MEDIATION: THE "GIRLY" LITIGATION?

Jennifer L. Schulz and Jocelyn Turnbull*

* Schulz, S.J.D. is Associate Professor and Associate Dean, Faculty of Law, University of Manitoba, Winnipeg and Turnbull, J.D. is Student-at-Law, Burnet, Duckworth & Palmer LLP, Calgary.

© 2012 Revue d'arbitrage et de médiation, Volume 2, Numéro 2

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Abstract

In this article we argue that mediation, as a process, is gendered. Although it is not a simplistic, binary opposition, mediation is primarily gendered female and litigation is primarily gendered male. As a result of this female gendering, mediation is devalued as compared to litigation in North America. In order to demonstrate this, in the first part of our article we focus on (i) the goals, (ii) skills, and (iii) language of mediation. When they are compared with litigation's goals, skills, and language, the gendering of both processes can be identified and the resulting devaluation of mediation observed. The goals, skills, and language of mediation are not simply "female traits" that come naturally to some individuals based on gender. They are real and difficult skills to master, and therefore mediation education is implicated. In the second part of our article we focus on ways to improve the mediation education experience in law schools. We make some recommendations for mediation pedagogy and consider how law professors can better teach mediation so that law students understand and value the process. We conclude by arguing that mediation will continue to be devalued, especially as compared to litigation, until the process is revalued and mediators' contributions are appropriately evaluated. By demanding an assessment of mediation success that is not constricted by notions of "female" and "male", both the profile and valuation of mediation and mediators will increase.

1. Introduction & Background

Mediation is the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.[1] Both mediation and litigation require a neutral third party to move the disputants toward an outcome. Litigators focus on the law and ask a decision-maker to render a binding, public decision. Mediators assist parties to find their own consensual, private, mutually beneficial resolution. In this article we argue that mediation, as a process, is gendered. Although it is not a simplistic, binary opposition, mediation is predominantly gendered female and litigation is predominantly gendered male.

We do not wish to perpetuate stereotypes. However, for ease of reference, the shorthand of "female" and "male" has been employed throughout this article. We are fully cognizant of the limitations of using "female" and "male" as shorthand terms of description.[2] However, we are buoyed and guided by third wave feminist energy that understands

1. Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd ed. (San Francisco: Jossey-Bass Publishers, 1996) at 15.
2. We are also fully aware of feminist critiques of mediation. Very valid concerns about the capacity of mediation to protect women's interests have been articulated. For example, in the family mediation context it has been argued that mediation can perpetuate inequality because some women, motivated by a desire to ensure custody, will give up rights they are legally entitled to. Or, that women in traditional marriages have unequal bargaining strength so they should not be in mediation, but rather, protected by advocates in the litigation system. The feminist critique of mediation is important, but it is not what our paper is about. For more see: Trina Grillo, "Mediation Alternative: Process Dangers for Women" (1992) 30 *Family Court Review* 415; 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; N. Nelson *et al.*, "Transformative Women, Problem-Solving Men? Not Quite: Gender and Mediators' Perceptions of Mediation" (2010) 26 *Negotiation Journal* 287; L. Babcock & S. Laschever, *Women Don't Ask: Negotiation and the Gender Divide* (Princeton University Press, 2003); L. Stamato, "Voice, Place, and Process: Research on Gender, Negotiation, and Conflict Resolution" (1992) 9 *Mediation Quarterly* 375; and C. Watson, "Gender versus Power as a Predictor of Negotiation Behaviour and Outcomes" (1994) *Negotiation Journal* 117.

the need to make complex ideas understandable and accessible. So, despite the fact that a contradictory response can always be found for every generalization about "female" or "male" and "mediation" or "litigation", we stand by our argument that mediation is primarily gendered female and litigation is primarily gendered male. How these two processes operate is gendered; what occurs privately – mediation – is feminized, and litigation, in the public sphere, is masculinized. Often, mediation is compared to and valued against litigation, and is found wanting.[3] We argue this is because the value attached to each process is informed by the gender assigned to the particular process.

Mediation, whether a field, an occupation, a calling, or a profession, is gendered female and therefore devalued within North American society. In order to demonstrate this, in the first part of our article we focus on the (i) goals, (ii) skills, and (iii) language of mediation. When they are compared with litigation's goals, skills, and language, the gendering of both processes can be identified and the resulting devaluation of mediation observed. The goals, skills, and language of mediation are not simply "female traits" that come naturally to some individuals based on gender. They are real and difficult skills to master, and therefore mediation education is implicated. Because our writing collaboration came out of the professor-student relationship, in the second part of our paper we focus on ways to improve the mediation education experience in law schools. We make some recommendations for mediation pedagogy and consider how law professors can better teach mediation so that law students understand and value the process. We conclude by arguing that mediation will continue to be devalued, especially as compared to litigation, until the process is revalued and mediators' contributions are properly evaluated. By demanding an assessment of mediation success that is not constricted by notions of "female" and "male", both the profile and valuation of mediation and mediators will increase.

For many years it was widely accepted that gender was an achieved status which one "constructed through psychological, cultural, and social means,"[4] whereas sex was dictated by biology. Understanding gender as an achieved status became problematic upon the realiza-

3. Melissa L. Nelken, *Negotiation: Theory and Practice*, 2nd ed. (Newark, NJ: LexisNexis Matthew Bender & Company, 2007) at 442 notes that another convenient method to ensure that women's work is undervalued is the division of men and women into separate spheres of work to ensure that their relative skills and contributions cannot be effectively compared and evaluated using the masculine measuring stick.
4. Candace West & Don Zimmerman, "Doing Gender" in Michael Kimmel & Amy Aronson, eds., *The Gendered Society Reader* (New York: Oxford University Press, 2004) 150 at 150.

tion that gender was not simply "achieved" by a specific age, only to remain stagnant forever. Judith Butler worked extensively not only to destabilize what people considered gender, but also what we understand as sex. Butler challenged the idea that sex was an appropriate natural categorization and attempted to destabilize what people considered to be the most basic distinction between women and men. She pointed out the difference between "expressively performed" and "performatively created" notions of sex and gender.[5] Butler argued that gender was not simply within us and performed for an audience, but was actively created through the performance itself.[6] This means gender is constructed inside and outside oneself continuously. Individuals often perform gender to conform to society's ideas of "male" and "female."[7] Candace West and Don Zimmerman argue that an individual "doing" gender was based on surrounding social guides rather than simply acting out an inherent gender from within.[8] West and Zimmerman discuss the ways in which doing gender is an "ongoing activity embedded in everyday interaction"[9] allowing individuals to use specific behaviours to "mark or display gender,"[10] which can then be evaluated by others based on notions of appropriate behaviours for each gender. It is now commonly accepted that "[g]ender is not a rigid or reified analytical category imposed on human experience, but a fluid one whose meaning emerges in specific social contexts as it is created and re-created through human actions."[11] We accept this understanding of gender – that it is produced and performed by individuals in interaction with others.

Because we are interested in mediation, we are concerned with the production of gender in the practice of mediation. Therefore, we turned to Joan Acker's work. Acker has written extensively about the need to understand the gender of workers, but also the gender and sexuality of the workplace itself.[12] She states that the very concept of "a job" is gendered as it "already contains the gender-based division of labor and

5. Judith Butler, "Performative Acts and Gender Constitution: An Essay In Phenomenology and Feminist Theory" (1988) 40 *Theatre Journal* 519.
6. *Ibid*.
7. *Ibid*.
8. Candace West & Don Zimmerman, "Doing Gender" in Michael Kimmel & Amy Aronson, eds., *The Gendered Society Reader* (New York: Oxford University Press, 2004) 150 at 150.
9. *Ibid*.
10. *Ibid*
11. Judith Gerson & Kathy Peiss, "Boundaries, Negotiation, Consciousness: Reconceptualizing Gender Relations" in Michael Kimmel & Amy Aronson, eds., *The Gendered Society Reader* (New York: Oxford University Press, 2004) 114 at 114.
12. Joan Acker, "Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations" (1990) 4 *Gender & Society* 139.

the separation between the public and the private sphere."[13] Traditionally men dominated the public sphere and as such, most understandings of work and paid employment were masculine. Despite the emergence of women in the workforce, the gender of "work" itself remains masculine, with specific areas of work or positions in the workforce being designated female.

Raewyn Connell argues that each individual occupation is assigned a gender.[14] There are certain jobs that are deemed to be more appropriate for women to hold than men. These jobs focus on gender traits which society dictates are "properly" held by women.[15] The most obvious of these gendered traits conceptualizes women as caring individuals and therefore states that women are most appropriate for caring work, such as nursing. This gendering of professions or occupations has occurred since women first entered the workforce.[16] Interestingly for our purposes, occupational gender not only dictates whom society believes will be an appropriate employee within that occupation, but also the value assigned to that occupation.[17] So, for example, in the 1970s when women began operating typewriters, the men who previously held secretarial positions no longer wished to perform the feminized work; it had become devalued because of the female employees. As female workers continued to enter the workforce in greater numbers, the positions they took were devalued and male reluctance to take on secretarial and other caring positions increased. The idea that women could perform the same work as men was simply not entertained, so numerous positions were created to allow men to perform similar work as their female counterparts, with added status. Jobs were delineated as "for men" or "for women" and thus men were made assistants and women remained secretaries.[18] We are intrigued by the notion that litigation might similarly

13. *Ibid*. at 149.
14. Raewyn Connell, "A Thousand Miles from Kind: Men, Masculinities and Modern Institutions" (2008) 16 *The Journal of Men's Studies* 237.
15. Susan B. Murray, "Getting Paid in Smiles: The Gendering of Child Care Work" (2000) 23 *Symbolic Interactions* 135; Damian Grimshaw & Jill Rubery, *Undervaluing women's work*, Equal Opportunities Commission Working Paper No. 53, 2007.
16. Judith Gerson & Kathy Peiss, "Boundaries, Negotiation, Consciousness: Reconceptualizing Gender Relations" in Michael Kimmel & Amy Aronson, eds., *The Gendered Society Reader* (New York: Oxford University Press, 2004) 114 at 114.
17. Joan Acker, "Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations" (1990) 4 *Gender & Society* 139; Damian Grimshaw & Jill Rubery, *Undervaluing women's work*, Equal Opportunities Commission Working Paper No. 53, 2007.
18. Judith Gerson & Kathy Peiss, "Boundaries, Negotiation, Consciousness: Reconceptualizing Gender Relations" in Michael Kimmel & Amy Aronson, eds., *The Gendered Society Reader* (New York: Oxford University Press, 2004) 114 at 114.

be understood as more "for men" while mediation, a more caring occupation, is more "for women."

When an occupation is for women or feminised, it is devalued.[19] Research shows that "feminising occupations during the 1970s and 1980s tended to be accompanied by drops in average pay for the occupation"[20] regardless of whether or not the workers were men or women. This devaluation of work is connected to the gendering of the occupation rather than the level of difficulty or schooling required to perform the work.[21] When evaluating any occupation we distinguish between applicable traits and valuable skills in accomplishing the required actions. In order to properly reward and value workers and occupations, we must distinguish between skills and mere personal traits, and then place a greater value on skills. One of the reasons discovered for the "low valuation attached to women's skills is the assumption that either women's skills are "natural", deriving from women's essence as mothers or caregivers, or that the exercise of these skills gives rise to high levels of job satisfaction, providing high levels of non-monetary compensation to offset the low monetary rewards."[22] To suggest that women enjoy their work to a greater degree than their male counterparts, or that they understand and naturally have a given ability to perform the tasks, allows the undervaluation to be considered justified.

Thus, North American society as a whole is not sufficiently concerned to do anything about the fact that the occupations that are set aside for women, or gendered female within society, are also the occupations that generally have lower status, lower wages, lack of authority, lack of opportunity for advancement, and/or are performed part-time.[23] It is fair to say that in North American society, all "women's work" and

19. It is also true that racialized occupations are devalued. However, a discussion of race and other intersecting dimensions of oppression is beyond the scope of this article.
20. Damian Grimshaw & Jill Rubery, *Undervaluing women's work*, Equal Opportunities Commission Working Paper No. 53, 2007.
21. Barbara F. Reskin, "Bringing the Men Back In: Sex Differentiation and the Devaluation of Women's Work" in Michael Kimmel & Amy Aronson, eds., *The Gendered Society Reader* (New York: Oxford University Press, 2004) 277; Damian Grimshaw & Jill Rubery, *Undervaluing women's work*, Equal Opportunities Commission Working Paper No. 53, 2007 at 60.
22. Damian Grimshaw & Jill Rubery, *Undervaluing women's work*, Equal Opportunities Commission Working Paper No. 53, 2007 at 21.
23. Barbara F. Reskin, "Bringing the Men Back In: Sex Differentiation and the Devaluation of Women's Work" in Michael Kimmel & Amy Aronson, eds., *The Gendered Society Reader* (New York: Oxford University Press, 2004) 277; Damian Grimshaw & Jill Rubery, *Undervaluing women's work*, Equal Opportunities Commission Working Paper No. 53, 2007.

feminized professions are devalued. For men who join female gendered occupations, their rate of promotion is impressive,[24] as men are believed to be "natural" leaders in those occupations.[25] Women who join male gendered occupations are often required to act as men to accomplish the work required, while simultaneously being punished for their lack of femininity.[26]

It is impossible to determine the gender of most practising mediators. However, we were able to obtain data from mediation organizations in Manitoba, Saskatchewan, and Ontario. So, for example, on Manitoba's Automobile Injury Mediation Program Roster, there are 16 mediators, 10 of whom are women.[27] At Mediation Services Winnipeg, there are 6 staff mediators and 3 are women and 3 are men. In 2011, 38 women and 11 men inquired about joining Mediation Services' volunteer mediator pool. In 2012, 12 women and 7 men inquired about joining the mediator pool.[28] While decidedly more women appear interested in working as volunteer mediators than men, Mediation Services Winnipeg actively balances their mediator pool such that they currently have 22 women and 20 men volunteer mediators.[29] At the Manitoba Human Rights Commission, there are four mediators on staff and all are women.[30] At Conflict Resolution Saskatchewan, the leading provincial membership organization that draws together dispute resolution practitioners, there are exactly 50 % male and 50 % female mediators.[31] In The Dispute Resolution Office for the Government of Saskatchewan in Regina, there are 13 male mediators and 11 female mediators.[32]

24. Susan B. Murray, "Getting Paid in Smiles: The Gendering of Child Care Work" (2000) 23 *Symbolic Interactions* 135; Christine L. Williams, "The Glass Escalator: Hidden Advantages for Men in the 'Female' Professions" in Michael Kimmel & Amy Aronson, eds., *The Gendered Society Reader* (New York: Oxford University Press, 2004) 291; Damian Grimshaw & Jill Rubery, *Undervaluing women's work*, Equal Opportunities Commission Working Paper No. 53, 2007.
25. *Ibid*.
26. Judith Gerson & Kathy Peiss, "Boundaries, Negotiation, Consciousness: Reconceptualizing Gender Relations" in Michael Kimmel & Amy Aronson, eds., *The Gendered Society Reader* (New York: Oxford University Press, 2004) 114 at 114.
27. As reported June 6, 2012 by Ms. Evelyn Bernstein, Project Manager, Automobile Injury Mediation, Winnipeg.
28. As reported June 6, 2012 by Ms. Nicole Robidoux, Volunteer Coordinator & Caseworker, Mediation Services, Winnipeg.
29. *Ibid*.
30. As reported June 6, 2012 by Ms. Kelly Jones, Mediator, Manitoba Human Rights Commission, Winnipeg.
31. As reported June 18, 2012 by Ms. Shirley Costron, Administrator, Conflict Resolution Saskatchewan Inc., Regina.
32. As reported June 11, 2012 by Ms. Verna LeBlanc, Administrator, The Dispute Resolution Office, Regina.

Ontario's Mandatory Mediation Program, which spans all civil, non-family legal cases in Toronto, Ottawa, and Windsor, has 149 male mediators and 108 female mediators.[33] These numbers do not reveal whether women and men tend to mediate in different practice areas (for e.g. family, commercial, or international disputes), nor do they demonstrate that women outnumber men as mediators.[34] (However, most Canadian law professors who teach mediation are women,[35] and on the only North American prime time television program to ever feature a mediator protagonist, *Fairly Legal*, the mediator is a woman).[36] Rather than focus on figures that may or may not be revelatory, we focus on our argument that in North America, mediation is devalued or viewed as an alternative or secondary process to litigation for resolving legal disputes because of its female gender. We argue this can be seen when the goals, skills, and language of mediation are compared to those of litigation.

2. Goals, Skills & Language

The goals of mediation can be broad or narrow depending on the type of dispute and the orientation of the parties and the mediator:

> Mediation proponents claim that mediation can preserve continuing relationships, provide privacy, identify underlying interests, discover integrative or win-win solutions, result in long-lasting agreements, prevent violence, and generally avoid the downsides associated with more adversarial approaches to dispute resolution.[37]

The goals of mediation focus on the future, amiable resolutions, and the relationship between the parties. Mediators are not fact-finders,

33. As determined on May 23, 2012 by reading the mediator rosters for each city: <http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/torontoroster.asp>; <http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/ottawaroster.asp>; and <http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/windsor-roster.asp>.
34. Indeed, many of the busiest, highest paid mediators in Canada are men. "Some areas, such as international commercial arbitration and the appointment of special masters/mediators for federal courts and mass and class action litigation, are notoriously known for their underrepresentation of women as dispute managers." (Carrie Menkel-Meadow, "Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers: What Difference Does 'Gender Difference' Make?" (2012) *Dispute Resolution Magazine* 4 at 8). And, tangentially perhaps, the word for mediator in French (le médiateur), German (der Mediator), and Italian (il mediatore) is gendered male.
35. Exact numbers are difficult to obtain, but a count based on law school websites across Canada suggests 29 female ADR professors and 18 male ADR professors.
36. Jennifer L. Schulz, "Settlement and Mediation in Canadian Legal Television" (2011) 1 *Journal of Arbitration and Mediation* 77 at 103-104.
37. Andrew Pirie, *Alternative Dispute Resolution* (Toronto: Irwin Law, 2000) 153.

so they do not spend much time investigating exactly what may or may not have happened between the parties. They are not attempting to determine who was right in the same way that litigators are searching for such a declaration. Instead, mediators are generally forward-looking, focussed on maintaining relationships, and making plans to alleviate problems as they arise. Many would argue that this corresponds with a feminized picture: focussing on restoring relationships as opposed to, for example, fighting for justice.

Jennifer Coates examined gender-differentiated language and the role it plays in the continued marginalization of women in the professions.[38] Her study found that men are socialized to be more competitive and to use competitive discourse throughout discussion, whereas women are socialized to use cooperative discourse.[39] Men in the study were more individualistic, while women often define themselves and understand their world with reference to their relationships.[40] Mediation mirrors this genderization of goals by focusing on cooperation, consensus, and the parties' relationship. Litigation, on the other hand, takes a masculine approach through competitive discourse and individualistic understandings of relationships. This is because the goal of litigation is best described as winning.

David Berg, an American trial lawyer, recalls the chief justice at his call to the bar telling the new lawyers, "You worry about winning. Let us worry about justice."[41] Of course, he acknowledges that winning also "includes great settlements, especially in an age of alternative dispute resolution. But you can't get great settlements without the credible threat that you will go to trial."[42] The goal of litigators is to use threats and intimidation to win their cases at the expense of their opponents. This winner-takes-all approach, which pits one party against the other, is conventionally masculine.

In mediation, the parties are likely less focussed on winning, and instead, wonder whether mediation will be successful. Determining success is difficult because participants' views of success, or their sense of the goals of mediation, often correlate with masculine views of winning or

38. Jennifer Coates, "Language, gender and career" in Sara Mills, ed., *Language & Gender* (New York: Longman Publishing, 1995) at 13. See also Carol Gilligan, In a Different Voice (Cambridge, MA: Harvard University Press, 1982).
39. Jennifer Coates, "Language, gender and career" in Sara Mills, ed., *Language & Gender* (New York: Longman Publishing, 1995) 13.
40. *Ibid*.
41. David Berg, *The Trial Lawyer* (US: American Bar Association Publishing, 2006) at 2.
42. *Ibid*.

defeating the opponent.[43] However, in mediation, both parties may leave believing they have won, whether that means avoiding court and its costs, preserving their relationship, limiting the number of issues to be dealt with, or enjoying the win-win settlement that was created. Successful mediation is not only "measured by whether or not participants reach an agreement."[44] Mediation success outcomes also "include client satisfaction, distributive justice, relationship improvement, and resolution of conflict."[45] The goals of mediation are not the same as litigation and therefore the two processes and how they are evaluated should reflect their different goals.

The goals of the two processes, mediation and litigation, also differ with respect to emotions. Mediation deals with the emotions of the parties and suggests that when parties become emotional, ignoring such emotions can be harmful.[46] Mediators must be "sensitive to emotional needs of all parties and recognize the importance of yearnings for mutual respect, equality, security, and other such non-material interests as may be present".[47] In mediation then, one of the goals of the process is to value, respect, and work with disputants' emotions.[48] Litigation, by contrast, often dismisses emotions, or uses the emotion of the litigator as strategy to affect the outcome of the case, while sometimes minimizing the true emotions of the parties.[49] Litigators utilize emotion when strategically necessary, but are careful to stay "under a witness emotionally" in order to appear in control.[50] Litigators only become "emotional or aggressive" after the jury understands the litigator's motivations for

43. Peter Lovenheim & Lisa Guerin, *Mediate: Don't Litigate* (Berkeley, CA: Delta Printing Solutions, 2004).
44. Nancy L. Hollett *et al*., "The Assessment of Mediation Outcome: The Development and Validation of an Evaluative Technique" (2002) 23 *The Justice System Journal* 345 at 348.
45. *Ibid*.
46. Joseph Stulberg & Lela Love, *The Middle Voice* (Durham, NC: Carolina Academic Press, 2009).
47. Melissa L. Nelken, *Negotiation: Theory and Practice*, 2nd ed. (Newark, NJ: LexisNexis Matthew Bender & Company, 2007) at 443.
48. Jennifer L. Schulz, "Confectionery and Conflict Resolution? What *Chocolat* Reveals about Mediation" (2006) 22 *Negotiation Journal* 251 at 265. This is true even in complex commercial mediations involving highly sophisticated disputants. Although commercial mediators are less likely than family mediators to encounter crying disputants, emotions run high in most mediations – they are just differentially expressed. What a commercial mediator will do that a judge will not is allow private caucus sessions for venting or allow parties to take breaks when necessary. These are contextually sensitive responses that acknowledge and deal with disputant emotions.
49. Andy Boon, *Advocacy*, 2nd ed. (London, UK: Cavendish Publishing Limited, 1999) at 13.
50. David Berg, *The Trial Lawyer* (US: American Bar Association Publishing, 2006) at 13.

doing so.[51] The manipulation of emotions to achieve a desired outcome is typical for litigation and abhorrent to mediation.

The goals of mediation and litigation are very closely connected to the skill sets required for each process. Although there is no complete agreement on the skills required for good mediation, many believe "there are core skills, knowledge and other attributes necessary for competence."[52] These skills include being able to earn the trust of the parties, inventing creative options, helping the parties make informed choices, and converting the parties' positions into needs and interests.[53] This skill set is not in binary opposition to the skills required of a good litigator. For example, both mediators and litigators must be able to tell a good story. Litigators share stories with the court when they try to articulate plausible explanations of events or gain sympathy for their clients. Mediators do this when they try to help disputants understand their conflict afresh.[54] Indeed, many of the skills required for both professions are the same. The difference comes in how they are employed. So, for example, litigators, when telling stories, want to establish facts, while mediators prefer to explore how a fact was experienced and felt.[55] Mediators and litigators are both required to be excellent communicators. However, the goal in mediation is to facilitate resolution, while the goal in litigation is besting one's opponent. As a result, though excellent communication is essential in both occupations, the ways mediators and litigators communicate differ in important, and ultimately gendered ways.

Mediators use neutral language, attempt to remove accusatory statements, and encourage "I statements." Litigators use directive statements and "you statements", which make up the bulk of good cross examinations.[56] Successful litigators do not allow full answers or additional information, and make certain to put directives to the court to ensure the information they wish to get across is not misconstrued and the information that is harmful to their case is not heard. Mediators, on

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51. *Ibid*.
52. Andrew Pirie, *Alternative Dispute Resolution* (Toronto: Irwin Law, 2000) at 151.
53. *Ibid*.
54. For example, some mediators practice narrative mediation, focussing on how disputants weave their personal woes into conflict stories, and then work with them to create an alternative story. See John Winslade and Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (San Francisco: Jossey-Bass, 2001) at 72.
55. Peter Eastwood, "Great Expectations: Popular Culture and the Narration of Conflict in Litigation and Mediation" (2012) 2 *Masks: The online journal of law and theatre* 16, <http://www.masksjournal.com>.
56. Ralph Adam Fine, *The How-To-Win Trial Manual*, 4th ed. (New York: JurisNet, 2008) at 242.

the other hand, tend to probe for more, try to obtain additional information, and often avoid a directive style in favour of a more facilitative approach. Linguistic studies show that women use their speech more like mediators, as they tend to refrain from using directives and tend to generalize their speech.[57] Men, like litigators, can be more likely to use strong directives when they speak, which can sometimes create a sense of attack.[58]

In order to foster good communication in mediation, adroit facilitation is essential. Facilitation skills, generally known or understood as "soft skills", include good communication skills, emotional intelligence, and interpersonal adeptness, and are explicitly gendered female, as is obvious by the reference to "soft". It is often assumed that women more naturally possess these soft skills, and therefore it is simply taken for granted that these skills are traits of women, and not truly mediation skills. Soft skills – communication to assist and understand others – are highly feminized, focusing on listening, caring, dealing with emotions, and thinking creatively, all in the context of a privately facilitated process, and can be contrasted with the advocacy skills required for litigation.

Successful litigators realize that "much in the way of preparation, imagination, ingenuity, and oratorical skill is required to mount the most persuasive presentation"[59] before the court in an effort to win their cases. Litigation skills focus on the individual litigator and his or her ability to manipulate, coax, and persuade a particular view point, in a public forum, to benefit one party at the expense of the other. Litigation skills are generally assumed to come more easily to men, whereas the "soft skills" of mediation come more easily to women. As a result, mediation becomes gendered female to allow for the appropriate worker pool to be established.[60] When those who do the work are "naturally" suited to work in that area, the work becomes devalued due to the lack of knowledge and training that is thought to be required for those working to accomplish what comes "naturally".[61] These differences contribute to the gendering of both processes.

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57. Jennifer Coates, "Language, gender and career" in Sara Mills, ed., *Language & Gender* (New York: Longman Publishing, 1995) 13.
58. *Ibid*.
59. Geoffrey D.E. Adair, *On Trial: Advocacy Skills Law and Practice*, 2d. (Markham, ON: LexisNexis Canada, 2004) at 481.
60. Joan Acker, "Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations" in Michael S. Kimmel and Amy Aronson, eds., *The Gendered Society Reader* 2d (New York: Oxford Press, 2004) 264 at 266; Damian Grimshaw & Jill Rubery, *Undervaluing women's work*, Equal Opportunities Commission Working Paper No. 53, 2007.
61. Damian Grimshaw & Jill Rubery, *Undervaluing women's work*, Equal Opportunities Commission Working Paper No. 53, 2007.

Active listening is another skill needed for both mediators and litigators. However, the goals that actively listening mediators and litigators are striving toward are very different, and are gendered along stereotypical lines. Mediators use active listening to explore differences between the parties, and to help clarify the parties' individual perceptions of the obstacles to resolution through restating "one party's point of view in a way that allows the other party to take it in and consider it."[62] By rephrasing, actively listening, and reframing, the mediator allows the other party to hear and understand, often for the first time, the message being sent.[63] By contrast, litigators listen to every answer in order to develop their theory of the case, and sometimes, to trap or trick the opponent into saying something to harm his/her case.[64] It is common practice in litigation to put toxic statements to opponents and then listen carefully to the answer in the hope that they may adopt them as their own, thereby injuring their case.[65] Although active listening should be gender neutral, the motivations and rationale for using it are gendered. Mediators attempt to remove the accusatory portions from the conversation and encourage honest and meaningful discussion, while litigators sometimes deliberately incite confusion. The aggressive nature of the speech patterns involved in litigation highlight the stereotypically male nature of the process, while the calming and inclusionary aspects of active listening in mediation demonstrate a more stereotypically female approach.

Related to active listening is the skill of reframing. Reframing is used by mediators to remove inflammatory portions of statements, to refocus the conversation, and to paraphrase.[66] The goal of reframing is to calm the disputant and to maintain control over the mediation session in a respectful way that enhances communication.[67] In litigation, reframing is generally not done. Litigators are not interested in protecting and understanding both parties' concerns, interests, and emotions. They must be focused on presenting the information they feel will best represent their clients' cases. To ensure that the litigator remains in control of the proceedings, interruptions are a useful and necessary tool. Mediators work in stark opposition and generally forbid interruptions. The contrast between reframing for better understanding (female) and interrupting (male) speaks to the gendering of both processes.

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62. Melissa L. Nelken, *Negotiation: Theory and Practice*, 2nd ed. (Newark, NJ: LexisNexis Matthew Bender & Company, 2007) at 437.
63. *Ibid*.
64. David Berg, *The Trial Lawyer* (US: American Bar Association Publishing, 2006) at 160.
65. *Ibid*.
66. Andrew Pirie, *Alternative Dispute Resolution* (Toronto: Irwin Law, 2000) at 28.
67. *Ibid*.

When disputants or mediators do not understand something, questions are used to establish what the true feelings, understandings, opinions, and concerns of the parties are, as well as to ensure continued discussion and smoothly facilitated conversation.[68] This is in sharp contrast to the use of questions in litigation. During discovery, direct, and cross examination, questions are used to both tell one's story and to injure the opposing side.[69] Ralph Fine suggests that a cross examination question should only be asked under one of three circumstances:

(i) the jury knows the answer before the witness responds; or

(ii) the answer cannot possibly hurt; or

(iii) if one or two is not possible, you have impeachment material (deposition, etc.) that will immediately punish the witness.[70]

Thus, litigation questions are often not designed to gain further information or facilitate understanding. The litigator's questions are tools used against the opposition. The use of questions to gain information and advance conversation feminizes mediation, while the use of questions as tools or even weapons further genders litigation male.[71]

The language associated with mediation and law is also gendered. According to Jonette Watson Hamilton, masculine military metaphors are preferred in law.[72] Watson Hamilton notes that these metaphors from the nineteenth century are still prevalent today in Canadian codes of professional conduct. She cites examples of military metaphors and words found in Canadian legal codes such as: officers, guarding, and challenging.[73] These metaphors are male and suggest that it is acceptable for lawyers to be combative, competitive, individualistic, and adversarial. This "battle" approach to our adversarial system came about because in the past, litigators spent the bulk of their days in court. Now, most lawyers, and even most litigators, spend their time on negotiations and pre-trial activity, and the vast majority of all legal cases settle. However,

68. *Ibid.* at 14.
69. Ralph Adam Fine, *The How-To-Win Trial Manual*, 4th ed. (New York: JurisNet, 2008) at 242.
70. *Ibid.* at 237.
71. Jennifer Coates, "Language, gender and career" in Sara Mills, ed., *Language & Gender* (New York: Longman Publishing, 1995) 13.
72. J. Watson Hamilton, "Metaphors of Lawyers' Professionalism" 33 *Alberta Law Review* 833.
73. *Ibid.* at 839-841.

military, war, battle, and even sports and sex metaphors[74] suggest that "anyone else who wanders into the war zone or playing field can protect herself only by hiring her own champion. And by winning the litigation battles and games, the litigator powerfully demonstrates his manhood."[75]

Susan Sturm's work is related to Watson Hamilton's. Sturm identifies the "gladiator" model of legal education and lawyering.[76] She says it celebrates analytical rigor, toughness, and quick thinking, and defines success as fighting to win, especially against the odds.[77] Litigators are conceptualized in this (male) gladiator sense – it is one of the most common ways litigators are represented in popular culture.[78] This is of course different from popular understandings of mediators, who are more likely to be confused with counsellors or meditation experts than gladiators. "Even in more informal settings such as negotiations or in-house advising, lawyering often proceeds within the gladiator model."[79] As Sturm points out, underrepresented groups, legal educators, and those who advocate for increased professionalism have all questioned the adequacy of the gladiator approach to lawyering and legal education. It simply may not be true that tougher is always better and that doing battle is always the lawyer's primary mission.[80] Certainly, when lawyers are also mediators, it is not wise to engage in battle. Thus, the language of mediation and litigation is gendered and exclusionary. "The predominant metaphors of the role of lawyers continue to exclude and disempower those whom these metaphors do not describe."[81]

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74. See for example: D. McArdle, "Brothers in Arms: Sport, the Law and the Construction of Gender Identity" (1996) 24 *International Journal of the Sociology of Law* 145; M. Archer & R. Cohen, "Sidelined on the (Judicial) Bench: Sports Metaphors in Judicial Opinions" (1998) 35 *American Business Law Journal* 225; and C. Yablon, "On the Contribution of Baseball to American Legal Theory" (1994) 104 *Yale Law Journal* 227.
75. E.G. Thornburg, "Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System" (1995) 10 *Wisconsin Women's Law Journal* 225 at 242.
76. S. Sturm, "From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession" (1997) 4 *Duke Journal of Gender, Law and Policy* 119 at 121-122.
77. *Ibid.* at 128.
78. Jennifer L. Schulz, "The Mediator as Cook: Mediation Metaphors at the Movies" (2007) 2 Journal of Dispute Resolution 455 at 473.
79. S. Sturm, "From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession" (1997) 4 *Duke Journal of Gender, Law and Policy* 119 at 121-122.
80. *Ibid.* at 141.
81. J. Watson Hamilton, "Metaphors of Lawyers' Professionalism" 33 *Alberta Law Review* 833 at 857.

Current litigation language marks litigation as an adversarial battle. For example, opponents put their dukes up, get ready for a fight, rip the other party's arguments to shreds, shoot arguments down, and look for a declaration of a winner and a loser. Mediators, on the other hand, bring parties together, or bring them to the table. Here, as Jennifer Schulz points out, more nourishing metaphors from the field of cooking are at play – mediators encourage expanding or slicing the pie, putting some issues on the back burner, and not biting off more than one can chew.[82] If the mediation process leads to resolution of the dispute, the parties can be said to have found a recipe for success for their future interactions, which is very different than declaring a winner and a loser, and is of course also gendered.

Although different metaphors describe mediation and litigation, the battle, sports, and sex metaphors are used so pervasively that many people have ceased to notice that they are only metaphors and not definitions of the lawyer's role. Elizabeth Thornburg notes that these metaphors are very overlapping, fit together, focus on competing and winning, and associate winning with proving masculinity.[83] Peppin and Carty observe: "Since the warrior image is masculine, it calls on gender assumptions about roles, including the passive and acquiescent role of the person in need of rescue."[84] Thornburg argues that the war, sports, and sex metaphors for the adversary system fit beautifully into a cult of manhood wherein winning a lawsuit powerfully demonstrates the litigator's masculinity.[85] And therefore, "being a trial lawyer – a competitive,

82. Jennifer L. Schulz, "The Mediator as Cook: Mediation Metaphors at the Movies" (2007) 2 *Journal of Dispute Resolution* 455 at 475.
83. E.G. Thornburg, "Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System" (1995) 10 *Wisconsin Women's Law Journal* 225 at footnote 8.
84. P. Peppin & E. Carty, "Semiotics, Stereotypes, and Women's Health: Signifying Inequality in Drug Advertising" (2001) 13 *Canadian Journal of Women and the La*w 326 at 343.
85. E.G. Thornburg, "Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System" (1995) 10 *Wisconsin Women's Law Journal* 225 at 252. "The sexual metaphors for litigation are much more underground than the other metaphors and therefore harder to document. One hears them mostly in lawyers' offices and in continuing legal education speeches. ...these sexual metaphors are not images of mutually pleasurable adult relationships; they are images of domination and aggression." (at 240). "Similarly, courts equate ineffectiveness with impotence. ...This choice of metaphor suggests that litigation involves some kind of proof of manhood, expressed through the culturally acceptable ritual of adversary trials...in our metaphorical system, lust is war...lust is a game." (at 241-242). "Comparisons of litigation to sex thus do not serve to introduce concepts of communication, balance, or recognition of the interests of others. Instead, sexual metaphors for the adversary system further glamorize and reinforce the adversarial nature of the war and sports metaphors, and the cultural overlap of the metaphors add a suggestion of sexual victory to their

warlike trial lawyer – allows a man to reinforce his male identity."[86] Thus, these metaphors are very gendered, they do not reflect the presence of women in litigation, and they "choose only glory, strategy, and generalship and ignore fear, violence, and destruction. The use of war metaphors is very selective."[87] Their use disguises situations in which the parties should be able to achieve a cooperative or mediative resolution of their dispute. Metaphors lie behind rules that reward competition and discourage greater cooperation or mediation approaches.[88]

Moving away from competitive, war, or male metaphors is important in our view because as Thornburg notes, these metaphors impact the behaviour and identity of those who work within the legal system and discourage cooperation by glamorising competitive activities.[89] In fact, "the competitive behaviour modelled by the metaphors can even invade the theoretically more cooperative world of alternative dispute resolution. ...Where this happens, the adversary metaphors distort not only litigation but also other forms of dispute resolution."[90] LeBaron and Zumeta concur: "So long as law and legal culture are reference points, even if in defining what mediation is not, they have a powerful impact on mediation processes and mediator behaviour."[91] The glorification of competitive and combative behaviours in North America encourages the adoption of such behaviours while passing judgment and even punishing those who choose other, more cooperative paths.

This value assessment which places combative, masculine traits and behaviours above cooperative, feminine behaviours maintains the status quo and ensures the continued devaluation of female processes such as mediation. (Female) mediation is constantly compared to and assessed against (male) litigation, and found wanting. There is, of course,

images" (at 242). "They smack more of conquest than of romance, and have to do with dominance rather than relationship" (at 243).

86. E.G. Thornburg, "Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System" (1995) 10 *Wisconsin Women's Law Journal* 225 at 253.
87. *Ibid*. at 247.
88. *Ibid*. at 228.
89. E.G. Thornburg, "Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System" (1995) 10 *Wisconsin Women's Law Journal* 225 at 247.
90. *Ibid*. at 261. Thornburg notes that sports metaphors could be used in different, less competitive ways "to highlight the value of working together, the reality that everyone loses sometimes, and the idea that there are better and worse ways of losing and winning." (at 243). Note the feminist deployment of sports metaphors in P.S. Mann, *Micro-Politics: Agency in a Post-Feminist Era* (Minneapolis: University of Minnesota Press, 1994); and J. Penelope, "Language and the Transformation of Consciousness" (1986) 4 *Law and Inequality* 379.
91. M. LeBaron & Z. Zumeta, "Windows on Diversity: Lawyers, Culture, and Mediation Practice" (2003) 20 *Conflict Resolution Quarterly* 463 at 468.

a significant danger in "measuring the value of women's work against a labour market norm that is implicitly male."[92] When assessed in relation to male litigation, female mediation is perceived as weaker or less valuable, simply because of its different traits. What male measurement ignores or misunderstands is that, what it views as weakness is ultimately what gives mediation its strength. The devaluation of mediation by the male litigation norm ensures not only the continued devaluation of women and mediation, but also, the institutionalization of that devaluation.

3. Mediation Education

What can we do about the devaluation of mediation? We believe the answer lies in improved mediation and legal education. In this section we will describe some ways to improve mediation education in law schools. We will make some recommendations and consider how law professors can better teach mediation so that law students understand and value the process. Ultimately however, more is required than simply altering pre-existing mediation curricula or individual professors' teaching methodologies. To effect real valuation of mediation, a completely renovated law school curriculum is needed. Law school education must focus on problem solving and all the methods available to lawyers to do so for their clients. Settlement is transforming the practice of law,[93] and law schools and professors must begin teaching to that reality.

While we do not propose to outline an optimal law school curriculum, we will highlight some starting points. Law schools must assess their operating assumptions to ensure those assumptions continue to make sense. Law schools cultivate assumptions in their students; Melissa Nelken notes two: "(1) that disputants are adversaries – i.e., if one wins, the other must lose – and (2) that disputes may be resolved through application by a third party of some general rule of law."[94] Susan Sturm agrees, noting that curriculum, pedagogy, and evaluation are all highly individualistic and use the pattern of determining winners and losers almost exclusively.[95] Julie Macfarlane concurs: "Law school focuses

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92. Damian Grimshaw & Jill Rubery, *Undervaluing women's work*, Equal Opportunities Commission Working Paper No. 53, 2007. The authors note at p. 8: "many of the types of skills required in women's work, or displayed by women, are not visible in, or valued by, the male labour market."
93. Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008).
94. Melissa L. Nelken, *Negotiation: Theory and Practice*, 2nd ed. (Newark, NJ: Lexis-Nexis Matthew Bender & Company, 2007) at 442.
95. S. Sturm, "From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession" (1997) 4 *Duke Journal of Gender, Law and Policy* 119 at 129.

on conflict resolution exclusively via adjudication using the study of appellate judgments. It presents a picture of legal practice, as litigation and especially as trial work, that is out-of-date and unrealistic."[96] These assumptions do not leave room for a mediation or problem-solving approach to legal conflicts, yet such an approach epitomizes the future of law. Law school working assumptions disguise the fact that the parties need not be opponents or adversaries – they can be disputants in search of mutually beneficial, creative agreements. As Sturm correctly points out:

> The current law school model is anachronistic. It fails to equip students with the tools needed to function effectively in a changing and uncertain world. ...Law schools have yet to take adequate account of the move toward team-oriented, context-driven, interdisciplinary practice that has begun to take root in corporations and non-profit institutions.[97]

Similarly, Menkel-Meadow argues that advocacy and partisanship are not necessarily the norms of the legal profession – "we must consider how we are to expand our conceptions of "thinking or acting" like a lawyer."[98] John Lande states, "Considering how much of lawyers' work involves negotiation, in an ideal world, law schools should require every student to have extensive negotiation instruction."[99] A switch in curricular focus to problem solving and other mediative approaches will better reflect the realities of practice, and will bolster the reputation of mediation at the same time.

Legal educators need to employ a problem-solving model because the image of the lawyer as gladiator is not descriptive of the range of roles lawyers play.[100] The problem-solving model has the "potential to address and create a dynamic between the concerns of women and the

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96. Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 225.
97. S. Sturm, "From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession" (1997) 4 *Duke Journal of Gender, Law and Policy* 119 at 142.
98. Carrie Menkel-Meadow, "The Lawyers' Role(s) in Deliberative Democracy or Lawyers Without Advocacy: 'Neutral' Lawyering in Consensus Building, Facilitation and Mediation for Social Problem Solving or Lawyers as Consensus Builders: Facilitators of Deliberative Democracy" (2000 – draft; Robert Bordone, *Course Casebook*, Harvard Law School, at 24).
99. John Lande, "Teaching Students to Negotiate Like a Lawyer" (2012) 39 *Washington University Journal of Law and Policy* 109 at 110.
100. S. Sturm, "From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession" (1997) 4 *Duke Journal of Gender, Law and Policy* 119 at 129.

need to reclaim the soul of the legal profession."[101] Sturm argues that a move from gladiator to problem-solver would reduce barriers to participation and create greater inclusion for women and people of colour in the profession,[102] as well as for those who learn differently, embrace different values, or pursue their role in different ways, such as by mediating rather than litigating conflicts.

Sturm does not advocate abandoning the gladiator model entirely, but rather reorienting it to become the background instead of the foreground. In this way, students would be taught the importance of lawyers' facilitative roles or mediative roles and respect for them would be increased. By offering a range of learning environments and approaches in law school and collaborating across disciplinary boundaries we might come closer to a problem-solving legal culture, rather than a gladiator legal culture.[103] Schulz agrees that a problem-solving approach is preferred[104] and this will necessitate curriculum review as well as lawyer re-education. As the Canadian Bar Association has noted: "For some lawyers this will mean a fundamental re-orientation away from fighting the other side to solving a common problem."[105] Or, perhaps, referral to programs like the "Rambo Abatement Program", a program created by the Los Angeles Bar to which judges may refer hostile lawyers for peer counselling.[106]

The magnitude of undertaking such a fundamental reorientation cannot be underestimated. The gladiator model has existed for hundreds of years and is strongly associated with the definition of success for lawyers. To alter this view and champion a problem-solving approach will take an incredible amount of energy, will, resources, and work. As Sturm notes, in a "law school that emphasizes tough, hierarchical interrogation of students as the dominant approach and the icon of success in first year teaching, any initiative that departs from that norm faces the likely prospect of marginalization and delegitimation."[107] Therefore, in

101. *Ibid.* at 122.
102. *Ibid.* at 141.
103. *Ibid.* at 143-144.
104. Jennifer L. Schulz, "Settlement and Mediation in Canadian Legal Television" (2011) 1 *Journal of Arbitration and Mediation* 77 at 93.
105. Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) at 63.
106. R. Mnookin, S. Peppet, & A. Tulumello, *Beyond Winning* (Cambridge, MA: Harvard University Press, 2000) at 321.
107. S. Sturm, "From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession" (1997) 4 *Duke Journal of Gender, Law and Policy* 119 at 123.

order to avoid delegitimation and to ultimately be embraced, problem-solving pedagogy must be integrated thoughtfully, with administrative, institutional, and resource support.

Law schools might begin by examining how professors teach. Which goals are articulated as important? Which skills are actually being taught? What kind of language do professors use? If winning is still the goal (for e.g. in moots and in the judgments we assign for study) and advocacy skills are taught to the exclusion of dispute resolution skills, we will never address the devaluation of mediation. When we use adversarial language in our teaching we are not validating the important and numerous benefits that come from problem-solving and other mediative processes. As educators, we must pay attention to our language and metaphors. If we continue to conceptualise mediation interventions as win/win, we imply that a win/lose option exists, which means we are still comparing what we do to the adversarial system's approach. Rather, we might consider thinking, talking, teaching, and role-playing mediation on its own terms, with its own non-adversarial metaphors.[108]

Disputant behaviour and the tone of mediation can be changed by switching metaphors.[109] Becoming aware of the metaphors we use in the classroom and in the mediation chamber offers insights into meanings, intentions, and areas of possible mutual gain. It suggests ways to reinforce rapport, query usefully, and explore different options. We can teach our students to use metaphor to guide inferences from what is said to what is being thought.[110] Quite simply, as Smith notes, when lawyers become conscious of the metaphors operating within their dialogue, more options become available to them for intelligent, creative, problem-solving.[111]

Prescriptive questions of metaphorical change lead to examinations of how linguistic and cultural frames might be shifted in conflict resolution endeavours.[112] For example, using a food, cooking, and kitchen linguistic frame in our teaching would go some distance to neutralising

108. J.L. Schulz, "Confectionery and Conflict Resolution? What *Chocolat* Reveals about Mediation," (2006) 22 *Negotiation Journal* 251 at 269.
109. J. Cohen, "Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution" (2003) 20 *Conflict Resolution Quarterly* 433 at 437.
110. Thomas H. Smith, "Metaphors for Navigating Negotiations" (July 2005) *Negotiation Journal* 343 at 344.
111. *Ibid*. at 345.
112. J. Cohen, "Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution" (2003) 20 *Conflict Resolution Quarterly* 433 at 436.

the "battle talk" currently predominating in law schools.[113] We can recalibrate the direction away from fighting battles toward developing palatable dishes for all to share.[114] Schulz notes that teaching mediation with cooking metaphors instead of adversarial language borrowed from litigation will make a difference:

> By using the mediator as cook metaphor to converse, teach, and mediate we could greatly impact mediation practice. Food, kitchen, and nourishment connotations could be brought to disputes, thereby encouraging disputants to think about conflict in less adversarial ways. By consciously using the metaphor of cooking, the mediator could work with disputants to reconceptualize their conflict interaction in more positive, nourishing language, and demonstrate the pleasure that might be gained from participating in mediation processes.[115]

By adjusting our teaching to more accurately encompass the range of demands on all conflict resolvers – lawyers and mediators alike – problem solving skills such as advising, planning, facilitating, negotiating and mediating would be represented, role-played, and taught.[116]

Mediation education can foster the transition from gladiator to problem-solver, or from battling to client-focused dispute resolution. In so doing, it will overcome outdated conceptions of adversarial practice that pose serious obstacles to the profession's capacity to respond to changing times. And, evidence of "changing times" is all around us. The use of alternative dispute resolution processes is growing, and mediation is daily increasing in popularity. The Canadian Bar Association (CBA) is in favour of greater use of mediation and other conflict resolution processes. The CBA has recommended: reducing the preoccupation with gaining advantage through an adversarial approach,[117] a reduction in the antagonistic nature of litigation,[118] a reorientation away from fighting

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113. Jennifer L. Schulz, "The Mediator as Cook: Mediation Metaphors at the Movies" (2007) 2 *Journal of Dispute Resolution* 455.
114. Thomas H. Smith, "Metaphors for Navigating Negotiations" (July 2005) *Negotiation Journal* 343 at 354.
115. Jennifer L. Schulz, "The Mediator as Cook: Mediation Metaphors at the Movies" (2007) 2 *Journal of Dispute Resolution* 455 at 475.
116. Even if we do not change metaphors, we could modify our use of the competitive metaphors "so as to highlight rules and sportsmanship rather than competition and victory" (E.G. Thornburg, "Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System" (1995) 10 *Wisconsin Women's Law Journal* 225 at 267).
117. Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) at 18.
118. *Ibid*.

the other side to solving a common problem,[119] and a shift away from hostility and grandstanding.[120] The CBA proposes that mandatory education and training on dispute resolution options and on the means by which they can be integrated into legal practice be offered.[121] Their recommendations highlight mediation and a wish for a corresponding reduction in the antagonistic nature of litigation. A follow-up CBA report, prepared by the Joint Multi-disciplinary Committee on Legal Education, notes that "[a]ll the traditional institutions of legal education recognize the need for a different combination of experiential knowledge and skills for people working in the civil justice system, yet for a variety of reasons, few have been able to make changes to provide them."[122] Therefore, this CBA report strongly recommends that Canadian law schools enhance their theoretical and experiential dispute resolution teaching.

The Federation of Law Societies of Canada struck a Task Force on the Canadian Common Law Degree. Their final report proposed a national requirement expressed in terms of competencies in basic skills, awareness of appropriate ethical values, and core legal knowledge that law students can reasonably be expected to have acquired during law school.[123] The skills competencies the Task Force recommends are in problem solving, legal research, and oral and written communication skills. In particular, with respect to problem-solving:

> 1.1 Problem-Solving
>
> In solving legal problems, the applicant must have demonstrated the ability to,
>
> a. identify relevant facts;
>
> b. identify legal, practical, and policy issues and conduct the necessary research arising from those issues;
>
> c. analyze the results of research;

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119. *Ibid*.
120. Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) at 64.
121. *Ibid*. at 65.
122. Canadian Bar Association Joint Multi-disciplinary Committee on Legal Education, *Attitudes, Skills and Knowledge: Recommendations for Changes to Legal Education to Assist in Implementing Multi-Option Civil Justice Systems in the 21st Century*, August 2000, at 45.
123. <http://www.slaw.ca/wp-content/uploads/2009/10/Task-Force-Final-Report.pdf>, last accessed on June 21, 2012.

d. apply the law to the facts; and

e. *identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute*.[124]

This of course highlights the importance of law school curricula focussed on mediation and other non-adversarial legal problem solving techniques, and indeed, most Canadian common law faculties include negotiation, mediation, and ADR courses as part of their curricula. However, are these courses valued?

It is our contention that because mediation courses are gendered female, they are not highly valued courses in the law school curriculum. Mediation courses can be understood to form part of outsider pedagogy.[125] Law school curricula remain heavily focussed on litigation-centred courses. These dominate the choices for students, while mediation and negotiation courses appear either as afterthoughts, as optional electives, or as specialized courses of short, often between-term duration. For example, the CBA notes "there is minimal attention paid to developing the capacity to deal with human relations except in few clinical courses and optional DR course in law schools."[126] This bolsters the view of (female) mediation courses as secondary to (male) litigation-focussed courses, especially since the gender of ADR professors (especially in introductory classes) is predominantly female.[127] As Bakht *et al.* point out, law students often refrain from taking classes they believe are gendered female – either due to their subject material or the gender of the professor.[128] We cannot hope to revalue mediation if students are refraining from taking mediation courses in the first place.[129]

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124. *Ibid.* at p. 8, emphasis added.
125. Natasha Bakht *et al.*, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45:4 *Osgoode Hall Law Journal* 667.
126. Canadian Bar Association Joint Multi-disciplinary Committee on Legal Education, *Attitudes, Skills and Knowledge: Recommendations for Changes to Legal Education to Assist in Implementing Multi-Option Civil Justice Systems in the 21st Century*, August 2000, at 44.
127. Exact numbers are difficult to obtain, but a count based on law school websites across the country suggests 29 female ADR professors and 18 male ADR professors.
128. Natasha Bakht *et al.*, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45:4 *Osgoode Hall Law Journal* 667 at 721.
129. Bakht *et al.* found that marketability was a primary concern for law students and dictated a number of their academic choices (at 719). This suggests that law students do not perceive mediation courses to have market value and therefore that

Changing the way we teach mediation and the metaphors we use is a step in the right direction. However, it is by no means a solution to the problem of mediation devaluation. For example, changing the way professors teach and speak in optional mediation courses only affects the students enrolled in those particular courses. As with many other outsider courses, the students who enroll in mediation courses generally already subscribe to the ideas and theories being taught, and therefore no new ground is gained for non-enrolled law students. Generally, mandatory and other doctrinal courses are seen as the most legitimate and most important courses in law school, and they are most often taught without any reference to the ideas and lessons of mediation. As Julie Macfarlane notes, practical skills courses (like some mediation courses) "are often considered intellectually "soft" options and are often taught by practitioners "outside" the elite circle of full-time faculty. They and the students that they teach occupy a subculture within the law school."[130]

Bakht *et al*. found that significant numbers of students believed that outsider courses were ineffectively taught, did not enhance one's legal education, and would not be useful in the real world after graduation.[131] As we see it, this is the real hurdle for legal educators when it comes to revaluing mediation. Mediative, problem-solving approaches must be integrated throughout all law school courses in order to ensure that they are not ignored or pushed to the fringes of legal education, but rather, gain prominence at the forefront. Indeed, as early as 2000 the CBA recommended:

> In order to improve their awareness of settlement-oriented practice, law students should be exposed to various theories of social and individual conflict resolution practices as well as to materials dealing with human experiences of conflict. This should be combined with experiential learning opportunities for students to develop communication and reflection/analy-

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they do not take them. This is of course incorrect, in that core competencies for superior legal practice, as articulated by the Canadian Bar Association and the Federation of Law Societies of Canada, include the problem-solving, client-centred skills of mediation (Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) and <http://www.slaw.ca/wp-content/uploads/2009/10/Task-Force-Final-Report.pdf>, and certainly law firms appreciate young lawyers with these skills.

130. Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 225.

131. Natasha Bakht *et al*., "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45:4 *Osgoode Hall Law Journal* 667 at 727.

> sis skills. This may require co-teaching by faculty from courses in other disciplines.[132]

If we do not have more courses at law school that offer interdisciplinary approaches to problem-solving, the entire field of ADR risks co-option by the legal system.[133] Or, as the CBA put it, "if the culture shift required for a multi-option system does not occur, it is likely that the plethora of DR processes now in place will gradually adopt many of the features of the adversarial system and replicate the court room experience."[134]

If we are to truly change the way law students and lawyers value mediation, we need to begin by reaching all students on a "gender neutral" basis to ensure that they not only hear, but internalize the message of mediation.[135] This will involve an enormous departure from the litigation focus currently dominating legal curricula. It will not be enough to change the way we teach, talk, and present mediation to those already in mediation classes. It will require a mediation, problem solving, and communication-focussed approach in every course taught in law school. John Lande has noted the "acceptability of a wide range of goals, norms, procedures, results, professional roles, skills, and styles in handling disputes involving legal issues" in the private sector.[136] Now law school curricula need to follow suit and foster the creative problem-solving and reflexivity necessary for current legal practice.[137]

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132. Canadian Bar Association Joint Multi-disciplinary Committee on Legal Education, *Attitudes, Skills and Knowledge: Recommendations for Changes to Legal Education to Assist in Implementing Multi-Option Civil Justice Systems in the 21st Century*, August 2000, recommendation #3, at 47.
133. Linda Ippolito, "ADR has lost its 'alternative' way" September 14, 2012, *The Lawyers Weekly*, accessed online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=1737>.
134. Canadian Bar Association Joint Multi-disciplinary Committee on Legal Education, *Attitudes, Skills and Knowledge: Recommendations for Changes to Legal Education to Assist in Implementing Multi-Option Civil Justice Systems in the 21st Century*, August 2000, at 43.
135. Natasha Bakht *et al.*, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45:4 *Osgoode Hall Law Journal* 667 at 720 points out that men do not consider themselves to be gendered beings and because of this, men view gendered classes as irrelevant to them.
136. John Lande, "Getting the Faith: Why Business Lawyers and Executives Believe in Mediation" (2000) 5 *Harvard Negotiation Law Review* 137 at 143.
137. A. Lerner, "Law and Lawyering in the Workplace: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem-Solvers" (1999) 32 *Akron Law Review* 107.

4. Conclusion

We have shown that when the goals, skills and language associated with mediation are examined, mediation is gendered female. This, in our view, is not a bad thing, because there is of course nothing wrong with the female gender. However, due to the lesser value placed on the female gender in society, the gendering of mediation, especially in contrast to litigation, has significant consequences for how mediation is valued. Education and law school curricula reform are the best ways to address the devaluation of mediation, though it is likely that mediation will continue to be devalued as compared to litigation until all things gendered female are revalued.

Some have tried to increase the value of mediation by highlighting its benefits.[138] The benefits that are most often highlighted – that it is cheaper and faster than litigation – reflect a concern with money and time rather than the process and relationship benefits of mediation. By focusing attention on (male) business and monetary gains that come from the (female) process of mediation, mediation gains more value and status. However, this means that saving money is highlighted, usually at the expense of the true hallmarks of mediation: its creative solutions and better agreement adherence. To say that mediation is cheaper than litigation could suggest that mediation is merely a way to cut costs, rather than an option of first choice for resolving complex disputes. Similarly, when the private and confidential nature of mediation is highlighted, it is generally to promote the monetary and business interests that are preserved because embarrassing situations (such as environmental disasters) can be kept secret. This means the mediation benefit of confidentiality is promoted in order to protect defendant interests, rather than showcasing the true value of confidentiality to promote frank discussion and reach agreement in all types of cases.[139]

These examples demonstrate an attempt to increase the value of mediation by re-gendering it. In other words, by focussing on stereo-

138. Gene Zipperele Jr., "Mediation: A new way to cut litigation costs" (1997) *Kentucky Banker Magazine* 15; Roger Peters & Deborah Mastin, "To Mediate or Not to Mediate: That Is the Question" (2007) *Dispute Resolution Journal* 15; Peter Lovenheim & Lisa Guerin, "Mediate: Don't Litigate" (Berkeley, CA: Delta Printing Solutions, 2004); Lee Raynor, "Litigation vs. ADR" (2006) 53 *Risk Management* 30; Todd Carver & Alberta Vondra, "Alternative Dispute Resolution: Why It Doesn't Work and Why It Does" (1994) 72:3 *Harvard Business Review* 120; and Tim Porter-O'Grady, "When Push Comes to Shove: Managers as Mediators" (2003) *Nursing Management* 34.

139. Roger Peters & Deborah Mastin, "To Mediate or Not to Mediate That Is The Question" (2007) *Dispute Resolution Journal* 15 at 18.

typically male benefits of the process, such as monetary savings, the overall value of what is otherwise a predominantly female process is increased. However, in our view, re-gendering or masculinising the mediation process is not beneficial for mediation. De-emphasizing the important "female" skills necessary for successful mediation means that crucially important components of mediation are not recognized. This is disturbing because it is exactly these attributes that set mediation apart from litigation, making it one of the best options for addressing disputing parties' needs and wants, and allowing them to tailor-make their own creative resolutions.

Mediation is much more than something we use before we get to the "real" process of litigation. To re-gender mediation male in an attempt to value it more highly, not only negatively affects mediation, but also does nothing to assist other devalued processes characterized as female. To re-gender the mediation process is to do a disservice to mediation. Much of the strength of mediation is found in its "femaleness". Therefore, any re-gendering of mediation away from feminine to masculine characteristics will ultimately harm the effectiveness of mediation.

We see the value of Judith Butler's invocation to more fundamentally destabilize the female/male dichotomy with respect to valuing mediation. Doing so would move us away from a value system based on gender, toward valuing the process of mediation itself. Instead of re-gendering mediation, we might revalue mediation by properly evaluating mediation and mediators' contributions. This must be done on mediation's, not litigation's, terms. For example, despite the similarities of some of the required skills for good litigation and good mediation, one cannot evaluate litigators and mediators the same way. Litigators are justly evaluated on the strength of their individual performances. This is logical given that the skills and strategies are their own and the deployment of those skills directly informs the success of their court cases, as memorialized in court records. Mediators, however, cannot be evaluated solely based on the outcome of their mediation sessions. There is no third party who makes a ruling declaring a winner and a loser. In fact, the mediation result is one that the parties fashion for themselves. The mediator's skills are employed in a private, confidential setting with no written record, and the outcome is totally controlled by the parties. To evaluate mediators and litigators the same way given these process differences is patently unfair.

How might we evaluate mediation on its own terms? Grimshaw and Rubery suggest an approach to addressing the undervaluation of women's occupations or "women's work." They suggest we "make more

visible in these occupations the skills that are required, the stress or work intensity that is involved and the responsibilities that the work carries"[140] with it. This approach may lead to the profile of the occupation being elevated, as people realize that the skills required are not simply female traits that come naturally to some based on gender. Rather, they are skills gained only after years of practice and training. By demanding a gender-neutral assessment of success, both the profile and valuation of mediation and mediators will increase.

Of course, the most important avenue to pursue is the much more complicated process of revaluing gender. The devaluation of mediation would be rectified if as a society, we overcome our prejudice against all female processes. If we valued female mediation as much as male litigation, we would not need to write this article. Revaluing gender is a crucially important, long-term goal that cannot begin without better education. Unless and until mediative, problem solving approaches become the focus of legal education, mediation will continue to be devalued and viewed as a secondary process to litigation by law students and society alike. Most importantly, it will mean that many who might benefit from the wonderful process of mediation will never be offered, or will not embrace, the opportunity.

140. Damian Grimshaw & Jill Rubery, *Undervaluing Women's Work*, Equal Opportunities Commission Working Paper No. 53, 2007.