Journal of Dispute Resolution* 241.

57. Episode 109, "Family Values."

What are we to make of this? Is mediation really useless? While research demonstrates that Walter was wrong and that mediation is not “half-assed lawyering,” Walter’s comment may still be partially true of Robyn because she is “scared of a fight.” Are mediation advocates simply weak lawyers who cannot handle the court room? Are women lawyers like Robyn more likely to be advocates for mediation because they are scared of litigation? Is mediation the ineffectual choice for ‘soft’ women lawyers who cannot really hack it in the ‘real’ legal world of litigation? No. Advocating for, using, and representing clients in mediation the way Robyn does is illustrative of a problem-solving approach, and research demonstrates that a problem-solving approach is valued by lawyers and preferred over adversarial approaches.⁵⁸ The issue may rather centre around the fact that Robyn is a woman.

There are two reasons why gender may negatively effect the character of Robyn on *The Associates*. Firstly, popular culture portrayals of women lawyers such as Robyn are problematic. In popular culture the “narratives about female lawyers seem less concerned with their work and more with how they find a man and thus become fulfilled human beings.”⁵⁹ And, especially in film, but also in television, women lawyers are portrayed as somewhat incompetent.⁶⁰ So, in terms of overcoming negative popular culture depictions of women lawyers, Robyn has a

58. Andrea Kupfer Schneider, “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style” (2002) 7 *Harvard Negotiation Law Review* 143 at 167.

59. Michael Asimow and Shannon Mader, *Law and Popular Culture: A Course Book* (New York: Peter Lang Publishing Inc., 2004) at 188.

60. See Stacy Caplow, “Still in the Dark: Disappointing Images of Women Lawyers in the Movies” (1999) 20 *Women’s Rights Law Reporter* 55; Christine A. Corcos, “Portia and Her Partners in Popular Culture: A Bibliography” (1998) 22 *Legal Studies Forum* 269; L. Graham and G. Maschio, “A False Public Sentiment: Narrative and Visual Images of Women Lawyers in Film” (1995-96) 84 *Kentucky Law Journal* 1027; Orit Kamir, “Feminist Law and Film: Imagining Judges and Justice” (2000) 75 *Chicago-Kent Law Review* 899; Cynthia Lucia, “Women on Trial: The Female Lawyer in the Hollywood Courtroom” in M.A. Fineman and M.T. McCluskey, eds., *Feminism, Media and The Law* (New York: Oxford University Press, 1997) at 146; Margaret M. Russell, “Law and Racial Reelism: Black Women as Celluloid ‘Legal’ Heroines” in M.A. Fineman and M.T. McCluskey, eds., *Feminism, Media and The Law* (New York: Oxford University Press, 1997) at 136; Carole Shapiro, “Women Lawyers in Celluloid: Why Hollywood Skirts the Truth” (1995) 25 *University of Toledo Law Review* 955; Carole Shapiro, “Women Lawyers in Celluloid, Rewrapped” (1998) 23 *Vermont Law Review* 303; and Mark Tushnet, “*Class Action*: One View of Gender and Law in Popular Culture” in John Denvir, ed., *Legal Reelism: Movies as Legal Texts* (Urbana and Chicago: University of Illinois Press, 1996) at 244. For women lawyers on television, see D. Klein, “Ally McBeal and her Sisters: A Quantitative and Qualitative Analysis of Representations of Women Lawyers on Prime-Time Television” (1998) 18 *Loyola of Los Angeles Entertainment Law Journal* 259.

tough, ongoing battle ahead of her. Secondly, and more importantly for my purposes here, Robyn may sometimes be disadvantaged as a negotiator and a mediation advocate due to her gender.

A large group of dispute resolution scholars describe gender differences in negotiation styles and strategies.⁶¹ As a negotiator, Robyn might fall into the category of women whom, by virtue of socialization, conversational style, or unequal positions of power, do not fair as well as men in negotiations when negotiating for themselves. She might, like many women, tend to expect less and therefore ask for less for herself in negotiations.⁶² When Tinsely, Cheldelin, Kupfer Schneider, and Amanatullah studied new women hires, they found that when these women asked for more compensation they were judged significantly more demanding and less nice than when new men hires engaged in the same behaviour.⁶³ The authors opine that women's reticence to assert their self-interests in negotiations stems from an anticipatory response designed to avoid backlash. Women negotiators' assertive behaviour is however acceptable, or subjected to less backlash, when it is seen as advocating for others.⁶⁴ Similarly, when Robyn negotiates on behalf of

61. See for example: Linda Babcock and Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* (Princeton University Press, 2003); D. Kolb, "Her Place at the Table: Gender and Negotiation" in L. Hall, ed., *Negotiation: Strategies for Mutual Gain* (Newbury Park, CA: Sage, 1993) at 138; C. Rose, "Bargaining and Gender" (1995) 18 *Harvard Journal of Law & Policy* 547; K. Leung, M. Bond, D. Carment, L. Krishnan and W. Liebrand, "Effects of Cultural Femininity on Preference for Methods of Conflict Processing: A Cross-Cultural Study" (1990) 26 *Journal of Experimental Social Psychology* 373; Burton *et al.*, "Feminist Theory, Professional Ethics and Gender-Related Distinctions in Attorney Negotiating Styles" (1991) 2 *Journal of Dispute Resolution* 199; I. Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations" (1991) 104 *Harvard Law Review* 817; I. Ayres, "Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause" (1995) 94 *Michigan Law Review* 109; and H. Riley and K. McGinn, "When Does Gender Matter in Negotiation?" (Sept. 2002) John F. Kennedy School of Government Harvard University Faculty Research Working Paper Series, available from <http://ssrn.com/abstract_id=320363>.
62. C. Eckel, A. de Oliveira and P. Grossman, "Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative than Men?" (2008) *Negotiation Journal* 429.
63. C. Tinsely, S. Cheldelin, A. Kupfer Schneider and E. Amanatullah, "Women at the Bargaining Table: Pitfalls and Prospects" (2009) 25 *Negotiation Journal* 233.
64. C. Tinsely, S. Cheldelin, A. Kupfer Schneider and E. Amanatullah, "Women at the Bargaining Table: Pitfalls and Prospects" (2009) 25 *Negotiation Journal* 233. The authors suggest that if women want to make economic gains but avoid social costs, they should frame their negotiations for raises or promotions as other-oriented (e.g. to support one's family or department at work). When a self-interested negotiation is reframed as an other-advocacy event, it appears to be much more palatable. It helps women to balance our self-presentation as both competent (like men) and likable

her clients in mediation, she does not fear social repercussions for behaving assertively. She makes fewer concessions and is able to negotiate better agreements for her clients, and is spared backlash. When negotiating on behalf of others, research demonstrates that women and men negotiators perform equally as well.⁶⁵ Thus, when acting on behalf of her clients, there would be no reason to assume that Robyn, by virtue of her gender, would perform any less well than the male associates at her firm.

Carrie Menkel-Meadow says: "I have argued for years that women may bring a different moral sensibility to the practice of law by seeking to do less harm, solve more problems, be more concerned with human relationships of both clients and of those who interact with clients, and to deal with others more honestly and fairly."⁶⁶ If Menkel-Meadow's view has any merit, it would cast Robyn in a different light. Instead of seeming 'weak' or 'scared', as suggested by Walter, Robyn could be conceptualized as more caring and concerned with her clients' satisfaction. Research supports this more positive view of female gender. Rather than being a liability, female gender could be an asset. At least one research study has found that women mediators achieve more stable agreements than men mediators.⁶⁷ This could be because women are more sensitive to the contexts of negotiations, especially when they involve a relationship.⁶⁸ Other studies support the view that female medi-

(like women). I note that I have had success implementing this suggestion, using phrases like this in my workplace: "I wouldn't be a very good associate dean if I didn't ask for more resources for the graduate program." This approach reminds others of my position rather than my gender and garners more of the resources I need or want.

65. C. Eckel, A. de Oliveira and P. Grossman, "Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative than Men?" (2008) *Negotiation Journal* 429. See also Andrea Schneider, "Negotiation Effectiveness: Is it the words we use, the meaning we intend, or who's speaking that counts?", April 16, 2004, American Bar Association Annual ADR Conference, New York City. Schneider's study asked people to describe, using adjectives, characteristics of good negotiators. She found that characteristics of effective problem-solvers, regardless of sex, were: assertiveness, empathy, and flexibility/creativity. (Six adjectives that differed statistically between women and men (i.e. men and women were perceived to be different in these areas) were: assertive, avoiding, creative, experienced, firm, and wise).
66. C. Menkel-Meadow, "Can They do That? Legal Ethics in Popular Culture: Of Characters and Acts" (2001) 48 *UCLA Law Review* 1305 at 1323.
67. K. Payne, P. Kohler, J.P. Cangemi and H. Fuqua Jr. "Communication and strategies in the mediation of disputes" (2000) 29 *Journal of Collective Negotiations in the Public Sector* 29.
68. C. Eckel, A. de Oliveira and P. Grossman, "Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative than Men?" (2008) *Negotiation Journal* 429.

ators are more transformative and somewhat more facilitative, but no less problem-solving, than male mediators.⁶⁹

While gender does matter in negotiation and mediation, overall, context and personality may be the most salient features of negotiation success. People's gender is not a consistent predictor of their negotiating behaviour or performance. Rather, it is either situational factors that make gender more or less relevant,⁷⁰ or how status and situational power interact to affect negotiation performance, sometimes rendering gender insignificant.⁷¹ We now understand, better than before, that gender is a shifting dimension of individual identity that is shaped by the contexts in which negotiation and mediation occur.⁷² "Race, ethnicity, and other simultaneous dimensions of identity are also likely to affect how different groups of negotiators come to the table."⁷³ Despite this understanding, however, we cannot discount the stereotypical perceptions that come with gender, and that were articulated by Walter in *The Associates*. For example, while research demonstrates that women tend to be more egalitarian than men and are perceived to be fairer,⁷⁴ these differences between women and men are small in comparison to differences in stereotypical *expectations* about what women and men will do. In fact, the expectations about differences have more impact upon negotiation than any actual differences.⁷⁵ This means that differences in behaviour

69. Noa Nelson, Adi Zarankin and Rachel Ben-Ari, "Transformative Women, Problem-Solving Men? Not Quite: Gender and Mediators' Perceptions of Mediation" (2010) 26 *Negotiation Journal* 287 at 298-299.

70. I. Bohnet & H. Riley Bowles, "Introduction: Gender in Negotiation" (2008) 24 *Negotiation Journal* 389.

71. Noa Nelson, Adi Zarankin and Rachel Ben-Ari, "Transformative Women, Problem-Solving Men? Not Quite: Gender and Mediators' Perceptions of Mediation" (2010) 26 *Negotiation Journal* 287 at 291.

72. D. Kolb, "Too Bad for the Women or Does it Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years" (2009) 25 *Negotiation Journal* 515 at 517.

73. D. Kolb, "Too Bad for the Women or Does it Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years" (2009) 25 *Negotiation Journal* 515 at 520.

74. C. Eckel, A. de Oliveira and P. Grossman, "Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative than Men?" (2008) *Negotiation Journal* 429.

75. C. Eckel, A. de Oliveira and P. Grossman, "Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative than Men?" (2008) *Negotiation Journal* 429. Similarly, Deborah Kolb, "Too Bad for the Women or Does it Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years" (2009) 25 *Negotiation Journal* 515 at 521 notes: "Gender schemas are implicit sets of hypotheses or assumptions about sex differences. Such schemas, although not wholly inaccurate, can inject bias into evaluations of professional women's behaviour."

actually have less weight than differences in expectations or perceptions about behaviour. Given that neither gender appears to be aware of its expectations or perceptions, we have many barriers to overcome. When Tinsely et al confronted the women and the men in their study with the fact that they had both penalized assertive women, the women and the men expressed no awareness that they had done so.⁷⁶ If women and men are both unconsciously penalizing women negotiators for assertive behaviour, all lawyers, TV and real, have a long way to go.

And so we come full circle. Popular culture portrays women lawyers less positively than men lawyers, and ADR research demonstrates that in some instances, women lawyers may have less negotiation success than men lawyers. These dual problems could of course be somewhat alleviated if we stop using men's negotiation and mediation styles as the standard against which women are compared. As Deborah Kolb notes:

Representing gender primarily along the lines of difference puts responsibility for change and remedying any disadvantage solely on the individual – a 'fix the woman' approach – limiting the possibilities for negotiating change in the cultures and institutions that potentially contribute to disparities in performance.⁷⁷

When we only target women for improvement, we leave the theory and practice of ADR unchanged.

5. Conclusion

How then might we change ADR? I began this article by noting that negative attitudes toward settlement and mediation continue to exist. Clearly, negative attitudes toward women negotiators and mediation advocates also continue to exist. One way to potentially combat these attitudes may be through popular television. Television may be the vehicle through which mediators are able to gain greater positive exposure.⁷⁸

76. C. Tinsely, S. Cheldelin, A. Kupfer Schneider and E. Amanatullah, "Women at the Bargaining Table: Pitfalls and Prospects" (2009) 25 *Negotiation Journal* 233.

77. D. Kolb, "Too Bad for the Women or Does it Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years" (2009) 25 *Negotiation Journal* 515 at 516, referencing the work of D. Myerson and J. Fletcher, "A modest manifesto for shattering the glass ceiling" (2000) 78 *Harvard Business Review* 126.

78. Increasing mediator profile is a goal of many mediators, who hope for raised profiles within the legal community, their community organisations, the legal profession and law schools, and in society generally.

In this article I have taken a cultural legal approach to explore the relationship between mediation and popular culture in one Canadian legal television series, *The Associates*. My close analysis of *The Associates* revealed an unprecedented, nor currently rivalled, number of mediation and settlement-focussed episodes. The sheer number of mediation-themed story lines on *The Associates* demonstrates that *The Associates* favoured a problem-solving, settlement-focussed approach to lawyering. In other words, *The Associates* was the first Canadian or American television show to actively attempt to highlight positive understandings of settlement and to provide positive depictions of mediation. When juxtaposed against all other North American lawyer dramas that venerate the trial, merely portraying mediation amounts to advocating for it. *The Associates* championed mediation each time it mentioned it, depicted it, and made it look as interesting and exciting as courtroom work. This is important, and leads me to conclude that television may be the vehicle through which mediators are eventually able to claim a larger piece of the popular culture pie.⁷⁹

Television is the medium that will best allow the process of mediation to enter into wide cultural use. Evidence of popular culture's success in disseminating lawyer imagery abounds. Philip Meyer notes: "Popular cinema often directly influences trial attorneys' selection of story structure, definition of story theme, and creation of recognizable stock characters, including the identity of the storyteller/attorney."⁸⁰ Stachenfeld and Nicholson, two lawyers who own a company called Legal Video Services that designs and creates courtroom graphics and visual aids, bolster Meyer's claim. They note: "We design courtroom graphics with a view to visual storytelling, keeping in mind the visual frame of reference of American jurors."⁸¹ The power of visual images is so strong that after a trial that included graphics created by Stachenfeld and Nicholson's company, every member of the jury asked to have his or her picture taken

79. Carrie Menkel-Meadow, "Legal Negotiation in Popular Culture: What Are We Bargaining For?" in Michael Freeman, ed., *Law and Popular Culture* (New York: Oxford University Press, 2005), writes the following: "I write this paper to ... encourage more critical thinking among the critics of popular culture of the overused tropes, metaphors, and literal depictions of negotiations in film, television and popular novels, and to encourage creators of popular culture to take a closer and more creative look at how negotiations, in both disputing and deal cultures, are evolving to solve problems, or at least expose them as more complex than just two sides with a single issued to be decided by some form of verbal jousting." (at 585).

80. P.N. Meyer, "Will you Please be Quiet, Please? Lawyers Listening to the Call of Stories" (1994) 18 Vermont Law Review 567 at 576.

81. A.J. Stachenfeld and C.M. Nicholson, "Blurred Boundaries: An Analysis of the Close Relationship Between Popular Culture and the Practice of Law" (1996) 30 University of San Francisco Law Review 903 at 906.

with the graphics.⁸² Owens also notes the power and influence wielded by popular culture and its images of lawyers, especially the images created by John Grisham. Owens states: "A quick search on Westlaw or Lexis will reveal many opinions from courts around the country describing the facts at issue as 'Grisham-like'."⁸³ He further notes:

If prosecutors, defence counsel, and judges are quoting Grisham in court filings, then it is safe to say that the public, including young lawyers, must take away something about practising law from Grisham's books. ... I do believe, however, that the descriptions of lawyers and the legal world in Grisham's books resonate very strongly with the American public, including young lawyers.⁸⁴

Asimow goes even further. He notes that, "On the issues of overwork and lawyer lifestyle and the single-minded pursuit of profit in big firms, the movies are on the money."⁸⁵ In other words, that films actually correctly portray the 'truth' of American big firm legal practice.⁸⁶ Asimow and Mader note that "popular culture both *constructs* our perceptions of the law and *changes* the way that the players in the legal system behave."⁸⁷ Based on television's enormous success inculcating the image of the lawyer and providing the public with much of its information on the legal system, we may extrapolate television's success in propagating information about mediation and mediators.⁸⁸

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82. A.J. Stachenfeld and C.M. Nicholson, "Blurred Boundaries: An Analysis of the Close Relationship Between Popular Culture and the Practice of Law" (1996) 30 *University of San Francisco Law Review* 903 at 912.
 83. J.B. Owens, "Grisham's Legal Tales: A Moral Compass for the Young Lawyer" (2001) 48 *UCLA Law Review* 1431 at 1433.
 84. J.B. Owens, "Grisham's Legal Tales: A Moral Compass for the Young Lawyer" (2001) 48 *UCLA Law Review* 1431 at 1434.
 85. M. Asimow, "Embodiment of Evil: Law Firms in the Movies" (2001) 48 *UCLA Law Review* 1339 at 1391.
 86. Others share the view that TV has the power to portray truth and improved ways of practicing. John Cooper, "Criminal Views of the Barrister", June 14, 2005, *The London Times*, <<http://www.timesonline.co.uk/article/0,,200-1649965,00.html>>, notes: "It is through these programmes that the public will form their views. ...The profession has to alter its image and the place to do that may not be in fact but in fiction."
 87. Michael Asimow and Shannon Mader, *Law and Popular Culture: A Course Book* (New York: Peter Lang Publishing Inc., 2004) at xxii, emphasis in original.
 88. Kottak argues that electronic media can spread and construct national and ethnic identities because of the reciprocal relationship between mass media and culture (C. Kottak, "The Media, Development and Social Change" in E. Moran, ed., *Transforming Societies, Transforming Anthropology* (Ann Arbor: University of Michigan Press, 1996) at 135). In this same vein, popular culture might spread and construct mediator image.

The mediation chamber is a site of cultural legal import. Seeing it on television would not only give us more opportunities to study mediation, but would also increase social space for mediators in our adversarial legal world. Even on a conservative estimate, the power of popular culture such as television to create mediation-awareness is undeniable. Just as journalists can create a 'crime wave' by reporting on all the crimes in a given time frame, and end the wave simply by not reporting on crimes,⁸⁹ so too can waves of enthusiasm for mediation and other non-adversarial legal processes be created by popular culture.⁹⁰ Indeed, the American television network, USA, premiered a new show on Thursday, January 20, 2011 entitled *Fairly Legal*. The show stars Sarah Shahi as Kate Reed, a former lawyer now practising as a mediator. At least initially, this one hour prime time dramatic series will not be broadcast in Canada. However, perusing the USA network website led to the following tag lines describing the show: "Don't go to court, go to Kate," "Kate solves people's problems," "No longer a lawyer, no longer innocent. She's somewhere in between." The website says that "Kate Reed knows how to put an end to a fight," "She wants to give everyone their fair shake," and "find a way to make sure everyone wins." The show is "Justice with a twist" and typically, because the star is a woman, "Justice never looked this good."⁹¹ It will be interesting to follow this program (likely online for Canadian viewers) to see what a television show focused on mediation, whose female protagonist is a mediator, does for the profile of mediation and mediators in North America. It stands to reason that if successful, this television show could have an enormous influence on the public, lawyers, judges, mediators, law students, and mediation students.

Just as *The Associates* was not a 'truly' feminist TV show, nor always accurate in its portrayal of mediation, it is unlikely that *Fairly Legal* will be a feminist show or always correctly depict mediation. The show will however focus on a strong, smart, effective woman mediator, and in so doing, send some pro-woman and pro-mediation messages. Since

89. C. McCormick, *Constructing Danger: The Mis/Representation of Crime in the News* (Halifax: Fernwood, 1995).

90. Obviously filmmakers bear a very large portion of responsibility for popular culture visual images – both positive and negative. Pierre Berton, in *Hollywood's Canada* (Toronto: McClelland and Stewart Limited, 1975), further explains the power of popular culture: "It was not the National Film Board that gave us our image of ourselves and it was not the National Film Board that gave the rest of the world its image of Canada. It was Hollywood." (at 237). Thus, if national identity can be created by popular culture, so might mediator identity also be created.

91. <<http://www.usanetwork.com/series/fairlylegal/>> (last accessed on January 18, 2011).

television reaches a much larger audience than legal academic feminist and conflict resolution writing, there is great potential for this show's messages to reach many.⁹² As Hollows points out, "The importance of some forms of 'popular' feminism such as those seen on *Oprah* is not simply about the size of their audience but the ways in which their mode of address seeks to include rather than exclude."⁹³ Inclusive, feminist conflict resolution approaches to disputing will more easily enter the public domain, make mediation more attractive, and gain authority through popular culture, than through academic treatises. Television, for marketing and monetary reasons, needs to appeal to the broadest possible audience. As a result, a show such as *Fairly Legal* will contain multiple ways of accessing and interpreting its messages. If even some of these ways are informed by feminist conflict resolution theory, it would make a difference, and could increase awareness of the strengths and benefits of mediation. Although granting legitimacy to popular feminism would likely entail giving up some forms of feminist authority,⁹⁴ this is likely worth it if we are able to actively pursue an agenda of conflict resolution intervention and feminist agitation in popular culture visual media. According to Margaret Russell, there is an "evanescent line between Hollywood fantasy and reality."⁹⁵ Popular television may just be the way to solidify that ephemeral line. Watching mediators on TV could very well increase mediator profile and champion settlement-focussed, feminist, problem-solving, mediative ways of resolving disputes. Stay tuned.

92. In other work I have examined films and what they reveal about mediators. See for example "The Mediator as Cook: Mediation Metaphors at the Movies" (2007) 2 *Journal of Dispute Resolution* 455. I argue that films such as *Chocolat*, *Soul Food*, *Fried Green Tomatoes*, *The Spitfire Grill* and *Mostly Martha* portray female mediators as vital, sometimes radical, principals, actively constituting the conflict resolution and filmic landscape, to the betterment of all. By featuring strong, effective mediation characters, these films affirm the power of feminist conflict resolution and the image of the mediator.

93. J. Hollows, *Feminism, Femininity and Popular Culture* (Manchester, UK: Manchester University Press, 2000) at 202.

94. J. Hollows, *Feminism, Femininity and Popular Culture* (Manchester, UK: Manchester University Press, 2000) at 203.

95. M. Russell, "Foreword: Law in Living Color" (1998) 5 *Asian Law Journal* 1 at 5, Symposium on Race, Law, and Film.

LE NOTAIRE, ARBITRE NATUREL DES DIFFÉRENDS ? : UNE LONGUE TRADITION QUÉBÉCOISE

*David Gilles**

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